Doping in Sport, the Rules on "Missed Tests", "Non-Analytical Finding" Cases and the Legal Implications

by **Gregory Ioannidis***

Much discussion has been generated with the introduction of a new rule to combat the use of performance enhancing substances and methods in sport. This discussion has been initiated and subsequently became an integral part of the sporting public opinion, as a result of the application of this rule on high profile professional athletes, such as the Greek sprinters Kenteris and Thanou.[1]

Before, however, an analysis of the application of this rule can be produced, it is first of all necessary to explain and define the operation of the rule and perhaps attempt to discover the reasons for its creation.

The article would concentrate on the IAAF's [International Association of Athletics Federations] rule on missed tests and critically analyse its definition and application, particularly at the charging stage. This would enable us to test the validity of the rule, by examining its application on potential alleged offenders and would also provide us with a unique opportunity to interpret the intention of the legislator. The relevant rule under examination is the IAAF's Rule 32.2.d which states:

> *"Doping is defined as the occurrence of one or more of the following anti-doping rule violations: (d) the evaluation of 3* missed tests (as defined in Rule *35.17*) in any period of *5* years beginning with the date of the first missed test."[2] Further, Rule 35.17 goes on to "define" what a missed test is. It states: *"If an athlete fails on request to provide the IAAF with his whereabouts information, or to provide adequate whereabouts information, or is unable to be located for testing by a doping control officer at the whereabouts retained on file for that athlete, he shall be subject to an evaluation by the IAAF Anti-Doping Administrator for a missed test. If, as a result of such evaluation, the IAAF Anti-Doping Administrator concludes that the athlete has failed in his obligation to provide whereabouts information or adequate whereabouts information, the IAAF Anti-Doping Administrator shall evaluate the failure as a missed test and the athlete shall be so notified in writing. If an athlete is evaluated as having 3* missed tests in any period of *5* years beginning with the date of the missed test, he shall have committed an anti-doping rule violation in accordance with Rule *32.2*(d)."

It is clear from the above rules that doping does not only relate to the use of prohibited substances and methods, but also to the "occurrence of one or more anti-doping rule violations". These anti-doping violations may incur in situations where the athlete did not use performance enhancing substances, but simply, where he "missed", "failed" and/or "evaded" the test. For the purposes of analysing these rules, we would call these specific cases "non-analytical finding" cases.

The reason for the examination of the IAAF's rule, concentrates on the fact that it is attracting intense criticism, in relation to its application on anti-doping violations. In addition, this regulation in question has been associated with high profile cases, and has also become the source of a unique form of questioning. A series of questions arise out of its construction, interpretation and application in practice.

These questions cannot be answered without a further examination of the factual issues that surround the application of this regulation. This work aims to explore the operation of these rules, in order to be able to explain and test the application of the regulations in question. It further aims to interpret the construction and the reasoning behind the creation of the said regulations.

Factual Analysis

The significance of this regulation lies in the fact that it does not concern positive tests for the use of performance enhancing substances, but instead the so-called "non-analytical finding" cases.[3] Such cases, as mentioned above, do not include positive tests on behalf of the athletes, but rather anti-doping violations, in a form of a strict liability offence, where the accused athlete missed, failed, refused and/or evaded the test. The last two ingredients of the offence form the subject of a separate analysis, as they require, it is submitted, a mental element on behalf of the accused athlete. The analysis would examine all of these provisions and it will show that, not only are they mutually incompatible, but they are also unworkable because of their specific definitions.

An independent observer would produce, not surprisingly, the following questions: what is a "missed test?" How does it operate? Is it a strict liability offence? Does it require knowledge (of the test) on behalf of the athlete? Does it create injustice? Does it breach recognised principles of law? Does it violate rules of natural justice and due process? Does it breach human rights? Are the Doping Control Officers, responsible for conducting the tests, adequately trained for the application of the rule and most importantly, are they independent, fair and unbiased?

The answers to these questions reveal significant findings, which they would, without a doubt, call for a review and re-examination of the propriety and fairness towards the application of this regulation. It would come as no surprise when the time arrives where a case attempts to test the legality and fairness of this rule before a national court of law. I was certainly privy, and still am, to the doubts expressed as to the specific elements of the offence in the analysis of this regulation.

Despite the fact that certain regulations of sporting governing bodies attempt to exclude the resolution of a private dispute before national courts of law[4], it is submitted that where an error of law and/or injustice have occurred, immunisation from judicial intervention may not so easily be achieved.

Under English law, an attempt to exclude the courts from their effort to interpret the law is considered to be against public policy. To this effect, Lynskey J has argued in the past:

> *"The parties can, of course, make a tribunal or council the final arbiter on quotations of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on a question of law."*[5]

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1 The author advised and acted as Counsel for the Greek sprinters in an appeal brought against them by the IAAF [Track and Field's governing body] before the Court of Arbitration for Sport in Lausanne and against their clearing of any anti-doping violations at first instance. This appeal was eventually withdrawn by the IAAF, last June, with both sides reaching an out of court settlement. The analysis of the present article does not, in any way relate to the above-mentioned Appeal, nor does it describe factual or otherwise situations arising out of this case. The author concentrates solely on his personal interpretation of the current regulatory framework.

2 The IAAF proceeded with a modification to this rule in 2006. Prior to the modification, the rule required "3 missed tests in 18 consecutive months".

3 Examples include the cases of the American sprinters Tim Montgomery, Chirstie Gaines, Kelly White and the well-known and highly publicised case which arose out of the Athens Olympic Games with the Greek sprinters Konstantinos Kenteris and Katerina Thanou.

4 Take for example the IAAF's Rule 45.1: "Anti-Doping rules are, by their nature, competition rules governing the conditions under which the sport of Athletics is to be held. They are not intended to be subjected to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters."

5 Baker v Jones [1954] 2 All Er 553, p. 558.

FORTHCOMING

The Sporting Exception in European Union Law

Richard Parrish and Samuli Miettinen

The Sporting Exception in European Union Law is the definitive, comprehensive and up-to-date account of EU sports law. It provides a detailed critique of major European Court of Justice judgments including *Walrave* (1974), *Donà* (1976), *Heylens* (1989), *Bosman* (1995), *Deliège* (2000), *Lehtonen* (2000), *Kolpak* (2003), *Piau* (2005) and *Meca-Medina* (2006) and a modern framework for the application of ECJ jurisprudence to sport. It also provides advanced commentary on major sports-related competition decisions of the European Commission. The book examines the application of EU law to broadcasting issues, to rules affecting player mobility in Europe and to issues of sports governance. In doing so it provides comprehensive coverage of all the current issues in EU sports law including the *Oulmers* case, the home-grown player debate, the regulation of players' agents, the impact of the Services Directive, the impact of the Audiovisual Media Services Directive, the influence of the 2006 Independent European Sports Review, the details of the 2007 Commission's White Paper on Sport, the likely impact of the Treaty Article for sport in the Reform Treaty and prospects for social dialogue within the sports sector.
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Dr Richard Parrish is Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom, and Chairman of the Association for the Study of Sport and the European Union. Samuli Miettinen is a senior lecturer at the Centre.

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FOREWORD

Sport is not mentioned in the EC Treaty. And yet sporting practices may have profound economic implications, and they may cut across basic assumptions of the EC Treaty such as non-discrimination on the grounds of nationality, free movement across borders and undistorted competition. So if the EC Treaty is to be interpreted in a manner apt to achieve its objectives it cannot afford sport unconditional immunity from its scope of application. On the other hand, sport has characteristics which are not shared by other sectors of the economy and, moreover, the Treaty is deficient in setting out any helpful framework for understanding just what is 'special' about sport. So the EU's institutions, most of all the Court and the Commission, are wisely circumspect when invited to intervene in sport. Add in a host of actors with incentives to argue for maximum autonomy for sport - sports federations and governing bodies, most obviously - and others, particularly those adversely affected by the choices made by governing bodies, with incentives instead to promote the aggressive application of EC law, and the scene is set for the shaping of a fiendishly complicated and hotly contested area of law and policy.

The European Court has a rather spotty record in keeping the law on track. Plenty of sporting practices have been challenged but found to suffer no rebuke when examined in the light of EC law. But *why* do some sporting rules escape condemnation under EC law? Usually, in my view, it is not because they exert no economic effects. In fact there are few such 'pure' rules. Usually it is because their economic effects are a necessary consequence of their contribution to the structure of legitimate sports governance. This is true of nationality rules governing the composition of national representative teams, of rules governing selection for international competition, of 'transfer windows', of rules forbidding multiple club ownership, of anti-doping rules and procedures, and so on. But in its first great case on sport, *Walrave and Koch*, the Court referred to 'a question of purely sporting interest' which 'as such has nothing to do with economic activity'. And it thereby introduced the idea of rules which lie beyond the reach of the Treaty. For governing authorities in sport this is a delightful notion, for it helps their interest in maximising the scope of their autonomy from legal supervision. This is the widest possible version of the 'sporting exception'. But I think it is misleading. Most sporting practices *do* fall within the scope of the Treaty - because they have economic effects - but this is not to say they are incompatible with it. In my view the correct way to understand the so-called 'sporting exception' in EC law is simply to regard it as the space allowed to sports governing bodies to show that their rules, which in principle fall within the EC Treaty where they have economic effects, represent an essential means to protect and promote the special character of sport. There is no blanket immunity. There is case-by-case scrutiny. EC law applies, but does not (necessarily) condemn. And I think that recently, in *Meca-Medina and Majcen v Commission* the Court adopted this approach.

This is the territory explored by this very fine book. It examines the development of the law and it then applies the analysis to particular areas of controversy, including broadcasting and the labour market. It richly repays close reading and it is the product of deep thinking and conscientious research. Richard Parrish has already shown us the way in his pioneering book *Sports Law and Policy in the European Union* (2003), in which he built his narrative around the appealing notion of 'separate territories', according to which there is 'a territory for sporting autonomy and a territory for legal intervention' (p.3). In this book, with the reinforcement of his co-author Samuli Miettinen, Richard Parrish shows us a great deal of overlap between those territories, and the writers pore over the frictions that exist at the boundaries.

In general sports governing bodies remain wearyingly reluctant to engage seriously with the need to demonstrate intellectually durable reasons why their structures and practices should be treated as necessary and therefore compatible with EC law. Even today they frequently complain about having to do what every other commercially active party has to do - comply with the law. 'Sport is special!' They declare. So it is - but not *that* special. If governing bodies want to take seriously the space which EC law allows them to show why and to what extent sport is truly special, while also generating large amounts of money, then this book provides them, their members and their legal advisers with a platform from which to develop balanced and well-informed arguments. I congratulate Richard Parrish and Samuli Miettinen on their scholarship. This book is a terrific addition to the literature on sport and the law and, I am sure, will be welcomed by all those with a professional, regulatory and academic interest and stake in this developing and important subject.

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This is obviously an encouraging statement which should allow some latitude for the accused athlete, where an obvious error of law has occurred, or some other principles of law have not been observed. The truth of the matter, however, is that the Court of Arbitration for Sport in Lausanne (CAS) remains the final arbiter, for both the facts and the law, and as such is followed by the parties to a dispute.[6] Lynskey J's statement, however, would not find application in practice, if the accused athlete feels that his rights have been breached and CAS has failed to produce an appropriate remedy. In my experience and in recent cases before CAS, the panel has remained silent on questions relating to human rights.[7] On a different issue, that of the lifting of the provisional suspension, the Panel suggested that CAS is not a court of law, but a tribunal, and therefore not the appropriate forum to deal with complex legal issues, such as the one raised by counsel for the accused athletes! And with the ECJ's recent decision in *Meca-Medina v Commission of the European Communities [C519/04]*[8] it is clear that actions that take a different road from that to Lausanne may also conventionally fail.

The Need for Stricter Rules

There is no doubt that the objects of the rules of sporting governing bodies are simple: healthy competition, equal or level-playing field for all and punishment for those who do not obey the rules. The rules themselves, however, are not always straightforward. As my learned friend, Michael Beloff QC suggests:

> *"In my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole."*[9]

This is an element which gives rise to intense criticism, particularly from the penalties' point of view. The issue of proportionality or the argument that the punishment is disproportionate to the offence committed has given rise to many different interpretations before national courts of law. It has been suggested that a four year ban is contrary to German law[10], whereas it was held valid under English law.[11] The case of *Meca-Medina* certainly confirms that a ban which is over a certain number of years could be held disproportionate. The introduction of WADA [World Anti-Doping Agency], with the main aim to harmonise different rules and penalties from different sports, suggests that a two year ban could be upheld as reasonable and proportionate to the offence committed. The European Court of Justice appears to agree. There are, however, exceptions to this general rule. If a second offence is committed and the accused is found guilty, then the ban takes the form of life ineligibility from international and national competitions.[12] There may be cases where the accused athlete is able to establish "exceptional circumstances" and have his lifetime ban reduced to 8 years.[13] Or there may be a case where an athlete is found to have committed two separate anti-doping rule violations, which have not arisen from the same test, and could receive a sanction of a three-year ban.[14]

To make things even more complicated and perhaps disadvantageous for the accused athlete, the sporting governing bodies, with the assistance of CAS, have devised a specific *standard of proof*. This indicates that the standard of proof in doping cases should be below the criminal standard but above the civil standard.[15] In addition, the CAS has already argued[16] that the ingredients of the offence must be established "to the comfortable satisfaction" of the court, bearing in mind "the seriousness of the allegation" made. The CAS has also suggested that the more serious the allegation, the greater the degree of evidence required to achieve comfortable satisfaction.[17] The "comfortable satisfaction" standard of proof is rather subjective and is not always the same for prosecution and defence. As Michael Beloff suggests[18]:

> *"The CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard.19 The Panel was also content to adopt the test, set out in Korneev and Gouliev v IOC20, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegation made. To adopt a criminal standard [at any rate, where the disciplinary charge is not one of a criminal offence] is to confuse the public law of the State with the private law of an association. The CAS went on, in Korneev, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve 'comfortable satisfaction'."*

With respect, I would have to disagree with the above statement, regarding the disciplinary nature of the anti-doping offences. In my personal view, the disciplinary charge and the sanction that follows such a charge, produce elements of a criminal law regulation. If one considers the penalties that follow the exclusion of an athlete from his trade, one would arrive at the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties[21] not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that usually the criminal law regulates. It follows that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones.[22]

But what is the standard of proof required of prosecutor and defendant where the burden shifts? Although in English criminal law the defendant could use the civil standard when making out his defence, the matter before CAS is still open to interpretation. And the "degree of evidence" is also an issue which could cause legal "headaches". For example, what is the degree of evidence required to achieve comfortable satisfaction? What is the admissibility of such evidence? How do you assess its probity? What rules do you apply in relation to disclosure of such evidence?

Despite the fact that professional athletes are now considered employees[23], or self employed in the case of many individual sportspeople and should be treated in the same way as other professionals,

6 See Dr. Gregory Ioannidis "WADA Code draft revision: questions remain", World Sports Law Report, January 2007, pp 14-15.

7 IAAF v SEGAS, Kenteris & Thanou CAS A/887/2006 [unreported].

8 The ECJ dealt with the issue as to whether sporting governing bodies' anti-doping rules were exempt from review under EC competition law because they concerned purely sporting matters which did not affect economic activity.

9 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 42.

10 That was the view of the German Federal Court in the case of Katrin Krabbe against the IAAF [1992], unreported, 28 June.

11 In the case of Paul Edwards v BAF & IAAF [1997] Eu LR 721, Ch D.

12 Not always the sporting governing bodies appear to follow the application of this regulation as it could be seen in the recent case of the American sprinter and former world record holder Justin Gatlin.

13 See IAAF Rule 40.3.e.

14 See IAAF Rule 40.8.

15 See the CAS' decision in Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

16 In the case of Korneev and Russian NOC v IOC; Gouliev and Russian NOC v IOC, Mealey's International Arbitration Report, 1997, pp 28-29.

17 Ibid.

18 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 50.

19 Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

20 Korneev and Russian NOC v IOC; Gouliev and Russian NOC v IOC, reported in Mealey's International Arbitration Report, February 1997, pp 28-29.

21 See the case of Torri Edwards v IAAF & USATF CAS OG 04/003, where the Panel notes: "The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction."

22 It is not my intention to analyse the issue of criminalization of doping in sport. This has been done elsewhere. For further discussion see: Dr. Gregory Ioannidis, " Legal regulation of doping in sport and the application of criminal law on doping infractions: can a coercive response be justified", I.S.L.R. 2006, 1(MAY), 29-39.

23 See the decision of the European Court of Justice in Case C-415/93 Union Royale Belge des Societies de Football Association ASBL v Jean-Marc Bosman [1996] 1 CMLR 645

it is submitted that the special nature of sport has led tribunals to adopt different ways of dealing with issues of disclosure and admissibility of evidence. It is evident from the CAS' jurisprudence, that the sporting tribunal is not bound by the rules of evidence which apply in English courts or indeed in any other common law or civil law jurisdiction. It is hardly ever the issue before the CAS as to whether there is a distinction between relevance and admissibility. Whatever is relevant to the issues of the case could be admissible, as long as the evidence is direct, which of course carries more weight than the indirect evidence. In certain circumstances, and I have certainly been privy to such development, the sporting tribunal may even allow hearsay evidence to be admitted, as long as it is fair. This, in essence, may prove to be helpful towards establishing a stronger case for the prosecution, but it violates procedural rights afforded to the defendant, that would, otherwise, have been protected in a procedure before a national court of law.

Finally, there is another obstacle for the athletes when they prepare their defence. The majority of the offences covered in the sporting governing bodies' regulations are strict liability offences. Athletes are responsible for the substances found in their bodies, but strict liability could operate rather unfairly where the rules themselves are unclear and their applicability to the facts of the cases doubtful. This is certainly the issue in the majority of the circumstances, as the rules in force do not clearly and in a concise way establish the intention of the legislator or their actual, correct and proper application. Although there may be an opportunity, for an athlete, to put a case in rebuttal, it is submitted that in cases where there is a prohibited substance present, the athlete may find himself in a very difficult situation rebutting the allegation. Testing laboratories usually operate under the auspices of the sporting governing bodies and there may be cases where issues of independence and bias may be put into question.

It is submitted that the above analysis indicates the degree of difficulty accused athletes face when they are against charges of anti-doping violations. The reason behind such difficulty relates to the argument that without rules supporting strict liability, the prosecuting authorities will never be able to prove the charges and therefore the war against doping in sport would become futile. Furthermore, the whole process would become unnecessarily expensive and sporting governing bodies could face the threat of legal action being taken against them. The issue of bankruptcy is not a new one for sporting governing bodies.

The CAS seems to support the idea of strict liability and has in the past rejected the principle of nulla poena cine culpa, or at least, tried not to apply it or interpret it too literally.[24] To a certain extent, the use of strict liability rules on behalf of sporting governing bodies, or at least, the reasoning behind their use, could be understood. What would, however, find itself labouring under great difficulty, is the argument that the CAS should be seen to support the operation of strict liability rules. This, however, appears to support the contention that if the non-intentional use of performance enhancing substances were to be allowed, it would then create a legal minefield and eventually bankrupts the sporting governing bodies. This would appear to be the reason as to the CAS' propensity to support the operation of strict liability rules. But where is the balance to be struck? Strict liability rules are arbitrary and capricious and when the rights of the individual are breached and general principles of law are violated, the accused is left with no remedy and the whole system becomes unfair, unjust and offensive. This as a result offends against fairness and justice. The following pages will attempt to test the rules on missed tests and therefore try to establish as to whether the above arguments could be justified in terms of striking a balance between the fight for a healthy and fair competition and the rights of the accused athletes.

The Rule on Missed Tests: "Dead Man Walking"

It has already been suggested that the rule on missed tests relates to the so-called "non-analytical finding" cases. This means that if sanctions were to apply on an athlete for an anti-doping violation, the athlete must have missed the test. What does this mean and how does it apply in practice? Let us test this in practice, by creating a hypothetical scenario

Test Case 1:

Fred Bloggs is a well-known and famous athlete. Prior to his event, during an international competition, he is notified that he has missed 3 anti-doping controls and he is therefore subject to a sanction under his sporting governing body's regulations. The regulation on missed tests states that if the athlete misses 3 tests in a period of 5 years, he would be deemed to have committed an anti-doping violation. The regulation also states that the athlete must be informed in writing about the alleged missed test, must be given the opportunity to produce his explanation and then the governing body must proceed with the evaluation of the alleged missed test. No decision should be taken before the athlete is fully informed of the missed test at a time. It is now the 24 of January 2006. The first recorded attempt to test the athlete was on 27 December 2005. The second on 23 January 2006, and the third on 24 January 2006. The athlete is unaware of the number of the missed tests he has, as he has not been informed in writing and no evaluation has taken place yet for any of them.

Let us now analyse this scenario. As it has been explained above the provisions for missed tests are set out in at Rule 35.16. The Rule requires the athlete to miss 3 tests in a consecutive period of 5 years, before any sanctions could be applied. In order to understand the legislator's intention for the correct application of this rule, it is first of all necessary to explain the procedure and the operation of this rule. The appropriate governing body has to notify the athlete in writing that a missed test has been recorded. The athlete is then given the opportunity to respond and provide an explanation to the allegation. If the explanation is not accepted then the Anti-Doping Administrator has to proceed with the evaluation of the test. If the Administrator concludes that the test has been evaluated as a missed test, he has to notify the athlete in writing.

It is submitted that the intention of the legislator is not to make one missed test an offence, but to give the opportunity to the athlete to realise that the completion of 3 missed tests is a serious anti-doping offence which carries an equally serious sanction. The legislator, following the principles of natural justice and basic human rights, provides the athlete with the opportunity to process in his thought the seriousness of such an offence, by giving him the ability to be more diligent. It is submitted therefore, that the number 3 which carries the penalty for the offence, provides the athlete with the flexibility to organise his professional career accordingly. This flexibility, however, cannot be achieved, unless the athlete in question has the knowledge as to the correct number of missed tests.

It is submitted that from the facts of the test case above it is obvious that there are procedural breaches, which would have a serious effect on the accused. There may be a possibility that the accused missed the test because he was trying to avoid detection or be subjected to a test. This is a speculation and it is based on mere suspicion, which of course runs counter to every principle of fairness and justice in law. We also need to remember that the regulation under analysis, so far, does not include evasion of the anti-doping control. It is submitted that notification here is the essential ingredient before the rule

24 Quigley v UIT CAS 94/129, para 14. The Panel notes: "Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on model budgets - in their fight against doping. For those reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.

can start operate in a proper and fair way. It is important therefore, for the athlete to have knowledge as to the correct number of the missed tests he has. In such case, it is also important to establish either intention or negligence and allow an effective application of the sanction. It offends against fairness and justice to apply a sanction when the athlete does not know that what he was doing was wrong and contrary to the rules. It also offends against the intention of the legislator who clearly states that the athlete needs to be informed in writing. Again the legislator indicates that the elements of communication and knowledge are the necessary ingredients before any sanction could be applied.

Variation to Test Case 1:

> *"Fred Bloggs is also informed that he is subject to another sanction for breaching an additional rule and therefore committing another anti-doping violation. That on the same day [24 January 2006] he missed a test, he also refused the test and tried to evade it. The sanction for this offence carries a penalty of 2 years' ineligibility from national and international competitions. No successful notification of the test was communicated to the athlete."*

It is obvious now that the application of two different rules on the same alleged test creates controversy and confusion. There may be a case where the prosecutors do not know which charge to proffer against the athlete and the athlete's defence is thereby undermined by having to defend multiple counts. The sporting governing body alleges that the athlete missed the test and also refused it at the same time, on the same day. In a purposive interpretation of these two rules, on missed tests and refusal that is, the outcome not only is ambiguous, but also extremely absurd! You cannot miss a test and refuse it at the same time! The tribunal obviously must interpret this according to the surrounding circumstances, the intention of the legislator and of course the intention of the party who drafted it, to apply it in a way that suits its case. Lord Denning's judgment is *Reel v Holder* provides useful guidance on this issue.[25] The Master of the Rolls argues:

> *"One can argue to and fro on the interpretation of these rules. The people who drew them up could not possibly have envisaged all the problems which would have to be coped with in the future in regard to them. The courts have to reconcile all the various differences as best they can."*

This is also true in the case where the rules create conflict. The rules must be interpreted purposively and not pedantically. In the case of a conflict or injustice the rules must be interpreted contra preferentem in favour of the athlete. And this is true when rules of strict liability are involved.

It is submitted that the tribunal must have some sort of evidence before it in order to support the finding. The evidence must be overwhelming. Not hearsay, not doubtful. Strong, good evidence which proves beyond doubt, considering the seriousness of the allegation and the severity of the action that the accused had knowledge and intended to commit the alleged offence. This evidence however, must be supported and fit into the purposive interpretation of the rules that dictate the relationship between the prosecuting authority and the accused. The Tribunal must apply valid rules correctly interpreted. And in doing so, it must consider, at the same time, the probity of the evidence. The surrounding circumstances of the evidence submitted, while suspicious could not and should not form the basis for concluding that the athlete might have offended. The surrounding circumstances cannot be evidence of the subjective suspicion that the athlete knew, so therefore tried to do a runner! The surrounding circumstances should form the basis of the objective fact that the athlete had not been notified, so therefore did not know about the test. And as Rule 32.2.c of the IAAF explains, it is an offence if you fail or refuse, or otherwise seeking to evade an anti-doping control, after having been requested to do so by a responsible official![26] The legislator is clear: after having been requested to do so by a responsible official. The purposive interpretation clearly suggests that prerequisite for the application of the rule is the request to the athlete by a responsible official. This is the first stage. Then the second stage follows, where the prosecuting authority has to establish whether the athlete failed, or refused or even evaded the test.

It is submitted that the intention of the legislator and its true meaning must be followed at all times. The prosecuting authorities should not be allowed to re-write the rules so they could be given the opportunity to circumvent, the otherwise ill-drafted provision, or their inability to apply the rule properly and fairly. As the Panel notes in the case of *Baxter v IOC*[27]

> *"The Panel is unable to rewrite or to ignore these rules unless they were so overtly wrong that they would run counter to every principle of fairness in sport."*

Furthermore, the application of two different rules on the same test and the allegation that the athlete refused to undergo a test and also that he missed the same test, at the same time, is confusing and absurd. The Panel in the case of *IAAF V Qatar Associations of Athletics Federations*[28]clarified the difference between refusal and a missed test:

> *"A missed test is defined as a consequence of a failure by an athlete to keep the IAAF informed of his or her whereabouts. It is completely different in nature and quality to a failure or refusal to provide a test when asked to do so."*

The jurisprudence of the CAS on this point is extremely helpful and suggests that it is important for the sporting community that the sporting governing bodies establish clear and concise rules. As the Panel noted in *USOC v IOC & IAAF*[29]

> *"The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply."*

The Panel also sites a passage from *Quigley*[30] at p. 24, para 74:

> *"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."*

Similarly, it is equally important that the athletes are informed not only of the regulatory framework in force at any given time, but most importantly, be given the opportunity to comprehend the application of this regulatory framework in order to plan their lives and careers accordingly. As our test case indicates, the regulatory framework must be followed and interpreted in a proper and fair way, if sanctions are to be applied on the accused athlete. At the same time consideration must be given to the fact that such sanction would have serious and incalculable consequences in the, otherwise, short career of an athlete. In any other event, we should not expect from an athlete to follow a

25 Reel v Holder [1981] 3 All ER 321

26 IAAF Rule 32.2.c states: "...the refusal or failure, without compelling justification, to submit to doping control having been requested to do so by a responsible official or otherwise seeking to evade doping control."

27 Alain Baxter v IOC, CAS, 2002.

28 Unreported, April 19, 2004, CAS

29 CAS 2004/A/725 p. 23, para 73

standard pattern of behaviour when we fail miserably to explain to him the exact precepts of the rules in force! In the case of *USOC v IOC & IAAF*[31] the Panel cited another relevant passage from Quigley which stated:

> *"To take every step to ensure that competitors under their jurisdiction were familiar with all rules, regulations, guidelines and requirements in such a sensitive area as doping control"* And the Panel continues by stating: *"It is important that the fight against doping in sport, national and international, be waged unremittingly. The reasons are well known...it is equally important that athletes in any sport...know clearly where they stand. It is unfair if they are to be found guilty of offences in circumstances where they neither knew nor reasonably could have known that what they were doing was wrong. For this purpose, it is incumbent both upon the international and the national federation to keep those within their jurisdiction aware of the precepts of the relevant codes."*

Similarly, in the case of *Tori Edwards v IAAF & USATF*[32] the Panel clearly states its dissatisfaction with the operation of the IAAF rules and cites two examples. The first one at page 16, para 5.14 where the Panel states:

> *"The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction."* The second example could be found on page 17, para 5.18 *"The Panel notes with unease that the IAAF Rules are unclear and that they make it almost impossible to establish that there are exceptional circumstances."*

This also indicates the argument submitted in the introduction of this work that strict liability rules could operate in a harsh and unfair way against the accused athlete. Unfairness becomes operative in a situation where punishment is applied to the innocent athlete in a case where the rules themselves are unclear or their applicability to the facts of the case doubtful. The CAS in the case of *KABAEVA v FIG*[33] analysed the correct application of strict liability rules. The Panel stated that

> *"The Respondent contends that the doping regime put in place by the Respondent's rules is one of strict liability. According to the Respondent it is sufficient to prove that an athlete used a forbidden substance. The Respondent submits that there is no room for any consideration of guilt. The Panel disagrees.*
> *The Respondent's rules (Section 1.4 of the DCR) expressly provide that an athlete is "liable to sanctions" if he/she "is found guilty of doping" (emphasis added). In the Panel's view this is a clear indication that the Respondent's doping rules require an element of fault, i.e. intent or negligence, in order for the athlete to be sanctioned for doping.*
> *In addition, the Panel wishes to point out that there is recent CAS case law according to which federation rules allowing for a suspension of an athlete for doping (as opposed to disqualification from a particular event) without fault on the part of the athlete would not sufficiently respect the athlete's right of personality as established in Articles 20* and *27 et seq. of the Swiss Civil Code which CAS Panels are required to apply (Article 58 of the Code; see CAS 2001/A/317, A v FILA, Award of 9 July 2001, p. 16 et seq.) According to this view, it is necessary for the federations to put forward the objective elements of the doping offence. If the federations succeed in doing so the athlete is presumed to be guilty of a doping offence but he/she has the opportunity of rebutting this presumption by proving that he/she did not act with intent or negligence. The Swiss Federal Tribunal has repeatedly considered this system of reversal of the burden of proof to be compatible with public policy (see judgement of 4 December 2000, 5 p. 427/2000, R v IOC at 2 a), not published; judgement of 31 March 1999, 5P.83/1999, N. et al. v FINA, in Digest of CAS Awards II, at 3 d), p. 781; judgement of 15 March 1993, G v FEI, in Digest of CAS Awards I at 8 b), p. 575)."*

Furthermore, the Panel, in the same case, goes on to analyse the *standard of proof.* The Panel states that:

> *"As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete's exercise of his/her trade (Article 28 Swiss civil code (ZGB)) it is appropriate to apply a higher standard than the generally required in civil procedure, i.e. to convince the court on the balance of probabilities. Following established CAS case law, the disputed facts therefore have to be 'established to the comfortable satisfaction of the court having in mind the seriousness of the allegation' (cf CAS OG/96/003, CAS OG/96/004, K & G v IOC, .20; CAS 98/208, N. et al v FINA, Award of 22 December 1998, CAS Digest II, p. 234, 248; confirmed by the Swiss Federal Tribunal, Judgment of 31 March 1999 [5P. 83/1999], unpublished)."*

As it has been argued above, the CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard.[34] The Panel was content to adopt the test, set out in *Korneev and Gouliev v IOC*, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegations made.

The CAS went on, in *Korneev*, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve 'comfortable satisfaction'.

In the case of *French v Australian Sports Commission and Cycling Australia*[35], the Panel went one step further towards defining the standard of proof. The Panel states:

> *"The Appellant submits that pursuant to the Australian authority of Briginshaw v Briginshaw and CAS jurisprudence, the standard of proof required to be met by the Respondents is somewhere between the balance of probabilities and beyond a reasonable doubt. The Appellant further submits that although the CAS jurisprudence itself is silent on the issue, Briginshaw further stands for the proposition that the more serious the offence, the higher level of satisfaction the Panel should require in order to be satisfied of the offences charged. It is further submitted that given the serious allegations with respect to trafficking and aiding and abetting and the consequences thereof, a very high standard almost approaching beyond a reasonable doubt is required for the Panel to accept that the offences have been proven. The Panel accepts that the offences are serious allegations and that the elements of the offence must be proven to a higher level of satisfaction than the balance of probabilities."*

It is submitted that particular emphasis should be given to the circumstances that give rise to an allegation for an anti-doping violation. Careful consideration should be given to the status of the accused, the publicity it has attracted and most importantly the serious breaches of the regulatory framework, if any, on behalf of the sporting governing bodies, which would allow the escalation of the negative publicity with the main aim to paint a bad picture for the athletes, which would also allow the sporting authorities to reduce considerably the burden of proof. This, it is submitted, cannot reduce the standard of proof to a mere probability, a mere suspicion. The degree of comfortable satisfaction of the Panel should be extremely high in order for it to meet the objective criteria required for a decision which would affect the livelihood of a dedicated and highly celebrated athlete. This appears to be in line with the Panel's judgment in the case of *USADA v Montgomery*[36] where the Panel states:

> *"As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. Counsel for*

30 Arbitration CAS 94/129, USA Shooting & Q. / International Shooting Union (UIT), award of May 23, 1995, at p. 24, para 74
31 CAS 2004/A/725 pages 24-25, para 75
32 CAS OG 04/2003
33 CAS 2002/A/386, page 10, paragraph V 1.2
34 Wang v FINA CAS 98/208, 22 December 1998, para 5.6.
35 CAS 2004/A/651, page 10, para 42
36 CAS 2004/O/645, p. 13.

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The Council of Europe and Sport
Basic Documents

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With a Foreword by Dr Ralf-René WEINGÄRTNER, *Director for Youth and Sport, Council of Europe, Strasbourg*

The Council of Europe is unquestionably the body that has made the most substantial contribution to paving the way for a European sports model. The Council of Europe was the first international intergovernmental organisation to take initiatives to establish legal instruments and to offer an institutional framework for the development of sport at the European level. The first stage of the Council of Europe's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967. The extensive work of the Council of Europe on sport is evident through the main texts on sport, such as the European Sports Charter, the Code of Sports Ethics, the European Convention on Spectator Violence, and the Anti-Doping Convention. Sport co-operation within the Council of Europe is organised in partnership with national governmental and non-governmental bodies.
The Council of Europe and Sport: Basic Documents is the second volume in the Asser series of collections of documents on international sports law, containing material on the intergovernmental (interstate) part of international sports law. The first volume was devoted to the European Union. In previous other publications, non-governmental materials, i.e. statutes and constitutions, doping rules and regulations and the arbitral and disciplinary rules and regulations of the international sports organisations were published.
This book provides an invaluable source of reference for governmental and sports officials, legal practitioners and the academic world. With the increasing public interest in the legal aspects of sports, this collection of documents is a timely and welcome contribution to enhancing the accessibility of basic texts on international sports law and policy.

The book's editing team consisted of Dr Robert SIEKMANN and Dr Janwillem SOEK, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

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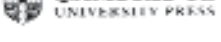

all parties concurred with the views expressed by the members of the Panel during the 21-22 February 2005 hearing to the effect that even if the so-called 'lesser', 'civil' standard were to apply, - namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegation which is made (what might be called the 'comfortable satisfaction' standard) - an extremely high level of proof would be required to 'comfortably satisfy' the Panel that Respondents were guilty of the serious conduct of which they stand accused."

The Panel, in the same case, goes on, to explain the threshold of the standard of proof[37]. The Panel states:

"In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or 'comfort', required. That is because, in general, the more serious the allegation, the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not."

I submit that it is not a question of being more probable than not. Such a test has an enormous degree of subjectivity and it cannot produce certainty or explain the precepts of reasonableness of the probability in question, given the gravity of the allegations and the effect that such allegation could have in an athlete's personal and professional life. It is my contention that on a balance between the gravity of the allegation, followed by the severity of the sanction and the destruction of the personal and professional life of an athlete, the standard of proof should approach the level of certainty and not the level of suspicion. In other words, the more serious the allegation, considering at the same time the special characteristics of the accused and the effect of the allegation on him, the higher the degree of a compelling evidence or justification required to meet the standard of proof.

Finally it is submitted that the present rules operate in an extremely harsh way without regard to the individual's rights. I would like to reiterate the point that it is important for the observation of justice and fairness that the rules of the sporting governing bodies are constructed in a way that produce consistency, proportionality and they do not offend against the rules of natural justice. In the case of *Squizzato v FINA*[38] the Panel argued:

"Applying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athlete concerned, in particular his personality rights [see Aanes v FILA, CAS 2001/A.317]".

In para. 10.24, the Panel goes on to note that:

"The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still - like before - regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case."

In conclusion, it is submitted that there is a need to protect the expectation of athletes to participate in competitions for which they are likely to have prepared for several years, if not their entire life. Although this need has to observe the quest for a healthy competition, it also needs to create clear and reliable measures in order to provide athletes with the highest degree of certainty about their rights as well as their duties.

It is also equally important for the sporting governing bodies to observe the rules on confidentiality and public disclosure. There are always examples where high-ranking officials from within the Olympic movement demonstrate an undisputable bias against athletes, before the athletes had the opportunity to have a fair hearing. Public statements to that effect not only breach the rules of natural justice, but they also create a field of fear. Athletes should not have to worry about high-ranking officials who make statements that indicate a certainty as to the guilt of the athletes. High-ranking officials should refrain from branding innocent athletes guilty, before all the internal disciplinary mechanisms have been observed and exhausted. This seems to be in line with the judgment of Mr Christopher Campbell in the case of *USADA v Tyler Hamilton*[39]

"However, if it is at all desirable for athletes to believe they will obtain a fair hearing, it is imperative that high-ranking officials within the Olympic community refrain from making statements demonstrating bias against an athlete before the athlete has a hearing. Mrs Hamilton's statements are by no means an exaggeration or unreasonable. As she so eloquently stated, athletes should not have to worry that high ranking officials are sending clear messages to the arbitrators to find the athlete guilty regardless of the facts of the case. The IOC and WADA should consider making rules prohibiting such conduct to comply with a very important fundamental principle of the Olympic movement, fairness."

Conclusion

It has been argued that the main aims behind the creation of rules controlling anti-doping in sport, is to create a safe level playing field and to protect the image of sport. These justifications are well-documented and followed by the sporting governing bodies in public statements all over the world. In theory, there is nothing sinister in supporting and condoning such principles. In practice, however, the application of these rules causes exactly the opposite effect of the one they are supposed to protect: the sport and the individual athlete.

There may be many and different reasons as to why the application of anti-doping rules on anti-doping violations lacks certainty and fairness. It may be the lack of clarity in the drafting; or the realisation that sport has been commercialised and commoditised and it would not be in the best interests of the SGBs if the athletes were to be banned; or, perhaps, the inability of the sporting governing bodies to prosecute the offence. Sometimes, the way the sporting governing bodies prosecute the alleged offence, is similar to something Christopher Columbus wrote when he finished his adventure in America. He said:

"When I was traveling to America, I didn't know where I was going; when I arrived in America, I didn't know where I were; when I left America, I didn't know where I'd been"!

Finally, it is submitted that healthy competition demands attention and action at every level, where medicine, sport and the law merge. Doctors, lawyers, parents, schools, club coaches and governing bodies must all address the issues raised and the implications for modern sport. The detrimental side effects of the use of performance enhancing substances must be constantly stressed in order that sports participants who are tempted to use them will understand that a better performance is not the only effect of this practice. To this effect the sporting governing bodies must ensure they create clear and concise rules that can be understood by all those concerned. Athletes, in particular, must be informed clearly about the behaviour they are required to follow. Rules such as the ones analysed in this work must be scrapped altogether, as they offend against fairness and justice, they fail to observe basic human rights and they violate the rules of natural justice and due process. They can only be described as "a relic from the middle ages" and they have no place in a democratic society which equally respects the rights of the individual and that of the public.

37 ibid

38 CAS 2005/A/830, p.13, para 10.23

39 United States Anti-Doping Agency Appeals Committee, 2004, p.7.