tuted a basis for the Commissioner to confirm closure of the file on the case on 3 November 2011.

A new bidding process

The UK Authorities have since instigated a revised tender process[3] on the basis of continuing public ownership of the Olympic Stadium with open invitations being made to bid for certain concessions to provide sporting, entertainment and/or cultural content citing minimum terms of 5 years and maximum terms of 99 years.

It seems clear that such a basis will not constitute illegal state aid provided, of course, that each concessionaire, in so far as it is a private undertaking in competition with other such undertakings in Europe, *'pays the market price for its use'*.

IMPLICATIONS FOR FUTURE EUROPEAN BIDDERS FOR MAJOR SPORTS PROJECTS

It is apparent that EU competition law is having an important bearing on the way in which the legacy use of the London Olympic Stadium is organised and the UK experience perhaps provides important guidance for other European nations contemplating construction of large-scale infrastructure, using state resources, as part of a bid for a major sporting event.

Whilst a spectrum of possible procurement vehicles exists there are four main generic categories for consideration with the state aid issue in mind:

1. State financed and owned facilities retained for the sporting event and subsequently sold or leased on a transparent open market basis.
2. State financed and owned facilities retained for the sporting event and subsequently state managed with concessionary arrangements monitored to ensure market prices.
3. Construction funded from private sources with funding predicated on long-term legacy use and with temporary occupation rights for the particular state sponsored event.
4. Public/private partnership with closely monitored and carefully agreed risks and benefits.

(The initial London stadium proposals fell into category 1 whilst the present proposals fall into category 2.)

The cost of these major sports projects has increased dramatically in recent years, more than 10bn euro has been expended on the London Olympics. In addition there are very long lead times with the Netherlands, for example, presently contemplating a bid for the 2028 Olympics (16 years hence). It is therefore crucial that adequate resolution of the state aid issue, explicitly incorporating essential EU open market characteristics, is woven into the fabric of any project from its conception.

Finally, beyond the issues of state aid and the need for transparency and fairness within the European Union, there is a question about transparency and fairness when EU nations are in competition with non-European nations. It could be argued that the stringencies of EU law on state aid may, in certain circumstances, be disadvantaging European bidders.

The FIFA decisions on both Russia and Qatar for the World Cup competitions in 2018 and 2022 along with the recent refusal of the Italian government to endorse Rome's bid for the 2020 Olympics have created a context for discussion on this subject.

It is important that European nations remain competitive on a global basis and some analysis of any asymmetries that may exist would seem worthwhile with the intention of identifying relevant political, economic, legal and sporting issues for debate both within the EU and perhaps with The World Trade Organisation.

3 www.legacycompany.co.uk/stadium/

Doping And Olympic Games In Italy

A comparative analysis between sports regulations and Italian criminal law in the light of the events of Torino 2006

By **Lucio Colantuoni*** & **Elisa Brigandì**** with the cooperation of **Edoardo Revello*****

Introduction

The Olympic Games are nowadays of such a great importance that their politic, economic and juridical relevance is increasingly shown during the various editions (enough to think about the growing global attention from Barcelona '92 to Beijing '08).

Behind the idea of Pierre De Coubertin, there was the utopia of a perfect world without distinctions on racial, sexual or religious basis. A universe of equal opportunities, democracy and peace where the physical education could become a vehicle for the individual growth.

His vision was founded upon some crucial values such as respect, brotherhood, fair play and sacrifice.

The Olympic spirit would have pervaded the entire world with the ambition of making it better. Therefore, the reintroduction of the Games should have been the means by which ethics and sport could be joined in serving the community, beyond the motto "*mens sana in corpore sano*".

According to such an idea, the athlete should embody these fundamental values during the sporting performance[1].

In the light of the above, there is a general shared opinion that a severe fight against doping should be conducted with increasingly rigid measures not only from a sporting point of view but also with the intervention of the criminal law. In fact, doping represents a plague which pollutes and oppresses those values at the bottom of the Olympic spirit itself. And some countries, like Italy, have enacted a specific anti doping criminal law.

Accordingly, this article has the aim of focusing and confronting the sporting regulations and the Italian criminal law on doping, by means also of the study of the disciplinary and judiciary cases on the matter during the XX edition of the Winter Olympic Games, held in Turin in 2006.

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Therefore, the present study shall analyze the peculiarities of the Italian fight against doping, which caused many concerns before the Games, due to the fact that the government had qualified doping as a criminal offence. As a matter of fact, it could have created some critical issues towards the sports legal order, as well as deterrent effects in choosing Italy as the host country of the Games.

Part I - Doping and Italian Regulations

1. The Regulatory Framework On Doping.

1.1 Introduction: the global evolution of the fight against doping.
Alongside the restless work for the assignment of the XX edition of the Games, the end of the 90s was characterized by the increasing diffusion of doping, which made the world of sport aware of the connected risks.

Such an awareness forced many countries to quickly develop the first global anti-doping program.

From the early 80s, the European Union (at that moment, the European Economic Community) had noticed the problem and, therefore, had started enacting some recommendations (not binding for the Member States) on the matter: particularly, the recommendation n.19, on 25 September 1984, adopted the "*European Charter against doping in sports*", as established by the Ministers for Sport.

Then, in 1989, the Council of Europe decided at last to settle a binding document: on 16 November, the Anti-Doping Convention of Strasburg was signed and, then, ratified by Italy with Law n.522/1995.[2]

However, the real fulcrum of the global anti-doping regulations is constituted by the *World Anti-Doping Code* and by the policy of the *World Anti-Doping Agency* (WADA)[3].

As a matter of fact, on 4 February 1999, the first World Conference of doping was held in Lausanne on the initiative of the IOC. The so-called Lausanne Declaration was approved, according to which doping violated the ethical principles of sport. All the parties agreed upon the creation of a sole World Anti-doping Code and of a body with monitoring and repressing powers against doping for all the sporting disciplines.

Thus, the World Anti-Doping Agency (WADA) was created with the aim of coordinating the global fight against doping and promoting the values of fairness and impartiality through the coordination of the national and international anti-doping programs[4].

The Agency became fully operational in 2000, while the Code came into force in January 2004 (the final version was approved by the World Anti-Doping Conference of Copenhagen) in order to be effective for the Olympic Games of Athens. It could be a mere coincidence, but that edition shall be remembered for the large number of positive athletes.

Therefore, the WADA Code represents the document which established in writing the set of rules to be respected by the athletes and the relative responsibilities in case of breach.

Meanwhile, in 2002, the Council of Europe of Warsaw allowed the Member States to ratify the Additional Protocol to the aforementioned Strasburg Convention of 1989.

Finally, on 19 October 2005, the XXXIII UNESCO General Assembly in Paris unanimously adopted the *International Anti-doping Convention*, which was afterwards ratified by the Italian Government with Law n.230/2007[5].

Accordingly, such a Convention, as well as the 2002 Warsaw Protocol and the WADA Program constitute the corner stone of the global fight against doping.

As said above, the WADA Code has been often modified and updated over the years due to the need for more effectiveness (in 2005, 2007 and, ultimately, in 2008 after the III World Anti-Doping Conference in Madrid). The last changes came into force in January 2009 and they represent the current version. Therefore, the *World Anti-Doping Program* is constituted by the *International Standards*[6], the *Models of best praxis*[7] and the *WADA Code*[8].

In the light of the aforementioned regulations, it is clear how doping has become through the years a crucial issue to be fought at the international level[9].

In this context, Italy took a strong position against such a phenomenon by approving Law n.376/2000 ("*Regulation of health standards in sports activities and the fight against doping*[10]"), according to which doping is considered as a criminal offence (punished with imprisonment).

1.2 The regulatory framework in Italy and the enactment of Law n. 376/2000.
Before the analysis of Law n.376/2000, we will now briefly analyze the former regulatory framework in Italy, which had mostly delegated to the sporting regulations the fight against doping until the end of the 90s.

In July 1988, the *Italian Olympic Committee* (CONI) enacted a circular providing with uniform rules and a list of prohibited substances as well. Accordingly, the National Sports Federations implemented them and regulated the controls and the relative sanctions.

As said, until the introduction of Law n.376/2000, there was a sort of legislative vacuum in Italy and doping was only countered by the set of rules as enacted by CONI[11].

All those theories endured within the sporting scenario until the year

1 A. Stelitano, "*Il profilo di Pier de Coubertin*", Centro Studi Coni, April 2009.

2 Published in Official Gazette n.287, 9 December 1995.

3 L. Colantuoni, "*Il doping e la tutela sanitaria delle attività sportive*", in Diritto Sportivo, Giappichelli 2009, p. 443 *et seq.*

4 Particularly, the WADA Statute provides that Agency's tasks are as follows: *a)* to promote and coordinate the fight against doping, at the international level, mainly through tests during and out of the competitions, with the full support of the entire sports system; *b)* to adopt, modify and update the list of prohibited methods and substances; c) to coordinate and sustain the surprise controls during the competitions with the cooperation of the private and public authorities involved; *d)* to elaborate, harmonize and unify the rules and the scientific procedures of the analysis methods.

5 Published in Official Gazette n. 290, 14 December 2007.

6 The *International Standards* clarify the provisions of the WADA Code by harmonizing some operative and technical aspects of the World Anti-Doping Program and they are: *a)* the List of prohibited substances and methods; *b)* the standards on the *Therapeutic Use Exemption* (TUE); *c)* the standards on the anti-doping controls mode; *d)* the standards on the anti-doping laboratories; *e)* the standards on athletes' privacy and their personal data's protection.

7 The *Models of best praxis* develop proceeding models within several areas of doping. According to such guidelines, the anti-doping bodies, as well as the National Sports Federation, take innovative solutions on the matter (such as the whereabouts information regarding the athletes).

8 The *WADA Code* is worldwide applied in any sector of sport, providing more than a simple definition of doping. As a matter of fact, the Code harmonizes the rules and the procedures that previously were different depending on the country and the discipline. Some provisions are expressly considered as binding and, according to Art.23.2.2, they need a reproduction without any substantial change within the national regulations. On the contrary, the others are more flexible and, notwithstanding their compulsoriness, they can be amended according to their general principles.

9 On the other hand, at the national level, we have to underline that the sporting disciplines have to deal with the policy of the *Italian Olympic Committee* (CONI). In fact, the WADA Code expressly provides that every sports legal order must have a national anti-doping organization (the so called *National Anti-Doping Organization* - NADO), as recognized by the WADA, with the aim of fighting doping in accordance with the WADA policy. In Italy, CONI has also the functions of NADO: consequently, its Statutes provides that CONI "*establishes the fundamental principles on sporting activities and athletes' health in order to guarantee fair and regular competitions*". Furthermore, CONI "*settles the principles in order to prevent and fight the use of prohibited substances or methods, capable of modifying athletes' sporting performance*". Therefore, CONI-NADO has the national body with the exclusive competence with regard to the enacting and adoption of the *Anti-Doping Sports Regulations*, including athletes' tests, their results and the following disciplinary proceedings. The 2011 edition of such Regulations, as approved by CONI in March, represent the implementing document of the WADA World Anti-Doping Program.

10 Published in Official Gazette n. 294, 18 December 2000.

11 A) First attempt: Law n.1099/1971 *("Health care of the sporting activities")* - published in Official Gazette n.234, 23 December 1971. Law n.1099/1971 represents the first attempt of the Italian Legislator to punish doping with criminal sanctions. As a matter of fact, such regulations provided that the assuming, the administering and the possession of doping substances ("*capable of modifying athletes' natural energies*") were considered as a criminal offence. b) Second attempt: *Decree of the President of the Italian Republic n.309/1990 (Consolidated text on drugs)* - published in Official Gazette n. 255, 31 October 1990. In such a vacuum caused by the decriminalization of the offence, some judges tried to fight doping with other legislative tools. The most

2000, when the Italian Legislator finally enacted a specific criminal law on doping.

Under the new regulations, doping is considered again as a criminal offence to be sanctioned with strong measures, namely imprisonment from 3 months to 3 years (and even to 6 years in the most serious cases).

In the aftermath of the enacting the law, the doctrine started analyzing the relation with the aforementioned Law n.401/1989 on sporting fraud. The mainstream deemed that there was a complementary relationship: as a matter of fact, those cases not covered by the new set of rules could be included within the previous law (such as, the use of a prohibited substance out of the list in order to alter a match)[12].

Particularly, from a structural point of view, the law is made by 10 articles in accordance with the principles and values set forth by the Convention of Strasburg in 1989.

Accordingly, Art. 1 par. 1 states that: "*the aim of sport is to promote individual and collective health and thus sporting activities must be governed by the ethical principles and educational values set forth in the Anti-Doping Convention, and relative appendix, opened in Strasbourg on 16 November 1989 and ratified pursuant to Law N° 522 of 29 November 1995. Sporting activity shall therefore be monitored according to the provisions established by the legislation in force regarding the protection of health and the legality of competitions and may not be undertaken using techniques, methodologies or substances of any type which could present a risk to the psycho-physical integrity of the athletes involved*".

Therefore, not only does the law have the aim of prosecuting dangerous conducts, but also those behaviors capable of modifying the psycho-physical conditions of the organism, which are not actually harmful[13].

Consequently, this new set of rules provides with an abstract crime of danger ("*reato di pericolo astratto*"): otherwise, it would have been nearly impossible for the judge to understand whether the result of the competition would have been different if the athlete had not assumed a doping substance (crime of damage - *"reato di danno*")[14].

The judge shall only evaluate whether the substance is capable of modifying the performance and such a characteristic is simply proven by its insertion within the list of prohibited substances as enacted by a Ministerial Decree.

With specific regard to the prohibited conducts, Art.1 par. 2 states that: "*doping consists in the administration or taking of drugs or substances which are biologically or pharmacologically active*" as well as "*the adoption of - or the participation in - medical practices which are not justified by pathological conditions and may change the psycho-physical or biological conditions of the organism and thus alter the performance of the athletes*".

Furthermore, Art.1 par. 3 establishes that: "*For the purposes of this law, the administration of drugs or substances which are biologically or pharmacologically active, and the adoption of medical practices which are not justified by pathological conditions and which may - and indeed intend to - modify the results of monitoring of the use of the drugs, substances and practices mentioned in Subsection 2 here in above, shall also be deemed to constitute doping*".

Then, Article 2 is specifically dedicated to the so called "*classes of doping substances*" which are revised on a regular basis through Ministerial Decree: as a matter of fact, all drugs or substances (biologically or pharmacologically active), as well as any medical practice (deemed to constitute doping pursuant to Article 1), in accordance with the Convention of Strasburg and the indications of the IOC, are classified into classes of drugs, substances or medical practice.

The classification of drugs and substances is determined on the basis of their respective chemical and pharmacological characteristics, while the classification of medical practice on the basis of their physiological effects.

Such a classification is generally approved by the Ministry of Health, according to the proposal put forward by the Commission for the Monitoring and Control of Doping and the Protection of Health in Sports Activities of which in Article 3 (as distinct from the CONI Anti-doping Commission)[15].

This Commission represents the "*watchdog*" of the entire system and the very first step in order to make the law operative.

Furthermore with regard to the controls, Article 4 specifically provides that the health controls on the sporting activities and competitions shall be performed by those laboratories accredited by the IOC or other international organization[16].

Then, this brief analysis has to focus on articles 6 and 9, to be considered as the most remarkable.

In fact, Article 6 provides the so-called "*obligation for integration of sports entities' regulations*". Particularly, Par.1 states that: "*CONI, sports federations, affiliated sports clubs, sporting associations and public and private organizations for the promotion of sport shall adjust their regulations to encompass the provisions of this law. They shall provide sanctions and disciplinary procedures to regulate their members in the case of doping or refusal to submit to testing*".

On the other side, Par. 2 adds that: "*being legally recognized as autonomous, the national sports federations may establish sanctions to discipline the administering or taking of drugs or of biologically or pharmacologically active substances and the adoption of - or participation in - medical practices which are not justified by pathological conditions and may change the psycho-physical or biological conditions of the organism and thus alter performance of the athletes, regardless of whether such practices are classified in the classes of which in Section 2, Subsection 1 or otherwise, on condition that such drugs, substances or practices are considered as to constitute doping by other international regulations in force*".

resounding attempt was constituted by the application of the provisions of D.P.R. n.390/1990, which disciplined the use of prohibited substance. c) Third attempt: *Law n.401/1989 (Sporting fraud)* - published in Official Gazette n. 294, December 1989. A part of the doctrine believed that doping had to be fought with Law n.401/1989 on the so-called sporting fraud. In accordance with such regulations, not only was "*the offer of money or of another utility to modify the sporting result*" considered as a criminal offence, but also the generic performance of "*fraudulent acts aimed at the same purpose*" (Art.1). These authors deemed that doping could be considered as a fraudulent act aiming at modifying the sporting result.

12 With the aim of showing the main differences amongst the two laws, we have to underline that: a) Law n.376 provides a criminal offence with a detailed analysis of the forbidden conduct, while on the contrary Law n.401 provides an offence with an open structure; b) Law n.376 is applicable to all the sports competitions, while Law n.401 only to those activities organized by CONI and other Sports Bodies, as recognized by the State; c) Law n.376 aims at protecting athletes' health as well as fighting doping, while Law n.401 has the purpose of guaranteeing the fairness of the sports competitions. Ultimately, we briefly point out a recent case law involving an Italian football team, FC Juventus, which clearly shows the difficulties in applying the correct provisions on the matter. In November 2004, the Court of Turin condemned the team doctor for the crime of sporting fraud due to the administering of drugs aiming at enhancing athletes' performance by using their secondary effects (the so called "off label doping"). But the Court of Appeal overturned the first ruling because there was no case to answer. The judges could not use the provisions as set forth by Law n.376/2000 due to the fact that the proceeding started before its enacting.

13 A. Traversi, "*Il diritto penale dello sport*", Giuffrè Milano 2001, pp. 109 et seq.

14 On the contrary, the judge has the only task of discovering whether the athlete has assumed doping, without paying attention to a concrete analysis on the fairness of the competition. It is not, thus, necessary that the competition has been effectively distorted, neither that the psycho-physical conditions have been really altered.

15 The Commission undertakes the following activities: *a)* establishing and revising the classes; *b)* determining the cases, criteria and methodologies for anti-doping control and identifying the competitions and sporting activities for which health checks shall be conducted by the laboratories of which in Section 4 (no more depending from CONI, but under the responsibility of the Minister of Health - cf. Article 3 of the French Anti-doping Law n.432/1989); *c)* performing anti-doping controls and checks on the health of the athletes during and outside competitions, availing itself of the laboratories of which in Section 4; *d)* preparing research programs into drugs, substances and medical practices; *e)* promoting information campaigns for the protection of health in sporting activities and the prevention of doping.

16 The laboratories shall complete the following tasks: *a)* perform anti-doping controls according to the rules approved by the Commission; *b)* conduct research into drugs, substances and medical practices which may be used for the purpose of doping in sporting activities; *c)* cooperate with the Commission in defining the requisites of which in Art.4 Par.3. Furthermore, control of competitions and sporting activities other than those identified pursuant to Article 3 shall be performed by laboratories with the organizational and functional requisites set forth in a Decree of the Minister of Health, after consultancy with the Commission.

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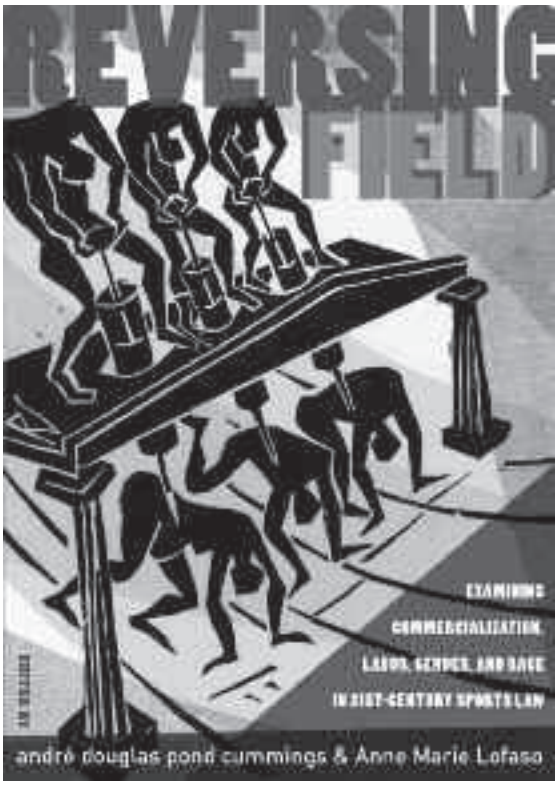
Reversing Field

Examining Commercialization, Labor, Gender, and Race in 21st Century Sports Law



Reversing Field invites students, professionals, and enthusiasts of sport to explore the legal issues and regulations surrounding collegiate and professional athletics in the United States. This theoretical and methodological interrogation of sports law openly addresses race, labor, gender, and the commercialization of sports, while offering solutions to the disruptions that threaten its very foundation during an era of increased media scrutiny and consumerism. In over thirty chapters, academics, practitioners, and critics vigorously confront and debate matters such as the Arms Race, gender bias, racism, the Rooney Rule, and steroid use, offering new thought and resolution to the vexing legal issues that confront sports in the 21st century.

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Then, all the organizations involved "*shall also prepare all the documentation necessary in order to comply with the rules governing the protection of health set forth in this law*".

Lastly, "*athletes shall comply with the rules of which in Subsection 1 and shall confirm their full awareness and acceptance of the terms and conditions therein*".

On the other side, Article 9, as analyzed in the following paragraphs, introduces the relevant sanctions in case of the commission of the offence, as well as aggravating circumstances and specific additional punishments.

2. A Comparative Analysis Amongst Sports Regulations and Criminal Law.

2.1 The mutual autonomy of the Italian criminal proceeding and the anti-doping sporting proceeding.

The relations amongst the sports legal order and Italian legal order are regulated by Law n.280/2003[17] establishing the so-called principle of autonomy. Autonomy is granted except for those subjective legal situations connected with the sports legal order, which could be relevant for the national legal order.

Accordingly, there is an issue every time a conduct violates the criminal law but not the sports regulations or vice versa. The sports provisions and the criminal law, notwithstanding their mutual autonomy, created over time coordination, according to which they reserve distinct areas of application. For example, the sporting entities have to conform their regulations to the anti-doping provisions, in accordance with the aforementioned Article 6 of Law n.376/2000.

On the other side, the disciplinary proceeding does not provide many of the principles characterizing the criminal proceeding.

Following these fundamental premises, we will now focus on the differing elements amongst the two proceedings concerned.

2.2 A critical, comparative analysis of the two systems: rules and sanctions.

With specific regard to their application, we have immediately to underline that the criminal law provides a close number of unlawful conducts, while the sporting regulations settle more general conducts[18].

Accordingly, Law n.376/2000 describes in detail three types of offence and the relative conducts, specifically with regard to article 9 paragraphs 1, 2, 7. The first hypothesis is constituted by the obtaining, the administering, the assumption or the encouraging of the use of doping substances, which are not justified by pathological conditions and may alter the performance of the athletes (art. 9 par. 1). Then, the second hypothesis is constituted by the adoption or the participation in forbidden medical practices, which are not justified by pathological conditions and may alter the performance of the athletes or modify the monitoring of the use of such practices (art. 9 par. 2).

Both the conducts are punished, unless they constitute another and more serious offence (such as, manslaughter) with the imprisonment from 3 months to 3 years and with a sanction from €2.582 to €51.645.

Aggravating measures are, then, provided according to paragraph 3 when: a) the health of any party is harmed by the criminal act; b) the criminal act is committed against a minor; c) the criminal act is committed by a member or employee of CONI or any national sports federation, club, association, or organization recognized by CONI. In case of the latter, the guilty party is permanently banned from his/her office as well. On the contrary, a professional figure in the health care sector will only receive a temporary suspension from his/her profession.

The subjective element for both the abovementioned conducts is the specific intent. As a matter of fact, in case of an involuntary assumption the responsibility only lies on the person who administered the substance.

The third, and last, hypothesis is provided by article 9 par. 7: "*whosoever shall trade in the drugs and biologically or pharmacologically active substances included in the classes [...] other than through retail pharmacies [...]shall be punished with imprisonment of between two and six years and a fine of between Lit. 10 million and Lit. 150 million*". In this case, the aggravating measures of the above cannot be applied and the specific intent to alter the sporting performance is not necessary (in fact, the Legislator is willing to punish the economic value of such illegal trade).

On the other side, the WADA Code contains a list of prohibited conducts, that is more generic and not definite (as a matter of fact, some circumstances are, here, relevant from a disciplinary point of view, but not in the field of the criminal law: for example, the simple possession is punished without taking into account the use of the substance).

Article 2 of the WADA Code determines the single hypothesis of breach of the anti-doping regulations: *a)* Art. 2.1 - *Presence of a prohibited substance or its metabolites or markers in an athlete's sample*[19]; b) Art. 2.2 - *use or attempted use by an athlete of a prohibited substance or a prohibited method*[20]; c) Art. 2.3 - *refusing or failing without compelling justification to submit to sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading sample collection*[21]; d) Art. 2.4 - *violation of applicable requirements regarding athlete availability for out-of-competition testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the athlete shall constitute an anti-doping rule violation*[22]; e) Art. 2.5 - *tampering or attempted tampering with any part of doping control*[23]; f) Art. 2.6 - *possession of prohibited substances and prohibited methods*[24]; g) Art. 2.7 - *trafficking or attempted trafficking in any prohibited substance or prohibited method; h)* Art. 2.8 - *administration or attempted administration to any athlete in-competition, as well as out-of-competition, of any prohibited method or prohibited substance, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation (or any attempt).*

As specifically to the sanctions, Article 10.2 (in case of a breach of the Code according to Articles 2.1, 2.2, 2.6) determines the ineligibility for 2 years for the first violation. In its new formulation, there is no reference to the second violation (which previously caused a permanent ban), while a subsidiarity clause for the application of articles 10.4, 10.5, 10.6 (specifically dedicated to aggravating and extenuating circumstances, capable of modifying the period of ineligibility[25]) has been introduced.

17 Published in Official Gazette n. 243, October 2003.

18 L. Colantuoni, op. cit.; G. Manzi, op. cit.

19 The athlete has the duty to ensure "*that no prohibited substance enters his/her body*". Accordingly, under the strict liability principle, an athlete is responsible whenever a prohibited substance is found in his/her sample. The violation occurs "*whether or not the athlete intentionally or unintentionally used such substance or was negligent or otherwise at fault*". However, the athlete then has the possibility "*to avoid or reduce sanctions*" in accordance with Articles 10.4 and 10.5 (as analyzed below). Notwithstanding such general principle, the imposition of a fixed period of time is not automatic: as a matter of fact, the strict liability principle set forth in the Code "*has been consequently upheld in the decision of CAS*".

20 The use of the attempted use of a prohibited substance or method may be established "*by any reliable means*", such as admission by the athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which "*does not otherwise satisfy all the requirements to establish* 'presence' *under Art. 2.1*".

21 The article expands the typical pre-Code rule including "*otherwise evading sample collection*", as a prohibited conduct (such as, if an athlete was hiding from a doping control). A violation of refusing or failing to submit to a sample collection may be based on either intentional or negligent conduct of the athlete, while "evading" contemplates an intentional conduct.

22 In appropriate circumstances, missed tests or filing failures may also constitute an anti-doping rule violation under Articles 2.3 or 2.5.

23 This article prohibits conducts "*which subverts the doping control process but which would not otherwise be included in the definition of Prohibited Methods*".

24 The article punishes the possession by an athlete or by an athlete support personnel in-competition, as well as out-of-competition, of any prohibited method or substance unless such a possession is pursuant to a therapeutic use exemption (according to Art. 4.4). See par. 3.4.

25 According to Art. 10.4, the period of ineligibility can be reduced from a reprimand to two years of suspension under specific circumstances (such as, whether the possession was not intended to enhance the sport performance or mask the use of a performance-enhancing substance). Then, Art. 10.5 provides that the period of ineligibility can be eliminated or reduced under exceptional circumstances (namely, when the athlete bears no fault or negligence or no significant fault or negligence). The following two paragraphs state that the athlete shall receive a reduction: *a)* in case of a substantial assistance in discovering or establishing an anti-doping rule violation or *b)* in case of the admission of the commission of the viola-

Furthermore, Article 10.3 provides that: "*the period of ineligibility for anti-doping rule violations other than as provided in Article 10.2* shall be as follows:*10.3.1* - for violations of Article *2.3* or Article *2.5* the ineligibility period shall be *2* years unless the conditions provided in Article *10.5*, or the conditions provided in Article *10.6*, are met. *10.3.2* - for violations of Articles *2.7* or *2.8* the period of Ineligibility imposed shall be a minimum of *4* years up to lifetime ineligibility unless the conditions provided in Article *10.5* are met".

Moreover, Article 10.7 introduces a table in case of multiple violation ("*each anti-doping rule violation must take place within the same eight-year period in order to be considered multiple violations*" - art. 10.7.5). In addition, we have to underline that: "*a third anti-doping rule violation will always result in a lifetime period of ineligibility*" (art. 10.7.3).

Lastly, Article 10.9.2 states that: "*where the Athlete or other Person promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred*".

2.3 The classification of the doping substances: requirements for the application of Law n.376/2000 and the disciplinary provisions.

After this brief analysis of the two regulatory systems, some crucial differences immediately arise: firstly, under the Italian criminal law, the doping substances are relevant only whether they are drugs and they fall within the list of prohibited substances in accordance with the aforementioned Article 2 of Law n.376/2000. There has been a long debate on the nature of such a list, particularly on whether the classification was exhaustive or, on the contrary, any substance capable of modifying the sporting results could be considered doping as well (in accordance with Art. 9)[26].

In 2006, the Joined Chambers of the Italian Court of Cassation[27] dealt with the matter stating that those criminal offences, as set forth by Art. 9 of Law n.376/2000, had to be applied even to those facts occurred before the enacting of the Ministerial Decree (15 October 2002), which had approved the list of prohibited substances and methods. As a matter of fact, such a Decree only had to classify the substances and methods concerned, without the task of identifying them from the outset.

On the other side, we observe that in a sports disciplinary proceeding not only are those substances (as prohibited by the criminal law) considered doping, but also some specific substances and/or medical practices (not included within the Decrees of the Ministry of Health) capable of modifying the sporting performance (for example, the so called "off label" assumption of some substances, like caffeine).

2.4 The subjective and objective aspects on doping under the criminal law and the disciplinary regulations.

According to Article 27 of the Italian Constitution, "*criminal liability is individual*": therefore, the Italian legal order shuns all the forms of subjective imputation, since the material element of the crime (namely, the conduct, the offensive event and a causal link amongst them) and the subjective element (namely, negligence or criminal intent) are necessary as well.

Under this light should Law n.376/2000 be read, providing different types of intent (specific intent according to article 9 paragraphs 1 and 2, and generic intent according to article 9 par.7). In such cases, once the material element has been proven, the authorities have also to demonstrate the subjective element.

Therefore, every time such subjective element is not proven, the athlete shall not be considered responsible under the criminal law (for example, in case of the administration of a substance unknown to him/her[28] or in case of a negligent assumption[29]).

On the contrary, with regard to the imputation, the WADA Code has a heterogeneous nature[30]. As a matter of fact, Article 2 of the Code generally specifies that athletes shall be responsible for "*knowing what constitutes an anti-doping rule violation and the substances and methods which have been included*" in the list.

Given the above, we have to underline a significant award issued by the CAS in 2009 with regard to the so called "*kissing theory*"[31]. The Panel considered without fault the tennis player Richard Gasquet, tested positive for cocaine, since his defense demonstrated the alleged assumption had occurred after some effusions with a girl who had previously taken such a drug. Therefore, the decision was based upon a concrete balance of probabilities on the "*route of ingestion*" of the prohibited substance[32].

2.5 The disciplinary relevance of the refusal to submit to doping controls and the absence of contradictory.

Furthermore, another remarkable difference is represented by the different consequences arising from the refusal to submit to a doping control.

In origin, Law n.1099/1971 expressly provided that those doctors designated for the visits were allowed to take samples of substances and the refusal was equated with a positive result (with the same sanction, namely a fine). Law n.376/2000 does not currently provide any sanction against this kind of refusal. Since such controls are not mandatory, they can be conducted by surprise but the athlete's consent is always necessary.

On the contrary, the WADA Code, according to the aforementioned article 2.3, clearly states that such refusal consists in an anti doping rule violation.

Ultimately, we have to underline another difference regarding the methods of control. In fact, the criminal law does not allow the athlete nor his/her defense to participate in the analysis of the sample by a regular contradictory. Furthermore, in case of a positive result, a re-examination is not provided. On the other side, the sports regulation expressly allows a second analysis on the sample, therefore ensuring the rights of defense[33].

PART II - Doping and Olympic Games in Italy: the cases during *Torino 2006*

3. The Suspension Request of Law N.376/2000 in Occasion of *Torino 2006*: The Position of the Italian Government and the so Called "*Storace*" Decree.

The comparative analysis in the previous section enables us to under-

tion if such an admission is the only reliable evidence. On the other side, Art. 10.6 provides that under some aggravating circumstances (for example, when the violation is part of a doping plan or scheme) the period of ineligibility shall be increased up to a maximum of four years.

26 A broad interpretation would reduce the risk of regulatory gaps, since there would be a constant updating process made by the jurisprudence. Accordingly, the Law would have a stricter application, but, taking into consideration the wording of the provision, the majority of the doctrine deems that only those substances within the list should be considered under the criminal law. Within the sporting scenario, CONI asked the CAS (the Court of Arbitration for Sport) for an advisory opinion on the matter in April 2004. The response was that "*the assumption of doping is punished under the sports regulations only if the substance is prohibited by the anti-doping rules or, in any case, if such a substance is associated with those expressly prohibited*".

27 Sentence n.3089, 26 January 2006, in *Diritto Penale e Processo*, n. 2/2007.

28 The criminal responsibility shall only lie on the person(s) who administered the substance (such as, trainers, coaches and sports doctors).

29 According to Art. 42 of the Italian Criminal Code, every criminal offence requires the intent, as subjective element, unless otherwise specified. Accordingly, every anti-doping rule violation needs the intent by the person who commits the relevant fact.

30 M. Vigna, "*Le condotte dell'articolo 2,8 del codice WADA e la valutazione dell' elemento soggettivo: ignorantia legis excusat? (nota a Lodo Tas 2010/A/2184 Lazzaro e lodo TAS 2010/A/ 2194 Giagio - non pubblicate)*", in *Giustiziasportiva.it n. 2/2011;* "L*'elemento soggettivo nell'illecito antidoping e la giurisprudenza del TAS*", report to the Conference "*I° seminario di aggiornamento sull'arbitrato nello sport: il TAS/CAS di Losanna*", Milan - 11 October 2011, as organized by the Sports Law Research Center based in Milan, with the cooperation of the Swiss Chamber of Commerce.

31 CAS 2009/A/1926 ITF v. Richard Gasquet & CAS 2009/A/1930 WADA v. ITF & Richard Gasquet. For a closer examination see M. Vigna "*Nuova linfa per l'individual case management in ambito antidoping: la 'kissing theory' non ha colpe*", in Giustiziasportiva.it n. 3/2010.

32 This Award clearly represents a point break within the CAS jurisprudence, since no Panel had previously granted a reduction of the suspension by taking into account an unintentional assumption (such as, contaminated cigarettes or drinks, passive smoking, food using hormones, manipulated drugs or supplements). Once the Panel had verified the factual elements, the presence of any element of fault or negligence on the part of the athlete were, then, analyzed.

stand all the concerns following the enactment of Law n.376/2000 and its impact on the Winter Olympics in Italy (*Torino 2006*). As a matter of fact, when the *Host City Contract*[34] was signed in 1999, the Italian legal framework was different, since doping was only considered as a sporting fraud, in accordance with the CONI Anti-doping Regulations.

As a direct consequence, such new set of rules caused a lot of reactions from foreign sports federations, which were worried about the fact that doping had to be punished with imprisonment (as well as with the sanctions provided by the sports justice) and that a specific Monitoring Committee had to coordinate the doping controls in order to verify any offence.

Furthermore, not only was imprisonment provided for the athletes, but also for any other person who had supported the anti doping rule violation (trainers, coaches, managers, etc.).

On the contrary, the Olympic Charter stated that the national sports federations had only to adopt sporting sanctions, in accordance with the supervening WADA Regulations.

Therefore, from one side the International sports federations were concerned about the possibility that some police officers could have licitly entered for inspections into the Olympic Village and about the consequences for those athletes tested positive. On the other, the IOC was afraid of the fact that many teams could have decided not to sign up for the Winter Games, due to the concrete fear of the criminal sanctions provided by the Italian law.

In such a tense atmosphere, the Italian Government refused the hypothesis of decriminalizing the offence taking into strict consideration the agreements previously signed at the international level[35]. Therefore, on January 5th 2006, the so-called "*Storace*" Decree was enacted, establishing the aforementioned Monitoring Committee, in accordance with Law n.376/2000[36].

Consequently, CONI appealed against such a Decree before the Administrative Court of Lazio, claiming for its suspension. The common desire to avoid diplomatic clashes led to the enactment of the Decree of 27 January 2006 of the Ministry of Health. Such a provision solved the controversy, by suspending the effectiveness of the "*Storace*" Decree from February 1st to March 31st 2006 (i.e. when the Olympic Games were scheduled to be held).

Ultimately, the Ministerial Decree of 20 April 2006 revoked the controversial "*Storace*" Decree and determined the participation of the President of the Monitoring Committee in the proceedings of those structures in charge of the anti doping controls during the international sporting events in Italy. By means of such a provision, the Italian Government tried to coordinate the functions provided by Law n.376/2000 with the powers of the IOC and the International Sports Federations.

Under this agreement, not only was the Italian law correctly observed (being binding the criminal sanctions against those athletes tested positive), but also the WADA Code (with regard to the list of prohibited substances).

4. The Anti Doping Controls During *Torino 2006*.

In such a context, the TOROC (*Torino Organizing Committee*) developed an Anti Doping Action Plan aiming at protecting athletes' health as well as ensuring the fairness of competitions, according to the indication of the IOC, the WADA regulations and Law n.376/2000.

Furthermore, the Plan dealt with the modalities and the proceedings to be followed for the collection of samples, their transfers and the relative analysis.

By a comparison with the previous edition of the Winter Olympic Games in Salt Lake City, we notice that the analysis of blood samples was introduced for the first time in the history of the Games and that the number of urine controls increased by the 48%.

In fact, almost 1200 tests were conducted over the entire period of Games, covering the four weeks from the opening of the Athlete Village until the Closing Ceremony on 26 February 2006[37].

All phases of the controls (namely, athlete's selection, custody and transportation of samples, analysis) were organized in order to guarantee athletes' privacy, as well as the integrity of samples and the confidentiality of the relative results.

The anti doping regulations were included within the *Rules and Regulations Governing Doping Controls at the XX Olympic Winter Games, Turin*, expressly stating in the preamble that "*the IOC has established these IOC Anti-Doping Rules (Rules) in accordance with the Code, expecting that, in the spirit of sport, it will contribute to the fight against doping in the Olympic Movement. The Rules are complemented by other IOC documents and International Standards addressed throughout the Rules. Anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is played. All Participants (Athletes and Athlete Support Personnel) accept these Rules as a condition of participation and are presumed to have agreed to comply with the Rules*".

5. The Judicial and Disciplinary Cases on Doping During *Torino 2006*.

5.1 The facts.

Having completed a brief analysis on the general regulatory framework on doping, as well as on the Italian criminal law and its relations with the sports regulations, we can now review the major cases that occurred during *Torino 2006* in order to highlight differences and similarities amongst the judicial and the disciplinary cases.

During the Games, the aforementioned set of strict rules produced significant results in terms of athletes testing positive: the most important cases concerned female biathlon and cross-country skiing.

With regard to biathlon, the Russian athlete Olga Pyleva, found positive after a control, represented the first case of doping during the Games, thus being subject to a disciplinary and criminal proceedings as well. On the other side, in the same days, twelve cross-country skiers were suspended for five days due to incongruous blood levels. Nine of them were later declared "clear" and, therefore, readmitted to the Games, while the Belarus Sergei Dolidovich and the Russians Natalia Matveeva and Nikolai Pankratov were suspended for other five days due to persistent high level of hemoglobin.

However, the major doping case, due to the media hype that ensued at the international level, involved the blitz conducted at late night by the Italian police in the premises of the Austrian Cross Country and Biathlon National Team[38].

The entire operation originated from a warning by the IOC (as previously informed by WADA) to the Public Prosecutor of Turin, reporting that Mr. Walter Mayer (former trainer of the Austrian Cross-Country National Team) was a member of the athlete support personnel, notwithstanding the permanent ban he had received during the Salt Lake City edition of the Games, due to a case of blood transfusions.

5.2 The disciplinary proceedings: current status.

5.2.1 The case of Olga Pyleva.

The athlete was found positive to a stimulating substance for military and aerospatial purposes, i.e. the *Carfedon*, which was prohibited by the IOC in 1998.

The IOC Medical Director, once he had verified the accuracy of the procedure in accordance with articles 7.2.2 and 7.2.3 of the IOC Anti-doping Regulations as applicable to the Winter Games, informed the IOC President on the positive result.

On 15 February 2006, a Disciplinary Commission[39] was estab-

33 See Art. 18 of the *Anti doping Sports Regulations* of the Italian Olympic Committee.

34 Once the City has been appointed as the Host, the *Host City Contract* is duly signed. Particularly, it consists in a non-negotiable contract document prepared by the IOC to be signed by the successful candidate city.

35 See Par. 1.1.

36 The Commission was instituted at the Ministry of Health with the specific competence of implementing the controls during the international sporting events in Italy: accordingly, Torino 2006 represented the first occasion to test the entire system.

37 In practical terms, according to the Plan, there were two kinds of control: a) tests on the athletes by a random selection and b) tests at the end of any competition on the top five plus two other chosen at random.

38 During the house search, the Italian Authorities found a lot of suspicious material (needles, used and new syringes, vials of distilled water, drugs for asthma even if none of them suffered of such an illness, a small blood-testing machine, and other equipment for preparing drips), but no prohibited substance was found. Furthermore, ten athletes were subjected to doping controls by surprise, but the results were all negative.

lished and the athlete was temporarily suspended pending the proceedings.

During the hearing of the following day, the athlete stated that she took a medicine (*Fenotropil*) to relieve the pain as a consequence of an injury occurred in January 2006, according to the prescription of her doctor. Moreover, the doctor of the Russian Olympic Committee noticed that *Fenotropil* was a legal drug not mentioning the presence of *Carfedon*. However, the Russian Olympic Committee, being aware of it, had asked the producer to mention that substance in vain. Subsequently, the Committee released a communication to all its athletes informing of the presence of *Carfedon*. Even though the athlete had declared her unawareness of such an official note, the Disciplinary Commission ordered two years of suspension for the violation of Art. 2.1 of the anti doping regulations, as well as the return of the Silver Medal and the subsequent change of results of the competition.

5.2.2 The case of the Austrian Cross Country and Biathlon National Team.

The disciplinary proceedings regarding the Austrian athletes are of great interest since they concluded before the CAS, after a judgment by the Austrian Ski Federation at first instance.

a) Eder vs Austrian Ski Federation & WADA vs Eder and Austrian Ski Federation[40]

The Austrian athlete Johannes Eder was subject to a disciplinary proceedings since the Italian police had found some suspicious material in the occasion of late night blitz of the above.

On 18 February 2006, the day before the relay competition in the discipline of cross-country skiing at the 2006 Winter Olympic Games in Turin, the Austrian athlete Johannes Eder suffered from severe diarrhoea. Therefore, he tried to consult the responsible medical doctor of his team but, due to some logistic problems, he could not show up at the Austrian lodging.

Accordingly, Eder contacted his private medical doctor, who recommended him to inject himself a saline solution by infusion.

Shortly after the athlete had started the infusion, the Italian Police arrived at the premises of the Austrian team with a search warrant, searched the house and carried out body checks as well as doping tests on the athletes.

In Eder's bedroom, hidden under the bed, they found a used infusion bottle with rests of a saline solution and a used infusion needle. The doping test on Eder did provide no adverse analytical finding.

On 12 May 2006, Ski Austria's Disciplinary Committee decided for the sanction of one year of ineligibility for Eder for violation of article 2 of the FIS (the International Ski Federation) Anti-Doping Rule Violations[41] and Rule M2.b of the relevant Prohibited List[42].

Accordingly, Eder and the WADA filed a Statement of Appeal against such a decision: from one side, Eder said that Ski Austria wrongly assessed the applied Anti-Doping Rules. As a matter of fact, he submitted that the intravenous infusion was a "*legitimate acute medical treatment*" and, therefore, not prohibited. Furthermore, if the administration of the infusion should have been regarded as a prohibited method, he bore no fault or negligence. Finally, he claimed that such regulations were in contrast with some human rights of the athletes (i.e. the right to choose the kind of therapy and to choose the most effective treatment of an illness), as well as the principle of proportionality under the Austrian Law.

On the other side, WADA appealed the decision claiming that the athlete had to be suspended for at least 2 years, in accordance with article 10.2[43] of FIS Antidoping Regulations.

Moreover, supporting the decision of the Disciplinary Committee, the WADA contended that the behaviour of the athlete did not fall within the scope of the exception provided for in Rule M2b, as a "*legitimate acute medical treatment*" demands the supervision by qualified medical personnel.

Indeed, WADA took the position that the mere fact that the Athlete performed on himself an intravenous infusion excluded the existence of a "*legitimate acute medical treatment*". Such infusion had to be performed by nurses or physicians in well-codified condition, mainly in emergency situation and reanimation. It submitted that the Athlete was not in an emergency situation: otherwise he should have visited the policlinic in the Olympic village or called a doctor.

In this case the Panel had to decide if the Rule M2.b of the Prohibited List 2006 was valid.

Taking into consideration Eder's claims, the Panel saw no reason why rule M2.b should have been incompatible with the mentioned provisions of the Austrian Law. As a matter of fact, by voluntarily acceding to the association, the athlete had accepted the application of the disciplinary rules and its sanctions as well. Consequently, the athlete's personal right to choose the kind of therapy and to choose a most effective treatment was not violated by Rule M2.b.

Afterwards, once the Panel was of the opinion that this Rule did not contradict the principle of proportionality and was, therefore, in compliance with bona mores according to Austrian Code[44], it also had to establish whether a doping offence had been committed.

For resolving this issue, the Panel used the criteria[45] identified in the case "Walter Mayer et al. versus IOC"[46], by which the legitimacy of a medical treatment would be judged.

The Panel accepted that a saline solution was not a substance capable to enhance an athlete's performance. However, the Panel found that in this case the other elements of legitimate medical treatment had not been met: a) the intravenous infusion was administered by the Athlete himself, in his bedroom; b) the Athlete was not examined by a medical doctor prior to the administering of the infusion; c) there were no medical personnel present when the Athlete set himself the infusion and finally; d) no records of any kind were drawn.

The Panel concluded that the infusion of a saline solution administered by the Athlete on himself did not comply with the requirements for legitimate medical treatment and therefore had to be considered as a doping offence.

Regarding the sanction, the Panel had to examine whether the proven circumstances were such that either "*no fault or negligence*" or "*no significant fault or negligence*".

Ski Austria said that the Athlete was not without any fault or negligence when using the prohibited method. One might expect that he had doubts whether he was allowed to do what he did. However,

39 According to article 7.1.2 of the IOC Anti-doping Regulations as applicable to the Winter Games, "*any anti-doping rule violation arising upon the occasion of the Olympic Games will be subject to the measures and sanctions set forth in Rule 23 of the Olympic Charter and its Bye-law, and/or Articles 10-12 of the Code*". Particularly, art. 7.1.4 stated that "*pursuant to Rule 23.2.2.4 of the Olympic Charter, the IOC Executive Board has delegated to a Disciplinary Commission, as established pursuant to Article 7.2.4 below (the "Disciplinary Commission") all its powers*". Therefore, the institution of such a committee was regulated by the Olympic Charter, according to art. 23.2.2.4 ("*In the case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the measures or sanctions which may be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are: (omissis) the IOC Executive Board may delegate its power to a disciplinary commission*").

40 CAS Awards 2006/A/1102 & 2006/A/1146 - not published.

41 That says: *"The following constitute anti-doping rule violations:[....] 2.2 Use or Attempted Use of a prohibited substance or a prohibited method".*

42 That provides under the heading "Chemical and Physical Manipulation": *"Intravenous are prohibited, except as a legitimate acute medical treatment".*

43 "*The period of ineligibility imposed for a violation of art. 2.2 [...] shall be: first violation - 2 years*".

44 The athlete, referring to Article 10.5.1 (burden of proof) and Article 10.5.2 of the FIS Anti-Doping Rules said that: a) they were disproportional with respect to practice bans in other areas of the Austrian Law; b) they violate the presumption of innocence; c) they provided an excessive penalty; d) they were contra bonos mores according to the Austrian Law.

45 A) the medical treatment must be necessary to cure an illness or injury of the particular athlete; b) under the given circumstances, there is no valid alternative treatment available, which would not fall under the definition of doping; c) the medical treatment is not capable of enhancing the athlete's performance; d) the medical treatment is preceded by a medical diagnosis of the athlete; e) the medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting; f) adequate records of the medical treatment are kept and are available for inspection.

46 CAS Awards 2002/A/389/390/391/392/393.

Ski Austria, taking into account the circumstances of the case, found that the Athlete behaviour was only slightly negligent, since the subjective elements of the doping offence were missing to a large extend. Therefore, Ski Austria concluded that it had the disciplinary powers of the exceptional circumstances provision in Article 10.5.2 of the FIS Anti-Doping Rules.

The Panel agreed with Ski Austria's assessment, taking into consideration elements such as: a) the athlete tried in vain to get medical assistance by his team doctor; b) he knew that the team doctor considered to treat him by performing an infusion of a saline solution; c) the athlete could assume that the performing of such infusion by the team doctor would not have been a doping offence; d) his private medical doctor likewise was of the option that in his case the infusion of a saline solution was indicated and recommended him to perform on himself the solution.

The Panel, therefore, found it difficult to see a significant fault in the athlete's behaviour. In fact, it understood that the Athlete was in distress and inclined to take the infusion as a "*legitimate acute medical treatment*".

Ultimately, with regard to the period of ineligibility, having Ski Austria imposed the minimum sanction (one year), the Panel decided not to dissent and to confirm such a suspension.

In fact, the Athlete did not have the intention to wrongfully enhance his performance or to mask prohibited substances or methods. He did not seek to gain advantage over his competitors and he cooperated with the authorities since the beginning of the proceedings.

b) Johannes Eder, Martin Tauber and Jürgen Pinter, vs IOC[47]

The second remarkable case concerned three Austrian athletes (Tauber, Pinter and Eder again) in a dispute against the IOC with regard to some suspicious material found during the late night blitz of the Italian police.

Accordingly, on 25 April 2007, the IOC Executive Board, having considered the recommendations of the IOC Disciplinary Committee that the three Austrian Olympic athletes were in violation of Articles 2.2 (only Eder), 2.6.1, 2.6.3 and 2.8 (all of them) of the IOC Anti-Doping Rules applicable to the XX Olympic Winter Games in Torino in 2006[48], decided to accept those recommendations: accordingly, the athletes were ordered to be permanently ineligible for all future Olympic Games in any capacity.

Such decision relied on the house search conducted by the Italian Police on 18 February 2006 within the premises of the Austrian Cross-Country Ski Team during the Winter Olympic Games in Turin, when several suspicious items were found.

This case is very interesting since Tauber and Pinter submitted that on proper construction, "*possession of a Prohibited Method"* means that "*an athlete possesses all and any devices, materials, substances etc necessary to carry out, administer or use a Prohibited Method*" and that they did not possess, physically or constructively, the items found with their fellow athletes or the support staff, and that in any event no one possessed blood of any of them.

Furthermore, Tauber submitted that the use of the haemoglobinmeter did not qualify as Possession of a Prohibited Method within the meaning of Article 2.6.1 because, in light of his high hemoglobin levels, he used the haemoglobinmeter to protect his health rather than to enhance his performance.

Similarly, Pinter submits that his use of the haemoglobinmeter does not qualify as Possession of a Prohibited Method within the meaning of Article 2.6.1 because he used the haemoglobinmeter out of "curiosity" rather than to enhance his performance.

Ultimately, Eder submitted that there is insufficient evidence to demonstrate a violation of Article 2.2 and that in any event, it could not be breached unless the athlete had a subjective intent to achieve increased performance. Eder asserted that he had no intention to achieve increased performance, but rather that he administered the saline infusion because: a) he had been suffering from diarrhea and abdominal pain, which he feared might result in dehydration and cause a circulatory collapse in the competition; b) he had naturally high haemoglobin levels and feared that a protective ban might be imposed on him by FIS, causing him to be excluded from competition.

The respondent submitted that Eder's saline infusion does not qualify as "legitimate acute medical treatment," particularly because one of the conditions of this exemption is that the athlete be physically examined by a doctor[49].

On the other side, the IOC - as the respondent - submitted also that the evidence demonstrates that each of the appellants knew of the existence of the items in the others' possession and intended to exercise control over those items to the extent required. The respondent also submitted that the related materials and substances found with the support staff were also within the appellants' constructive possession.

Consequently, the IOC submitted that each of the appellants violated Article 2.8 as a result of: a) his active participation in, and facilitation of, the blood doping practices of his fellow Appellants; b) his utilization of the services of team support staff members in order to commit his own doping violations; c) his facilitation of the breach of the ban imposed against Walter Mayer through his continued involvement with Mayer during the Torino Olympic Games[50].

Further to the above, the respondent submitted that there was a high level of coordination within the cross-country ski team.

The Panel made a number of observations regarding the frequency of the coincidences upon which the appellants relied in support of their respective cases. Other than the haemoglobinmeter, the appellants had each claimed to have no knowledge of the items possessed by his fellows or found with their trainer. The Panel had been asked to view as mere coincidence the fact that the appellants each arrived at the Torino Olympic Games with different part of a complete kit for the manipulation of hemoglobin levels.

Furthermore, the athletes were unable to explain satisfactorily why the Austrian cross-country team had chosen to stay in another lodging, rather than in the Athletes' Village, where they would have been subject to bag searches and a controlled environment that would have made infusions or transfusions virtually impossible. In this respect, the Panel noted that Mayer was credited with having chosen the accommodations for the Austrian cross-country team and that he was also accommodated in the same premises (a further coincidence that the Panel was asked to accept).

And more, the appellants had each provided a different medical justification for the items found in their physical possession during the house search conducted by the Italian Police in February 2006.

Ultimately, the Panel found the combination of all such coincidences highly unlikely in the circumstances of the case and was also

47 CAS Awards 2007/A/1286 ; 2007/A/1288 ; 2007/A/1289.

48 Art. 2.2: "*Use or attempted use of a prohibited substance or method constitutes an anti-doping violation*"; Art. 2.6.1: "*The following constitute anti-doping violations: [...] possession by an athlete at any time or place of any prohibited substance or prohibited method, referred to in Article 2.6.3 below, unless the athlete establishes that the possession is pursuant to a TUE (Therapeutic Use Exemption) granted in accordance with Article 4.3 or other acceptable justification*"; Art. 2.6.3: "*In relation to possession, the following categories of substances and methods are prohibited (for the full list of prohibited substances and methods, see the List of Prohibited Substances and Prohibited Methods) [...] Categories of prohibited methods: M1 - Enhancement of oxygen transfer; M2 - Chemical and physical manipulation*"; Art. 2.8: "*The following constitutes an anti-doping rule violation: administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation*".

49 For further details see the CAS case as previously analyzed in this paragraph.

50 In 2002 the IOC Board had sanctioned Walter Mayer, as the trained and manager for the Austrian Couss-Country Ski Team, for his role in performing blood transfusions on two Austrian skiers at the Salt Lake City Winter Olympic Games. Therefore, the Board had declared him to be ineligible to participate in future Olympic Games up to and including the 2010 Edition (the decision had been upheld by a CAS arbitration panel in 2003). Despite the imposition of such a sanction and in apparently wanton disregard of it, during the 2006 Torino Olympic Games, Mayer had decided to accommodate in close vicinity to the premises occupied by the appellants.

disturbed by the level of inconsistency that was evident both within the appellants' own pleadings and also against the evidence before the Panel.

After these general considerations, the Panel started to analyze the possible use of a prohibited method by Eder. In light of his admission that he had been concerned about high hemoglobin levels and the risks that he would have been subject to a FIS protective ban, it was unnecessary for the Panel to make a finding on whether or not Eder suffered from diarrhea. The administration by the athlete of saline infusion in order to ensure that his hemoglobin levels were within the FIS range was not "*legitimate acute medical treatment*". Therefore, the Panel found that Eder had committed a violation of Article 2.2.

Subsequently, the Panel posed the question whether a breach of Article 2.6.1 (with regard to prohibited methods) had been committed by the three athletes.

Firstly, the Panel agreed that "possession of a Prohibited Method" was a difficult concept, requiring some interpretive guidance. Tauber and Pinter argued that the term "possession of a Prohibited Method" was unclear and that it had to be interpreted as requiring an athlete to possess all of the materials necessary in order to perform that prohibited method. In the case of intravenous infusions, this would have required a butterfly needle, infusion tube and a liquid for infusion, at a minimum. In the case of blood doping, this would have additionally required the possession of blood to be transfused.

The Panel was also of the view that it would not have been sufficient to justify a charge under Article 2.6.1 if an athlete had been merely in possession of, for example, one single syringe - even though such an item would have been viewed suspiciously in the absence of a reasonable explanation or a recognized therapeutic use exemption ("TUE").

At the other extreme, the Panel considered Tauber and Pinter's interpretation of "possession" to be unworkable and counter-productive to the fight against doping. The Panel was of the view that possession of a prohibited method was proved where it could be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a prohibited method. Accordingly, the Panel found that the appellants were indeed each in possession of a prohibited method: namely, "intravenous infusions" as specified in Article M(2)(b) of the WADA 2006 Prohibited List.

Accordingly, the Panel rejected the argument that in addition to establishing actual or constructive possession it was also necessary to establish the intent to use the Prohibited Method. First, this anti-doping violation was proved simply by possession. Secondly, the necessity of proving intent would have rendered Article 2.6 nugatory. In addition, the Panel believed that it was likely that the Appellants were also in possession of an additional prohibited method: namely, "blood doping" as specified in Article M(1)(a) of the WADA 2006 Prohibited List.

Although it was not necessary for the Panel to make a definitive finding on this point, the Panel noted that the only element of "blood doping" that was not found within the appellants' physical or constructive possession was blood or blood bags containing their own blood.

Then, bags containing blood of Austrian biathletes were found in trainer's quarters, along with blood-typing equipment. Moreover, traces of blood were found in Pinter's syringes, which could only be properly explained by the injection of blood using those vessels.

Then, the next question to be determined was whether or not any of the appellants fell within either of the two exceptions outlined in Article 2.6.1: i.e. the possession of the prohibited method pursuant to a TUE or some "*other acceptable justification*". Generally, the Panel was of the view that any items related to a prohibited method that were prescribed on the advice of a medical doctor should have been the subject of a TUE and the other acceptable justification was intended to cover situations in which emergency medical treatment was required (so that there was no opportunity to apply for a TUE).

Since none of the appellants applied in the case for such an exemption in relation to the medical equipment that was found in their possession, the first exception could be immediately excluded. Regarding the second one, the Panel found that none of the appellants had an "acceptable justification" for the possession of a Prohibited Method. Being unconvinced by the submission of the athletes, Panel found that the appellants were in violation of Article 2.6.1.

Further, while the Panel was comfortably satisfied that it was sufficient to show that each of the appellants had violated Article 2.8 by his active of psychological assistance in his fellows' possession violations, it had to be noted that the evidence in the case strongly indicated that the athletes were not only in possession of a prohibited method (i.e. intravenous infusion), but had also been engaging in that method during the Torino Olympic Games.

The Panel was also of the view that there was a strong likelihood that the appellants were in possession of an additional prohibited method (blood doping). In this regard, the Panel found the following facts particularly interesting: a) the saline infusion by Eder; b) the traces of blood in the syringes and tubing of Pinter; c) the usage of Tauber's haemoglobinmeter; d) the involvement of Walter Mayer in the training and his accommodation in close vicinity to appellants' lodging; e) the blood-testing device found with athletes' trainers.

Moreover, with regard to the complicity in anti-doping regulations violation, as sanctioned by Article 2.8, the Panel had to consider whether or not each of the appellants assisted, encouraged, aided, abetted or covered up the possession violations of his fellows in such a way as to contribute to causing his fellows' possession violations. The IOC had proven to the Panel's comfortable satisfaction that each of the athletes had met these standards. In fact, taking into account some objective facts (as outlined in the award), a broad pattern of cooperation and common activity with the other athletes and with the coaches in the possession of prohibited method of blood doping had been demonstrated.

Then, the athletes contended that there was "*no significant fault of negligence*" in their possession of a prohibited method, according to Article 10.5.1 of the WADA Code. Therefore, the period of ineligibility had to be reduced by half, as provided by Article 10.5.2.

Due to a considerable CAS jurisprudence, the Panel found clear that these exemptions were intended to protect an athlete who innocently ingests a prohibited substance, while the circumstances of the case clearly did not fall within this meaning. In fact, the fault shown by all of the appellants in possessing the materials, and likely also by engaging in a prohibited method, was substantial. Therefore, the athletes could not qualify for a reduction in sanction.

Finally, with regard to the proportion of the sanctions applied, the Panel found that the offences committed by the appellants were extremely serious in the case. They could not pretend to be "*merely innocent bystanders*" in this pattern of conduct within their team, being responsible for their active complicity in the offences committed.

Elite athletes are constantly subject to intense pressure to succeed in their disciplines. However, even in the face of such a pressure, they must bear the responsibility of their choices and must understand that their actions have a direct effect on their fellows.

Moreover, taking into consideration that the appellants had shown an apparent lack of understanding of the wrongfulness of their conduct (as shown by their continued denials), the Panel found that the athletes should not be afforded the possibility of participating in future Olympic Games in any capacity (neither as coaches nor support staff).

On these grounds, the Panel ruled that: a) the appeals filed by the athletes against the decisions rendered on 25 April 2007 by the IOC Executive Board were dismissed; b) the decisions of the IOC Executive Board of 25 April 2007 declaring each of the Appellants to be ineligible permanently for all future Olympic Games in any capacity were affirmed.

5.3 The criminal proceedings: current status.

As to the criminal proceedings carried out by the Prosecutor's Office in Turin regarding the doping cases occurred during the Winter Olympic

Games, their specular nature, in comparison with the sports disciplinary proceedings, can be outlined.

Accordingly, the Italian authorities instituted legal proceedings towards the Russian athlete Olga Pyleva, as well as towards some athletes and support personnel of the Austrian National Team.

a) The case of Olga Pyleva

The Prosecutor Office of Turin, simultaneously to the sports proceeding, initiated an investigation regarding the case of Olga Pyleva, afterwards pronouncing a writ of summons before the Criminal Court of Turin.

The athlete, judged in her absence because in the meantime she had gone back to Russia, was accused of the infringement of article 9 par. 1 and par. 2 of Law n.376/2000 (assumption of a prohibited substance - *Carfedone* - during the Winter Olympic Games of Turin 2006, not justified by pathological conditions and capable of modifying the athlete's conditions with the aim to alter her sporting performance).

Based on the results of the preliminary investigation, the Court found the athlete responsible for the facts as charged. In fact, the athlete assumed the substance without asking for the exception for therapeutic purposes and in the absence of any traumatic episode. On the contrary, she had admitted the assumption only after the positive result of the doping control.

The defendant tried to demonstrate her good faith and the awareness of the presence of the prohibited substance in the drug she took, but the Court stated that any athlete has a duty of self-information on the kind of medicine assumed.

Therefore, the Court of Turin with ruling n.211 of December 14th 2009[51] (exactly 9 years after the entry into force of Law n.376/2000!) sentenced Olga Pyleva to 1 year imprisonment and a €4.000 fine (together with the litigation costs)[52].

Due to the fact that the punishment was within the time limit of 2 years and the athlete had no previous convictions, the Court suspended the sentence.

b) The case of the Austrian Cross Country and Biathlon National Team.

Following the aforementioned blitz by night of the police authorities, the Prosecutor Office of Turin, in December 2008, pronounced a writ of summons towards the President of the Austrian Ski Federation, Peter Schroecksnadel, the coaches of men's team Markus Gandler e Hoch Emile, the notorious Walter Mayer (banned from the Olympic Games for a precedent episode of doping), the responsible of the medical staff of the Austrian team Baumgartl Peter, the former biathlon athletes Wolfgang Rottmann, Wolfgang Perner, the former cross-country skiers Martin Tauber, Johannes Eder e Jürgen Pinter.

The Prosecutor's Office supported the following charge: violation of article 9 paragraphs 1, 2 of Law n.376/2000 with the decisive contribution of the aforementioned support personnel, according to the same clues as follows: a) the athletes chose to stay out of the Olympic Village (and, consequently, away from the other athletes and the Olympic personnel). Moreover, the athletes were accommodated in buildings other than the ones for the medical staff, in order to distinguish their responsibility in case of doping offences committed by the athletes; b) the personnel gave directions to deny access to athlete's buildings to doping control officials; c) they adopted a specific waste collection system for all the tools aimed at doping practices; d) they allowed Mr. Mayer to participate in the Winter Olympic Games, notwithstanding his ban; e) they allowed the athletes to assume prohibited substances and adopt prohibited medical practices in accordance with Law n.376/2000.

At the time of publication, the proceeding is still in progress and, therefore, we have to wait for the sentence for further comments.

Ultimately, the Prosecutor Office is currently acquiring more information after the sensational statements by Arne Ljunqvist as President of the IOC Medical Commission. In fact, he would have stated that there would be some evidence on the assumption of *Cera* (a prohibited substance, become notorious after the positive results of some Italian cyclists - i.e. Riccò, Sella, Piepoli - during the 2008 edition of the *Tour de France*) already during *Torino 2006*. Therefore, the President announced that the IOC would start further analysis on some samples taken during the Winter Olympic Games.

Such a decision is now possible due to a Protocol (since *Athens 2004*), which allows the blood-samples to be frozen and stored at the IOC laboratories for further and following controls (taking into account the advancement of scientific techniques).

Even if this new analysis after more than 6 years from *Torino 2006* (and 4 years after the discovery of *Cera*) could be seen as anachronistic, we have to remark that the WADA Code expressly provides a statute of limitation of 8 years for the doping violations concerned.

Conclusions

In the light of the above, the fight against doping requires a long and intense undertaking in order to protect the ethical and social values of sport as well as the athletes' health. Therefore, all the people involved shall be actively committed without any compromise.

The present article has shown a changing reality, where the regulatory and organizing framework is taking steps forward over the years.

The establishment of WADA, and consequently of the relative Anti Doping Code, clearly represents the turning point in the fight against doping. As a matter of fact, such a Code has been implemented by all the International Sports Federations, finally leading to a harmonization of the single anti doping policies as carried out by the States.

Furthermore, this new set of rules has been effective since its enactment, since it is based upon strict principles and fair rules. Then, even the CAS is duly playing its role, giving a solid interpretation of the anti doping regulations.

As seen, in Italy the situation is quite peculiar and somewhat concerning.

Concerns regarding the rules by those operators within the sporting scenario who are afraid of possible criminal proceedings against athletes who test positive in Italy (this does not, however, represent a unique case in the global framework), are absolutely reasonable. However, taking into account the aim of such rules (i.e. the protection of athletes' health), this can be deemed an imperative duty.

The first results of the criminal proceedings for the facts occurred during *Torino 2006* can be seen as a starting point for a progressive harmonization with the sports disciplinary regulations.

Of course, the outcomes are not yet established and definitive.

To this purpose, it will be of great interest to analyze the final decision (once issued by the Court) arising from of the criminal proceeding involving the Austrian athletes, especially whether the so called "constructive" doping shall be deemed as a violation of the Law.

In such a case, the converging results would clearly demonstrate that cohabitation amongst the two proceedings is possible, notwithstanding their peculiarities in the fight against doping.

51 Exactly 9 years after the entry into force of Law n.376/2000.

52 The Court deemed that, according to the elements gathered during the investigations, the athlete had clearly shown the willingness of increasing her sporting performance in the occasion of the Olympic competition, therefore proving the subjective element.