

f. The conclusion can therefore only be that the authority of NADOs to grant TUEs to athletes in their RTP, is limited to those athletes that are not included in the RTP of any IF. This is however the only limitation established by the Code. Only athletes expressly included in an IF's RTP fall outside of the authority of NADOs. Once an athlete is not included in the IF's RTP, the authority of a NADO concerning TUEs is *not* limited by the participation of an athlete in an international event. Hence, participation in international events does not affect the NADO's authority to grant TUEs. As this authority is then in force also when an athlete participates in

an IF competition, article 15.4.1 is fully applicable and the national TUE of such a participant should be recognized and respected by the IF.

g. Of course, IFs can easily sidestep this issue by establishing the rule in their regulations that all athletes that are participating or scheduled to participate in an IF competition are part of the IF's RTP for this duration. Some IFs have already taken this approach. The consequence of such an approach is that IFs then have exclusive jurisdiction over these athletes when it comes to TUEs.

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## Doping As a Crime?

# The Policy Issue Concerning the Choice of Method to Deal with Doping

by Julia Völlmecke\*

### I. Introduction

Doping in sports has become popular within the past few years. The Tour de France scandals in 1998 and recently in 2007 or the BALCO affair in 2003<sup>1</sup> are only a handful of examples of how doping infractions seriously hit the news' headlines. More and more athletes are going to use performance enhancing drugs. Doping seems to have become an integral characteristic of sports competitions, despite the diverse side-effects the use of prohibited substances may have.

Fortunately, governments seem to have recognised the alarming development of doping cases. The USA, for example, used to be very reluctant in restricting domestic professional sports by imposing drug laws to sports.<sup>2</sup> To ensure a sustainable successful economy, the government deferred decision-making to private organisations. Since government regulation was seen as potentially profit limiting, restrictions should only have been imposed if necessary.<sup>3</sup> The attitude changed significantly when steroids in sports became a national issue and began to make headlines in the news on a regular basis.<sup>4</sup> Most importantly, the US government recognised the effect steroid use can have on youths and amateur athletes<sup>5</sup> and now sees regulation as a necessary step to address the issue. The Clean Sports Act of 2005 has been introduced to keep teenagers and youths away from performance enhancing drugs by eliminating their use by professionals in the US.<sup>6</sup> The bill provides for the uniform adoption by the four major American sports leagues of rules similar to the strict Olympic enhancement policies in order to eradicate steroid and enhancement use in competitive professional athletics.<sup>7</sup> Some European countries also have implemented anti-doping laws including criminal provisions to combat doping infractions. France, Spain, Belgium and Italy are only a few countries to mention here.<sup>8</sup>

Switzerland, for example, adopted a dual doping sanction system where sanctions can be imposed by sports governing organisations or by public authorities.<sup>9</sup> The Federal Act on the Advancement of Sports

of 2002 provides criminal sanctions in order to expand the sanctions of sports organisations.

This year, Germany finally introduced an Anti-Doping Law. The government recognised that doping tends to destroy ethical-moral values of the sports world and took it as its obligation to protect society's health.<sup>10</sup> Since 66 percent of all adults living in Germany participate in sports regularly and see professional athletes as their heroes, politicians assumed that the fight against doping would have a positive effect on society's health.<sup>11</sup> Whether the new Anti-Doping Law can be seen as innovative in the fight against doping is still contested. Opponents still question whether the government should get involved in the combat against doping and face the difficulties the introduction of such legislation entails.

The policy issue concerning the choice of method to deal with doping is not over yet.

### II. The Situation in Germany

In Germany, both the sport itself and the state are dealing with doping. Whilst the sport and its authorities are primarily controlling and sanctioning athletes, the state is more reluctant in regulating doping issues. This might have changed within the past few years.

The state has become seriously concerned about the increase of doping incidents.

Consequently, it has been thinking of extending its legal provisions to profoundly regulate anti-doping violations. By this time, the State is already processing a so called Anti-Doping Law<sup>12</sup> which expands existing regulations.

Before the new law was introduced by the German government, the debate of whether to interfere in sports regulations through governmental legislation, and criminal sanctions in particular, had been broad and controversial. Since the new Anti-Doping Law is not satisfying for many opponents, the discussion is still ongoing.

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1 For the whole story see Mark Fainaru-Wada and Lance Williams *Game of Shadows, Barry Bonds, BALCO and the Steroids Scandal that Rocked Professional Sports* (Gotham Books, New York/USA, 2006).

2 Colin Leitner "Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution" (2006) 3 DePaul J Sports L & Contemp Probs 192, 204.

3 Ibid.

4 Ibid.

5 Ibid 210.

6 Ibid 212.

7 Ibid.

8 See Rainer T Cherkeh and Carsten

Momsen "Doping als Wettbewerbsverzerrung? - Möglichkeiten der Strafrechtlichen Erfassung des Dopings unter besonderer Berücksichtigung der Schädigung von Mitbewerbern" NJW 2001 Heft 24, 1747.

9 Christoph Gasser and Eva Schweizer "Switzerland: Doping Sanctions System" ISLR 2005, 4 (NOV), 94.

10 Entwurf eines Gesetzes zur Verbesserung

der Bekämpfung des Dopings im Sport (30.05.2007) Deutscher Bundestag, <http://dip.bundestag.de/brd/2007/0223-07.pdf> > (at 13 September 2007).

11 Ibid.

12 Entwurf eines Gesetzes zur Verbesserung der Bekämpfung des Dopings im Sport, above n 10.

The supporting arguments primarily consider the doped athlete as being a delinquent rather than a victim. They refrain from protecting an athlete using prohibited substances and encourage the government to get involved with the doping issue. One of the biggest doping scandals in Germany is a good example with which to show the impact doping can have upon the sporting community. In the 1980s, the East German government was behind a doping scandal involving nearly 10,000 athletes.<sup>13</sup> The government implemented "State Plan 14.25", a secret initiative to develop sports nationwide by providing steroid pills to coaches. The coaches then gave the pills to unknowing athletes in their daily dose of vitamins.<sup>14</sup> The athletes were also given testosterone injections under the premise that the injections were "vitamin cocktails".<sup>15</sup> A similar scandal happened in 2003 in the USA. The Bay Area Laboratory Co-Operative (BALCO) supplied some of America's top track and field athletes with tetrahydrogestrinone (THG). THG was only identified after a prominent coach came forward and sent a syringe containing the drug to the USADA.<sup>16</sup> The USADA then developed a test for detecting the substance.<sup>17</sup> However, during the Sydney Olympic Games the international sporting community faced the shock of having a new undetectable drug in use without any means of testing for the substance.<sup>18</sup> Hence, the BALCO scandal illustrates how athletes can cleverly circumvent testing standards and procedures, while anti-doping agencies struggle to maintain accuracy and credibility in the system.<sup>19</sup> In addition, the 1998 Tour de France marked the eruption of a major scandal in cycling, revealing that doping was widespread within the cycling world at the elite level. This scandal was the driving force behind the creation of the World Anti-Doping Agency<sup>20</sup> and, unfortunately, repeated similarly this year.

The doping scandals indicate that the sports world needs assistance from the state. It seems as if the sports governing bodies are unable to regulate doping in sport and as if the current anti-doping framework is ineffective. The application of criminal law on doping infractions could be a way to protect the individuals as well as the society from harm.<sup>21</sup> It is argued that state coercion, in terms of criminal sanctions, is an appropriate method to avoid serious threat to society's welfare, integrity and existence.<sup>22</sup> The adoption of such legislation is intended to reflect the important role sport plays in society and citizens' lives.<sup>23</sup> People like sport, they play sport and they regard sport as one of the most important elements of pedagogic development.<sup>24</sup> Sport promotes values that society creates and wishes to safeguard. Such values are known as health, honesty, fairness and fitness. It is submitted that doping in sport threatens all these values.<sup>25</sup> Doping is deemed to be unhealthy. Doping is cheating and yet immoral.<sup>26</sup> The methods used for cheating have become more and more innovative and have reached epidemic proportions.<sup>27</sup> Doping therefore is of public interest and demands a public rather than a private response.<sup>28</sup> It is argued that the application of criminal law has a moral element in its enforcement<sup>29</sup> and that "(...) it is in the public's best interests to invoke the law and protect sport from the disintegration it faces posed by an uncontrollable degree of cheating"<sup>30</sup>. It is submitted that the application of criminal law on doping infractions fills up the elements currently missing in the sporting bodies' regulatory framework, such as

certainty, consistency and transparency<sup>31</sup>. A criminal framework is supposed to function as the protection of athletes' health as well as the protection of the social and cultural role of sports, the "fair-play" principle, the genuineness of the results, as well as a means of general and specific prevention<sup>32</sup>.

Moreover, both the increase of doping infractions and technologically undetected substances invite for criminally organised networks of pharmaceutical trading. During recent years, the misuse of steroid anabolic in Germany has significantly increased in the field of fitness and body building<sup>33</sup>. This has led to an organised criminal network where it is necessary to implement criminal investigation methods and deterrent sentences to solve the problem<sup>34</sup>. This is true for leisure sports level as well as for professional sports.

Hence, since the doped athlete is part of a network around him, the sports world is in need of the state's assistance. The state has to implement new laws in order to enforce methods, which the sports world does not cover<sup>35</sup>. It is submitted that by means of creating new legal provisions, the state is supposed to assist the sports world in an effective way<sup>36</sup>. An anti-doping law would offer new ways of criminal investigations and measures. Public prosecutors and judges would be able to order searches, seizures and interceptions of telecommunications<sup>37</sup>. This would lead to improved methods for clarifying doping infractions. Therefore, the doped athlete needs to become subject of a criminal accusation in order to become the centre of any investigation<sup>38</sup>. Once this is legally permitted (by an anti-doping law), the doped athlete is not immune from prosecution anymore. It is argued that a doped athlete facing a criminal procedure is likely to cooperate with the authorities.

Certainly, he or she would cooperate in order to prove innocence<sup>39</sup>. An incentive for cooperation would also be the fear of ending up incarcerated at the end of the trial. Also, the threat of costly legal proceedings can be intimidating enough to cooperate. This is also a factor not unknown to those who have an economic or other interest in having the accused athlete continue in competition<sup>40</sup>.

Likewise, the international anti-doping network seems to lack certain methods to efficiently and fairly combat doping. The fight against doping is the number one priority for the International Olympic Committee (IOC). It follows a 'zero-tolerance' policy where violations of anti-doping rules automatically lead to disqualification of the individual result obtained in the competition, including forfeiture of medals, points or prizes<sup>41</sup>.

Similar provisions can be found in the WADA-Code where most first anti-doping violations carry a mandatory period of ineligibility of two years and a second violation results in lifetime ineligibility<sup>42</sup>. Both the IOC and the WADA follow the 'strict liability' rule in its regulatory frameworks where fault is not considered in determining a violation.

Both authorities refrain from imposing criminal liability, although they emphasise their 'zero-tolerance' policy. However, the strict liability rule is likely in some sense to be unfair in an individual case where, eg, the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible. It is then hard for the athlete to prove his or her innocence. Nonetheless, the rules of the competition will not be altered to undo the unfairness. Therefore,

13 Karen Helmstaedt *History of Doping: Acceptance Tinged with Fear*, ASCA Online Articles <http://www.swimming-coach.org/articles/9904/9904-6.htm> (at 17 September 2007).

14 Ibid.

15 Ibid.

16 Jessica K Foschi "A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport" 16 *Duke J Comp & Int'l L* 457, 470.

17 Ibid.

18 Ibid.

19 Ibid 471.

20 World Anti-Doping Agency WADA *History* <http://www.wadaama.org/en/>

dynamic.ch2?pageCategory.id=311> (at 17 September 2007).

21 Gregory Ioannidis "Legal Regulation of Doping in Sport and the Application of Criminal Law on Doping Infractions: Can a Coercive Response be Justified" *ISLR* 2006, 1 (May), 29.

22 Ibid 38.

23 Ibid 34.

24 Ibid.

25 Ibid 33.

26 Ibid.

27 Ibid.

28 Ibid 30.

29 Ibid.

30 Ibid 34.

31 Ibid 29.

32 Ibid.

33 Thomas Röwekamp "Bekämpfung des Doping mittels eines Anti-Doping-Gesetzes: Pro" *ZRP* 2006 Heft 7, 239.

34 Ibid.

35 Thomas Bach "Bekämpfung des Doping mittels eines Anti-Doping-Gesetzes: Contra" *ZRP* 2006 Heft 7, 239.

36 Ibid.

37 Christian Krähe "Anti-Doping-Gesetz - Pro und Contra; Contra: Argumente gegen ein Anti-Doping-Gesetz" *SpuRt* 5/2006, 194.

38 Clemens Prokop "Anti-Doping-Gesetz - Pro und Contra, Pro: Argumente für ein

Anti-Doping-Gesetz" *Spurt* 5/2006, 192, 193.

39 Ibid.

40 Richard W Pound "The World Anti Doping Agency: An Experiment in International Law" *ISLR* 2002, 2 (JUL), 53, 58.

41 International Olympic Committee, *Anti-Doping Rules Applicable to the XX Olympic Winter Games in Turin 2006* [http://multimedia.olympic.org/pdf/en\\_report\\_1018.pdf](http://multimedia.olympic.org/pdf/en_report_1018.pdf) (at 18 September 2007), at 14.

42 World Anti-Doping Agency, *World Anti-Doping Code*, art. 10.2 (2003) <http://www.wadaama.org>

it is submitted that the IOC and the WADA in particular have the responsibility to protect innocent athletes from false positives<sup>43</sup>. This could be achieved if these anti-doping authorities were to move towards a practice of considering all the facts and circumstances on a case-by-case basis and giving each athlete a fair and real opportunity to prove their innocence<sup>44</sup>. This is the way in which a criminal procedure in Germany would be realised, and it is another indication that the anti-doping regulatory framework needs to be controlled by other authorities. As such, some European countries have already implemented anti-doping laws<sup>45</sup>.

Finally, the importance of sports competitions, and their commercial backgrounds and investigations in particular, welcome an improved criminal legal system<sup>46</sup>. If doping affairs are not punished by criminal sanctions, they will jeopardise the moral-ethic function of the sport in general<sup>47</sup>. An anti-doping law would be able to forestall such a situation. It would also lead to new and improved cooperation between the state and the sports world and the fight against doping would become more efficient<sup>48</sup>.

As a result, antagonists welcome an anti-doping law but also consider cooperation between the sports world and the German government as helpful in order to fight against doping efficiently.

## 2 The contra arguments

The arguments against the introduction of an anti-doping law doubt that the government should get involved in the issue of doping. They focus on the difficulties such legislation would create. In particular, they primarily doubt that it is possible and reasonable to introduce such a new law under the German system. Whilst some arguments question whether it is legally permitted to introduce an Anti-Doping Law with respect to constitutional difficulties, other opinions concentrate to a greater extent on procedural difficulties which are likely to occur once an Anti-Doping Law is adopted.

### (a) Constitutional difficulties

Although the German government is allowed to create new criminal sanctions<sup>49</sup>, the fact that it is not obliged to criminally sanction athletes using prohibited substances is supposed to cause a barrier. Article 1 of the Basic Law of the Federal Republic of Germany<sup>50</sup> does not impose the duty upon the State to protect an athlete against risking their own health. This is confirmed through article 2 of the Basic Law of the Federal Republic of Germany. It protects the general freedom of action which includes the right to choose a riskfilled life in terms of health concerns<sup>51</sup>. Everyone has the right to choose a healthy life or to risk health by using dangerous doping substances. To oblige the state to interrupt in this field would change the constitutional understanding of both article 1 and 2 of the Basic Law of the Federal Republic of Germany<sup>52</sup> and would infringe the liberal attitude towards life.

Article 103 (2) of the Basic Law of the Federal Republic of Germany is seen to be another problem. An implemented law needs to be defined adequately and, even more importantly, the premises of the penalties need to be transparent. In Germany, the legislator is not allowed to let other authorities decide which actions are to be sanctioned<sup>53</sup>. However, the "doping lists" which define and list all prohibited substances and methods are a product of the World Anti Doping Agency (WADA) which the National Doping Agency (NADA) and the national sports unions have adopted and implemented in their

regulations<sup>54</sup>. The state would have to refer to these authorities to be able to define what actions are prohibited. This is not allowed<sup>55</sup>. Additionally, it is doubtful whether, by means of referring to the doping lists, a new law would always be accurate. Because of the rapid invention of new doping substances, WADA's doping list necessarily changes often.

Consequently, the German legislator would always have to renew the new law in order to keep the law presentable and up to date with the newest research findings in the doping field<sup>56</sup>.

Furthermore, the sports unions have already adopted regulations that prohibit anti-doping violations in order to protect the sports ethos. According to article 9 (1) of the Basic Law of the Federal Republic of Germany, the sports unions are constitutionally protected and are therefore independent. The state is not allowed to interfere with the sports regulations.

It is a legitimate and intended dichotomy between the state and the sports world. Although the state supports the sports world in many ways, such as supporting the sports unions and clubs on a monetary basis; supporting the sports unions by organising international competitions; protecting competitions by providing sufficient security measures; et cetera, it is intended that the government should only assist and support the sports authorities when it is inevitable. This is, a fortiori, the case when it comes to regulatory issues. The autonomy of the sports world is tied with the subsidiary of government interference.

Therefore, although the sports ethos is a considerable and noteworthy issue to protect, article 9 of the Basic Law of the Federal Republic of Germany does not allow the state to regulate the issue for the sports unions.

Additionally, the anti-doping policies and measures of the sports unions indicate that they are more efficient than an anti-doping law would be. The system of controlling antidoping violations starts world wide. Since the International Olympic Committee called for a World Conference on Doping in Sport in 1999 to combat the phenomenon of doping in sports, the World Anti-Doping Agency (WADA) was created. WADA implements and oversees the Anti-Doping Programme which consists of the Code, International Standards (including the Prohibited List, Testing Standards, Laboratory Standards, Standards for Therapeutic Use Exemptions), and Models of Best Practice. Since WADA's formation, virtually every sporting organisation in the world has accepted the Code<sup>57</sup>. All athletes wishing to take part in a competition have to agree with the sports unions' regulations which themselves reflect the Code. They agree with all control measures provided in the WADA anti-doping regulations. These measures, provided in article 6 of the WADACode, are efficient and force the sports unions as well as the arbitration courts to react quickly<sup>58</sup>. Also, the rules provided in the WADA-Code are not compatible with the German regulations. It begins with the Code's "strict liability rule" provided in article 2.1 of the Code where a positive analysis of a doping control sample automatically leads to the athlete's liability of an anti-doping violation. "However, the athlete then has the possibility to avoid or reduce sanctions if the athlete can demonstrate that he or she was not at fault or significant fault."<sup>59</sup> Though, there has not been an athlete yet who was successful in proving their innocence<sup>60</sup>. What's more, the provision is contrary to the German legal understanding of criminal liabilities. In Germany, an accused (athlete) is innocent until the state has proven his guilt. This

org/rtecontent/document/code\_v3.pdf> (at 18 September 2007).

43 Foschi, above n 16, 485.

44 Ibid.

45 See Cherkeh and Momsen above n 8, 1747.

46 Ibid 1746.

47 Ibid.

48 Prokop, above n 38, 193.

49 Walter Dury "Kann das Strafrecht die Doping-Seuche ausrotten?" SpuRt 4/2005, 137, 138.

50 The English version of the "Grundgesetz

der Bundesrepublik Deutschland" is available under German Law Journal <http://www.iuscomp.org/gla/statutes/GG.htm> (at 30 November 2006); the German full text version is available under Deutscher Bundestag [http://www.bundestag.de/parlament/funktion/gesetze/gg\\_aug2006.pdf](http://www.bundestag.de/parlament/funktion/gesetze/gg_aug2006.pdf) (at 30 November 2006).

51 Although the interpretation of article 2 of the Basic Law of the Federal Republic of Germany allows for contrary opinion, the valuation above is supposed to reflect best

what the legislator aimed to protect, see Udo Steiner "Verfassungsfragen des Sports" NJW 1991 Heft 43, 2729, 2734.

52 Martin Nolte *Sport und Recht: Ein Lehrbuch zum internationalen, europäischen und deutschen Sportrecht* (Hofmann Verlag, Schorndorf, 2004) Nationales Sportrecht, 226.

53 Ibid.

54 Christian Krähe, above n 37, 194; the WADA-Code is implemented in Germany through the National Anti Doping Agency (NADA); a good abstract

of the implementation of the WADA-Code offers Christian Weber "Die Sportsschiedsgerichtsbarkeit nach dem World Anti-Doping Code und ihre Umsetzung in Deutschland" SchiedsVZ 2004 Heft 4, 193.

55 Krähe, above n 37, 194.

56 Dury, above n 49, 138.

57 Foschi, above n 16, 462.

58 Dury, above n 49, 139.

59 Ibid.



fundamental rule, known as “in dubio pro reo”, is expressed in different regulations and in connection with criminal liability it shifts the burden of proof upon the state’s authorities<sup>61</sup>. Hence, the “strict liability rule” of the WADA-Code is not allowed in the German criminal legal system. Furthermore, it will be questionable whether a positive analysis of a doping sample can be used in an official criminal procedure. Because the athlete has to assist the laboratories in order to get tested, this cooperation resembles much of a “self-accusation”. With regard to criminal procedures, an obligation to do anything which might prove your own guilt is not allowed in Germany<sup>62</sup>. Therefore, a positively tested analysis can hardly be used as evidence in order to prove the athlete’s criminal liability. Additionally, the A- and B-samples regularly offer binding results for the athlete. Once the whole procedure of the doping control has been validated, there will not be the possibility for the athlete to ask for a third “C”- sample. Also, the athlete will not be allowed to offer counter evidence by introducing DNA-expertise which could prove that the used samples were not their samples<sup>63</sup>. That means the WADA-Code remarkably shortens the athlete’s possibilities of any counter evidences. This is not compatible with the German legal understanding of defence in a criminal procedure. Apart from that, criminal sanctions provided in a new anti-doping law will not be able to discourage the athlete from using prohibited substances. They will not function as a good deterrence<sup>64</sup>. Athletes who were doping themselves for the first time will have to expect a monetary fine rather than imprisonment<sup>65</sup>. In contrary to this, the WADA-Code provides much harsher sanctions. In accordance to Article 10 of the Code, athletes have to fear the disqualification of their results as well as a two years’ ineligibility for the first violation. For the second anti-doping violation they even have to fear lifetime ineligibility. These provisions are suitable enough to function as deterrence. Also, they constitute a better respect for the treatment of a sports career because the bans provided in the WADA-Code sensibly influence an athlete’s future career. According to this, sports disciplinary sanctions seriously affect an athlete’s career whereas sanctions such as custodial sentences will rarely be achieved.

Finally, the nature of the current anti-doping framework of sports governing bodies is of a disciplinary character. If an athlete desires to participate in competition, he has to accept the regulatory framework of his governing body. This, in a sense, creates a contractual relationship between the two parties<sup>66</sup>. Both parties are bound by the terms of the antidoping regulatory framework, and the athlete has to submit to its terms. Consequently, the athlete agrees to submit to referential authority<sup>67</sup>. If this authority and its regulatory framework insofar are not followed, the athlete is subject to disciplinary sanctions. This is enough to indicate the private nature of doping<sup>68</sup> which automatically excludes any governmental involvement. Following these considerations, it is only natural that opponents consider the mechanisms sports governing bodies are able to use as sufficient enough to combat against doping<sup>69</sup>.

As a result, the implementation of an anti-doping law is difficult and faces serious constitutional difficulties.

### (b) Procedural difficulties

Procedural inadequacies support the difficulties in adopting an anti-doping law.

Once an athlete is accused of doping infractions, a criminal procedure may begin. In these proceedings the accused does not only have the right to refuse saying anything about the action that brought him before court, he even has the right to lie<sup>70</sup>. The legally justified refusal to cooperate with the public prosecutors or the judges makes it difficult for the relevant authorities to find out the truth and it complicates any criminal investigations.

Antagonists presume that an anti-doping law would interfere with the sports tribunals’ jurisdiction. German judgments need to be enforced. The verdict itself is only a part of the whole procedure of judgment enforcement. Additionally, the international enforceability of German district court’s judgments is hard to realise<sup>71</sup>. But, decisions of sports tribunals can be applied internationally without any enforcement procedure<sup>72</sup>. It would complicate the whole procedure if

an athlete is found guilty by a sports tribunal in accordance with the “strict liability rule”, but the criminal court, on the one side, would have to find him innocent because it could not collect enough evidence to prove the accused guilty and therefore had to apply the rule of “in dubio pro reo”<sup>73</sup>. This would lead to contradictions between the two decisions and would have a negative impact on the whole procedure and its credibility. Moreover, it is questionable whether it is valid to firstly reach decision by a sports tribunal and then finding a following judgment by a criminal court. The aspect of double jeopardy or “ne bis in idem”, prohibiting to punish a person twice for the same action, could be a justified baulk<sup>74</sup>.

Apart from that, it is doubtful whether an anti-doping law would lead to adequate judgments. The judges sitting in the criminal courts are not specialised in doping issues or any sports issues as such<sup>75</sup>. However, the “judges” in the sports tribunals and courts are well specialised in the sports field. Furthermore, all decisions of the sports tribunals can only be appealed before the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland<sup>76</sup>. In spite of this, Germany offers the possibility of two appeals against a district court’s judgment. That means it would take more time to reach a verdict than it would take before the CAS. During this time of procedure, the athlete could still take part in further competitions which obviously would not lead to a clarified situation.

Additionally, the local public prosecutor’s offices are overloaded with loads of cases which make it impossible for the public prosecutors to concentrate on doping cases within a short period of time<sup>77</sup>. This also supports that a long period of time passes by until the final verdict is reached.

### 3 The new Anti-Doping Law

The German government introduced a new Anti-Doping legislation which is still in process and not enacted yet. Basically, the new law amends existing provisions of the Medicinal Products Act and those of the Law of Germany’s Federal Criminal Police Office<sup>78</sup> and is not meant to represent an independent law.

The aims of the Anti-Doping Law are clear and well formulated. The new legislation has been created to effectively combat against criminally organised networks on a national and international basis. Furthermore, it has developed auxiliary provisions to criminalise those athletes who are possessing significant amounts of dangerous doping substances.

Additionally, the legislation has recognised provisions reaching for preventive measures.

By renewing the provisions of the Federal Criminal Police Office Law, the government developed a mechanism by which the Federal Criminal Police Office is entrusted with police tasks. Section 4 (1) of the Federal Criminal Police Office Law entrusts the Federal Criminal Police Office to work against unlawful trade of pharmaceuticals. The subject matter jurisdiction of the Criminal Police Office is supposed

60 Karsten Mertens “Jan Ullrich und die Unschuldsvermutung: Die Verteidigungsstrategie des Radprofis aus juristischer Sicht” *SpuRt* 5/2006, 177, 179.

61 *Ibid* 177.

62 Dury, above n 49, 139.

63 *Ibid*.

64 *Ibid* 140.

65 *Ibid*.

66 Ioannidis, above n 21, 31.

67 *Ibid*.

68 *Ibid*.

69 Johannes Horst and Constanze Jacobs “Arbeits- und Verbandsrechtliche Konsequenzen des Dopings” *RdA* 2003 Heft 04, 215.

70 Krähe, above n 37, 194.

71 Bach, above n 35, 239.

72 Dury, above n 49, 140.

73 Krähe, above n 37, 194.

74 Martin Heger “Zur Strafbarkeit von Doping im Sport” *JA* 2003 Heft 1, 76, 83.

75 Dury, above n 49, 140.

76 *Ibid*; a good survey about the CAS offers Simon Gardiner et al *Sports Law* (Third Edition, Cavendish Publishing Limited, Sydney/London, 2006), section 2, chapter 6, 232; the CAS is also known as TAS (Tribunal Arbitral du Sport); see [www.tas-cas.org](http://www.tas-cas.org).

77 Walter Seitz “Hexenjagd auf Dopingsünder? - Ein bundeseinheitliches Schiedsgericht für Sportdopingsachen muss her!” *NJW* 2002 Heft 39, 2838, 2839.

78 For the official translation of the Bundeskriminalamt see its English homepage at [www.bka.de/](http://www.bka.de/) (at 13 September 2007).

to battle the international trading of medicinal products. In order to support this aim, the Federal Criminal Police Office is obliged to work together closely with specialised foreign investigation bureaus.

The Medicinal Products Act takes the development of the Federal Criminal Police Office Law into account by introducing and aggravating those sanctions connected with the possession of significant amounts of prohibited substances. Because of the huge dimension of doping nowadays, the government considers the aggravation of these sanctions as necessary in order to fight against criminal behaviour. The alterations of ss 6 (a) and 95 of the Medicinal Products Act take this into account. Additionally, by renewing ss 4 and 6 of the Act, the government sought to implement provisions sanctioning blood doping and providing the obligation to add a warning notice concerning prohibited doping substances to every patient information leaflet. The latter provisions are meant to protect the athletes from using prohibited substances as well as to forestall the athlete's defence of nescience.

The German government introduced the new legislation because it has primarily found the need for action in two ways. Firstly, it finds it necessary to combat the criminally organised networks. In order to do so, the government implemented provisions offering rigorous ranges of sentences. They are meant to function as a deterrent. The government has also recognised that the doping network is often based on international networks.

Therefore, it finds it necessary to work together with international investigation bureaus.

Additionally, the new provisions criminalising the possession of significant amounts of prohibited substances are supposed to successfully work against the circulation of dangerous doping substances. Secondly, the new law aims for preventive measures in order to brighten the athletes of the consequences being faced with when using prohibited substances. Hence, by introducing the new law, the German government sees it as her task to provide regulations in order to make government interference possible.

Although the new Anti-Doping Law is recognised as a useful step towards the fight against doping in Germany, there are still deviating opinions. One of politics most striking arguments against the new Anti-Doping legislation criticises the fact that the law still does not criminalise the doped athlete. Opponents censure that the law rather resembles minor changes of existing provisions than severely endeavours to act against athletes using prohibited substances. Other antagonists seriously condemn the new law by means of its failure to provide sufficient specification and transparency<sup>79</sup>. In terms of constitutional correctness the new law lacks the necessary precision and cannot therefore follow the rules of article 103 (2) of the Basic Law of the Federal Republic of Germany<sup>80</sup>. Firstly, the provisions of s 95 and s 6 of the Medicinal Products Act do not clarify which prohibited substances are meant<sup>81</sup>. Although these sections refer to existing lists of prohibited substances, those lists change according to the latest developments in economy and technology<sup>82</sup>. Therefore, it remains unclear which lists or supplements of prohibited substances are meant to be the basis for criminal sanctions<sup>83</sup>. Secondly, s 4 of the Medicinal Products Act does not sufficiently clarify what is actually meant when blood is supposed to be the basic substance for blood doping. Although WADA's list of prohibited substances recognises blood doping as a prohibited method by means of either using blood injections themselves or by using pharmaceutical products resulting in the

increase of oxygen transfer, section 4 does not differentiate between the two methods<sup>84</sup>. The different possibilities of interpreting s 4 do not clarify whether blood doping by means of blood injections is meant to be covered by the provision<sup>85</sup>.

#### 4 Result

Following the discussion above, Germany's new Anti-Doping Law is a bit of a surprise.

Although many opponents worked against the introduction of such legislation, the government implemented it. This reflects the policy in Germany. Most of the politicians regard it necessary to combat the doping problem by means of implementing a new regulatory framework. Therefore, already existing provisions were altered and expanded in order to fight against doping effectively. However, the government has declined to introduce new provisions criminalising the doped athlete. Although the new law now punishes those persons possessing a significant amount of prohibited doping substances, it does not provide a mechanism to sanction the use of prohibited substances. The reason why the government refused to develop such provisions can be drawn from two aspects.

Firstly, the government recognised the procedural difficulties once an athlete is part of a criminal procedure. The athlete's right of a denial of evidence and the predicted procedure ending up with monetary penalties most of the times are but two reasons to mention here.

Secondly, the government emphasised that it sees the essence of the fight against doping in regulating the unlawful circulation of prohibited pharmaceuticals as well as in the suppression of criminally organised trading networks. The sanctioning of the doped athlete himself has not been its primary concern.

Anti-doping laws of other European countries also failed in providing efficient and transparent provisions to fight against doping. In Italy<sup>86</sup>, for example, politicians had to admit that the Anti-Doping Law has not been successful<sup>87</sup>. This can be drawn from the law itself. Provisions lack precise wordings and it is not clear what the law really aims at<sup>88</sup>. Since the law mentions three different aims which it is supposed to protect legally<sup>89</sup>, it fails in providing transparent guidance. The Italian government has already recognised the weaknesses of the Anti-Doping Law and plans to revise the law<sup>90</sup>. Italian politicians are planning to shift the jurisdiction over the sanctioning of doped athletes back to the sports governing bodies<sup>91</sup>. Following this attempt, Italian's anti-doping policy would subscribe itself to the IOC's policy emphasising that doping infractions are a matter for sports governing authorities<sup>92</sup>. Switzerland, for example, is faced with similar difficulties and developments, although it still has a dual doping sanction system<sup>93</sup>. The Federal Act on the Advancement of Sports of 2002 is applicable to everyone, offences are investigated by criminal prosecutors and its sanctions range from imprisonment to a monetary fine<sup>94</sup>.

However, the application of the law is limited by the required intention to commit the violation of the law for the purpose of doping and within regulated competition sports<sup>95</sup>.

The requirements of an athlete's intention to commit the violation of law for the purpose of doping are supposed to demonstrate a problem for the prosecution. Although substantial amounts of prohibited substances may be detected, most of time the intention and the use in regulated competition sports cannot be proven<sup>96</sup>. Furthermore, the Act does not declare the presence of prohibited substances in an ath-

79 Markus Parzeller and Christine Rüdiger "Blutdoping: Unbestimmte Regelungen im Arzneimittelgesetz" *Zeitschrift für Rechtspolitik* (ZRP) 2007 Heft 5, 137.

80 Ibid.

81 Ibid 139.

82 Ibid.

83 Ibid.

84 Ibid 139.

85 Ibid.

86 *Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping*;

Italian full text version available under: Italian Parliament <http://www.parlamento.it/leggi/003761.htm> (at 06 December 2006).

87 "Sportpolitik: Italien will Anti-Doping-Gesetz revidieren" *Die Welt* (27 November 2006) <http://www.welt.de/data/2006/11/27/1126602.html> (at 07 December 2006).

88 Manfred Maiwald "Probleme der Strafbarkeit des Doping im Sport - am Beispiel des Italienischen Antidoping-

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89 Maiwald, above n 88, 414, 400: the heading of the law and its preamble mention different aims.

90 *Die Welt*, above n 87.

91 Ibid.

92 Ibid.

93 See Gasser and Schweizer, above n 9, 94;

There are two categories of doping sanctions: (1) those imposed by bodies of sports organisations, and (2) those imposed by public authorities. Depending on the offence committed, an athlete may be sanctioned by one authority or both.

94 Ibid.

95 Ibid.

96 Gasser and Schweizer, above n 9, 94. A survey among the prosecution officers of the Swiss cantons showed that the prob-

lete's body, the use of a prohibited substances or method by an athlete, or the possession of prohibited substances as punishable<sup>97</sup>. In sum, the limitation of scope of the criminal provision in the Federal Act has led to few convictions. Also, it has led to various discussions among lawyers and politicians whether to extend the criminal provisions to athletes using doping on themselves<sup>98</sup>. This was denied.

### B Criminal Provisions

Prior to the introduction of the new Anti-Doping Law, the discussion in Germany mostly focused on whether to regulate anti-doping violations by introducing new or expanding existing criminal provisions. Although the new law does not offer new provisions criminalising the doped athlete, it is interesting to have a closer look upon the Criminal Code since it offers the most important provisions to regulate anti-doping infractions.

These provisions are not abolished by the introduction of the new Anti-Doping Law. Also, other regulations exist which may be considered when regulating anti-doping violations.

#### 1 The Criminal Code

Although the German Criminal Code offers provisions for sanctioning doping infractions, the doped athlete barely has to fear any punishments. The focus in the Criminal Code lies upon the persons behind the athlete using prohibited substances. Hence, provisions criminalising the doped athlete hardly exist.

##### (a) Crimes against life and bodily integrity

It is supposed that doping regularly harms the integrity of the athlete's body. Therefore, the athlete's medication with doping substances by doctors or coaches often results in a violation of section 223 of the Criminal Code<sup>99</sup>. Doping might even be sanctioned with murder according to s 211 of the Criminal Code, if doping medications result in the athlete's death. However, it is unlikely that s 211 will be fulfilled. Section 211 requires causality between the medication of the doping substance and the athlete's death. Since it usually takes a long time until the athlete's death takes place, the causal chain is unlikely to be proven<sup>100</sup>. Additionally, section 211 will not be realised if the athlete knew how risky the medication could be. Finally, it is unlikely that the doctor or coach who is treating the athlete with risky substances has intended to actually kill the athlete.

##### (b) Fraud

The negative impact doping is likely to create upon competitions may justify the realisation of fraud<sup>101</sup>.

The disadvantage the organiser of a sports event has to face if an athlete was doped may realise section 263 of the Criminal Code. Since the doped athlete taking part in a competition submitted himself under the anti-doping regulations, the cheating may cause harm to the sports governing authority<sup>102</sup>. In case the doped athlete wins the competition, the sports event organiser wrongfully pays him the trophy money. This could be a financial disadvantage for the organiser because the prize money is not meant for an athlete who has violated the anti-doping regulations. However, such a disadvantage does not exist. The organiser is obliged to pay the trophy money, either to the 'clean' or to the doped athlete. He loses the prize money in both cases<sup>103</sup>.

Yet, the disadvantage of the doped athlete's competitors may violate section 263. In case the doped athlete was disqualified, the second ('clean') winner has the right to demand the prize money. Nonetheless, he or she may not claim the money because of the unawareness of the faulty result<sup>104</sup>. This could resemble a financial disadvantage. However, this is rejected. The person who is cheating (here the doped athlete) and the person who is obliged to pay the prize money (here the sports event manager) are not one and the same person. In such a constellation, fraud is not realised under the German Criminal Code<sup>105</sup>.

Another violation of fraud might exist in connection with the audience of the competition.

The audience who has paid an entry fee for watching a sports competition has the right to expect the following competition is obeying the anti-doping regulations<sup>106</sup>. If the doped "winner" of the event gets disqualified, the audience might have the right to claim back the entry fees they have already paid<sup>107</sup>. However, the disqualification of the doped athlete leads to a valid competition according to the anti-doping regulations, excluding any related claims of the audience. Section 263 is not violated.

The athlete's sponsors may claim a violation of section 263. A sponsorship is based on the athlete's personal capacities. If the athlete was doped when he or she signed the contract, the athlete's doped performance abilities form the basis of the sponsorship, and the sponsors expect him or her to show these abilities<sup>108</sup>. If the athlete stopped using doping substances afterwards, he or she would not be able to show the same personal performance anymore. The athlete would be cheating beyond his personal abilities which were the reason for the sponsors to offer him a contract<sup>109</sup>. A fraud is therefore realised and is also acknowledged the other way round<sup>110</sup>.

As a result, section 263 is only realised by cheating against the sponsorship.

##### (c) Crimes against competition

Section 298 of the Criminal Code is protecting competition and may sanction a doped athlete. A doped athlete could be liable under s 298 because their aim is to influence the outcome of a sports competition by medicating themselves with doping preparations.

However, the main idea of s 298 is to protect the commercial and economic side of competition in general, rather than to protect the competition in sports<sup>111</sup>. Therefore, the competition in the sports area is not meant to fall under the terms of s 298 and hence inhibits the athlete's liability.

As a result, it is only section 263 of the Criminal Code sanctioning a doping infraction by disadvantaging the athlete's sponsors.

#### 2 Other provisions

Sections 4 and 6 of the Law against unfair competition are punishing unfair competition practices. Although this law is protecting fair competition, it is argued that it does not cover the competition taking place in a sports event. It is only the commercial and economic competition which is meant to be protected by this law<sup>112</sup>. Hence, it does not cover any doping violations in sports.

The assistance to any doping measures is punished by the Medicinal Products Act<sup>113</sup>. Section 6 (a) of the Act prohibits, for the purpose of doping, the placing on the market, the prescribing and

lem to prove to commit an anti-doping violation is one of the reasons why there have not been many criminal convictions based on the Federal Act on the Advancement of Sports, see *ibid*.

97 *Ibid* 95.

98 *Ibid* 95.

99 For the translation of the German Criminal Code see German Law Journal <http://www.iuscomp.org/gla/statutes/StGB.htm> (at 29 November 2006). All German versions of the laws used in this paper can be seen on Bundesministerium der Justiz

<http://www.bundesrecht.juris.de/aktuell.html> (at 29 November 2006).

100 Heger, above n 74, 77.

101 For the translation of s 263 of the Criminal Code see German Law Journal <http://www.iuscomp.org/gla/statutes/StGB.htm#263> (at 29 November 2006).

102 Heger, above n 74, 80.

103 Heger, above n 74, 81.

104 Cherkeh and Momsen, above n 8, 1749.

105 *Ibid*.

106 Heger, above n 74, 82.

107 *Ibid*.

108 Cherkeh and Momsen, above n 8, 1748.

109 *Ibid* 1749.

110 *Ibid*.

111 *Ibid*.

112 *Ibid* 1750. Ulrich Fischer "Unlauterer Wettbewerb durch Doping im Europäischen Profisport?" *EuZW* 2002 Heft 10, 297, however, argues that the sport has to be equally treated with any other commercial action. He approves section 1 of the law to be the adequate norm to sanctioning the competitive behaviour of doped athletes, *ibid*, 300.

113 For the translation of the German word "Arzneimittelgesetz" see Kassenärztliche

Bundesvereinigung <http://www.ebm200oplus.de/service/wortwahl.asp> (at 29 November 2006); English version for the Arzneimittelgesetz available under Bundesministerium für Gesundheit [http://www.bmg.bund.de/cdn\\_040/nn\\_617002/SharedDocs/Download/EN/Health/AMGpdf/templateId=raw,property=publicationFile.e.pdf/AMG-pdf.pdf](http://www.bmg.bund.de/cdn_040/nn_617002/SharedDocs/Download/EN/Health/AMGpdf/templateId=raw,property=publicationFile.e.pdf/AMG-pdf.pdf) (at 30 November 2006).



administering of medical products to others. Section 95 (1) cl (2a) sanctions the intended violation of this doping-prohibition.

### 3 Result

Although the German legal system offers ways to sanction doping infractions, the provisions struggle to succeed in punishing involved people, not to forget that the doped athlete remains immune to any punishment. Therefore, the new Anti-Doping Law was developed to fill in this gap and to expand the provisions of the Medicinal Products Act which have been inventive already but rarely successful<sup>114</sup>.

### III. Conclusion

The new Anti-Doping Law in Germany may be seen as an innovative step towards the fight against doping. Certainly, its aims and intentions recognise the immense dimension doping has reached within the sports world. Provisions which entrust police work with more power on a national and international basis and those that intend to combat against criminally organised networks seem to be helpful in the fight against doping. Apart from that, the new legislation resembles no more than a failed attempt to get governmentally involved in doping affairs.

There are more than two reasons to support this statement. Firstly, antagonists also wished to see the doped athlete criminalised which has not been adopted in the new law. This may be seen as a failure, but also considers the dichotomy between the state and the sports world. The sports world tends to support the existing divisions of work and resists the idea of criminalising the doped athlete. Although sports organisations see the need to work together with governments to fight against doping efficiently, they respect the different responsibilities of each party<sup>115</sup>. Governments are deemed to support the efforts of sports organisations' anti-doping activities<sup>116</sup>. With the implementation of WADA, governments agreed to operate *through* this organisation which is to be appreciated.

Secondly, and probably the most important reason to work against an Anti-Doping Law is that the development of doping infractions has become very serious. Athletes seem to push themselves as far as they can in order to become 'the best'. "A good effort is not admirable compared to a winning or record-breaking effort."<sup>117</sup> Nations encourage athletes to triumph in international competitions because winning medals is a symbol of both national pride and superiority over other nations<sup>118</sup>. Victorious athletes are seen as national heroes and are sometimes rewarded as such<sup>119</sup>. Unfortunately, the potential of benefits of performance enhancing drugs outweigh any negative aspects of its use. Let us consider, for example, genetic doping. Gene therapy treats diseases by replacing, manipulating or supplementing non-functional genes<sup>120</sup>. Scientifically, it involves injecting synthetic genes into muscle cells where they become indistinguishable from the receiver's DNA<sup>121</sup>. Gene therapy has evolved significantly in recent years, but is very early in development and highly experimental<sup>122</sup>. The science is still immature in its application to humans, potential adverse effects are unknown<sup>123</sup>. However, a German case in 2006 suggests that some athletes are already engaged in genetic doping and WADA suggests that it will be used within the future<sup>124</sup>. The German running coach, Thomas Springstein, was convicted of doping charges and was also suspected of being involved in genetic doping<sup>125</sup>. The case rose suspicions about whether genetic doping took place at the 2006 Torino Olympics, which began a few weeks after evidence was presented in the Springstein case<sup>126</sup>. The problem with genetic doping is that it is not very complicated to perform and could be easily duplicated<sup>127</sup>. Current technology does not detect genetic doping in humans since it is nearly indistinguishable from naturally occurring genes<sup>128</sup>. Hence, genetic doping causes technical and legal difficulties at the same time. Once the athlete is genetically doped, the effects of such a procedure are present for the rest of the athlete's life<sup>129</sup>. Since genetic doping is permanent, an anti-doping law will not be the right answer to combat its use.

Rather, it is assumed here, that the sports world and governments should work together closely in order to develop new mechanisms to fight problems such as genetic doping. The help of governments is

primarily seen in providing sports organisations with money in order to support substantial research into detection methods and new testing technology.

WADA's Monitoring Program<sup>130</sup> to detect patterns of misuse should also be encouraged.

An anti-doping law, concentrating primarily on prosecution than prevention, is not the right way to support an efficient fight against doping. Overly strict prohibitions and penalties may only create other problems of its own, and are supposed to hinder the development of sports and professional athletes by chilling innovation. The question of how to punish the doped athlete should not be oversized since it is only one module of the whole fight against doping in sports. This might also follow the desires of the sports world. As the German ice hockey player Daniel Kreutzer said: "A successful combat against doping may never be achieved. Though, it is important to recognise every single possibility to solve the problem. Improved routine doping controls and educational advertising of dangerous side-effects of doping substances may improve the fight against doping."<sup>131</sup>

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# 8th Asser International Sports Law Lecture

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*The Rules of the Game for the American Sports Agent*

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Mr Jean-Christian Drolet, Law Faculty, University of Hamburg, Germany
- moderator: Robert Siekmann, ASSER International Sports Law Centre.
- venue: T.M.C. Asser Institute, The Hague, The Netherlands