10. CONCLUSION

The threat of fixing has been recognised and sport's fight-back is underway, but much remains to be done both in terms of evolving state regulation of sport and betting (better licensing of online gambling and statutory protection for competition organiser's rights), and the processes that are available to SGBs to stop future fixing (athletes' educational programmes) and uncover any that might have occurred (more use of amnesties such as the recent one by the England and Wales Cricket Board). Cricket has in some senses led the way and if fixing is to be controlled it would seem likely that Sports Integrity Units have to adopt a proactive approach towards investigation and policing such as the "mystery shopper" technique recently recommended by the MCC World Cricket Committee and greater use of "unjust enrichment" laws.

Practice Makes Perfect: An analysis of the World Anti-Doping Code 2009

by **John O'Leary**

Introduction

The reality of elite sporting competition today is that cheating in one form or another is relatively commonplace. No example of cheating however carries the stigma nor results in such punitive and emotive reaction as doping. For whatever reason, doping more than any other type of sports cheating, has transcended sport and entered the public domain. The public consciousness of anti-doping has been raised in part because of the stringent sanctions attached to such a breach and because the loss of a lucrative career often forces the hand of the sanctioned athlete to utilise appeal mechanisms built in to the regulations of sports governing bodies and, if unsuccessful, to seek recourse from the courts. For these reasons anti-doping and the law enjoy a complex and special relationship[1].

Over the past ten years anti-doping regulation has been radically revised. Two landmark regulatory models epitomise the rigorous approach the issue: the World Anti-Doping Codes of 2003 and 2009. The 2009 model contains some important amendments to the 2003 code. The objects of this chapter are twofold: to evaluate the importance of the World Anti-Doping Code (the Code) in the light of a changing legal and political landscape and to evaluate whether the 2009 Code improves on the 2003 model by satisfactorily balancing between the right of individual athletes to complete with the desire on the part of sports governing bodies to regulate effectively against those who seek to avoid anti-doping restrictions. In this context it is necessary to consider both the legal and the sport regulatory framework because, whether it is considered conceptually as a process of juridification or as an example of legal pluralism, the interaction between law and regulation has become so interwoven that the significance to the athlete of this distinction is practically irrelevant. Equally, as lawyers are actively involved in both the process of law and regulation, such a distinction might be considered more accurately as the difference between hard and soft law.

The changing legal and political landscape

It is important to observe the way in which, since 2003, the law has embraced the Code thereby further blurring the distinction between law and regulation. What in 2003 could have been perceived as little more than a professional code of conduct has now taken on a greater judicial and political significance. Courts, for many years, have condoned the use of the Code but tended to do so on the basis of Lord Denning's philosophy that ' justice can often be done…better by a good layman than by a bad lawyer'[2] as might befit an approach to the Code predicated on a view that such regulation covered merely internal sports disputes which, for the most part, were not worthy of legal intervention. Although the Court of Appeal in *Modahl v British Athletics Federation Ltd*[3], did seem to strengthen the legal status of the Code by holding relationships between athletes and governing bodies was contractual and as a consequence, the Code constituted contractual terms, it did so only on a majority. The strong dissenting judgment of Jonathan Parker LJ followed a line of argument promulgated by Lord Denning who, in cases such as Nagle v Feilden and Lee v The Showman's Guild of Great Britain expressed his concern that the identification of a contractual nexus in such situations was little more than a fiction.

This lowly legal status is now in need of reappraisal following the ECJ decision in Meca-Medina v Commission of the European Communities[4]. The European Court of first Instance agreed with the European Commission that the anti-doping rule fell outside the scope of European competition law. The ECJ disagreed and gave an important judgment which helps to establish the sphere of legal influence and also whether the anti-doping regulations contained within the Code are a proportional response to the perceived problem. The Court stated: 'although anti-doping regulations fall within the ambit of the law as an economic activity, they did not, on the facts, breach principles of proportionality under EU law.' It would be fair to state therefore, that those sporting bodies that draft anti-doping regulation that is broadly in conformity with the Code will not be susceptible to legal challenge. The Code allows for deviation in certain articles and it is here that governing bodies must beware if they deviate to any significant degree by making their regulations more stringent[5].

The Code is not wholly justiciable. As Weatherill points out, the judgment brings the Code into line with other areas of sports regulation where the courts have been more active:

> The same point, delivered in slightly different vocabulary and in relation to Art.39 not Art.81, is found in *E.C.L.R. 657 the Court's judgment in Bosman which accepts as "legitimate" the perceived sports specific anxiety to maintain a balance between clubs by preserving a certain degree of equality and uncertainty as to results and to encourage the recruitment and training of young players. And in Deliege, an Art.49 case, the Court accepted that selection rules limited the number of participants in a tournament, but were "inherent" in the event's organisation. Such rules are not beyond the reach of the Treaty, but they are not incompatible with its requirements.[6].

1 Ruijsenaars P et al Manifesto: "stop the doping inquisition!" I.S.L.J. 2007, 3/4, 84-85

2 Enderby Town Football Club Limited v The Football Association Ltd [1971] Ch591

3 2001 WL 1135166

4 (C-519/04 P) [2006] E.C.R. I-6991; [2006] 5 C.M.L.R. 18.

5 Subiotto R. *The adoption and enforcement of anti-doping rules should not be subject to European competition law* E.C.L.R. 2010, 31(8), 323-330; Pijetlovic K. *Paragraph 31 of C-519/04 Meca-Medina reversed* I.S.L.J. 2009, 1/2, 137-138; Subiotto R. *How a lack of analytical rigour has resulted in an overbroad application of EC competition law in the sports sector* I.S.L.R. 2009, 2, 21-29; Manville A. *European court vs sports organisations - who will win the antitrust competition?* I.S.L.J. 2008, 3/4, 19-26; Szyszczak E. *Competition and sport* E.L. Rev. 2007, 32(1), 95-110; Baily D. *Taking the governance of sport out of court* S.L.A. & P. 2007, Jun, 5-6.

It is also important to note the growing status of WADA and its code, inter alia, through its acknowledgement by supra-national government organisations such as UNESCO. The UNESCO International Convention Against Doping in Sport[7] states its purpose 'within the framework of the strategy and programme of activities of UNESCO in the area of physical education and sport, is to promote the prevention of and the fight against doping in sport, with a view to its elimination'[8]. The convention is interesting because it adopts, overtly, the WADA Code whilst asserting the primacy of the Convention where there is conflict[9]. Such conflict is inevitable as the Convention stands, referring as it does to the repealed 2003 Code. It also emphasises how little distinction there is between law and regulation. Article 3 of the convention confirms that state parties agree to adopt appropriate anti-doping measures, encourage cooperation and foster links 'in the fight against doping in sport, in particular with the world anti-doping agency'.

The need for anti-doping regulation

Long before the rise of WADA and its Code, the International Olympic Committee (IOC), was in the vanguard of the 'war' against dopers. The unyielding philosophy, and rhetoric, adopted by the IOC and the governing bodies was and is based on the premise that doping is contrary to the very essence of sporting competition. This philosophy which underpins all anti-doping regulation been adopted almost axiomatically by those who run sport. In 1999 the IOC reiterated 'its total commitment to the 'fight' against doping, with the aim of protecting athletes' health and preserving fair play in sport. Any declarations which go against these principles are both wrong and misplaced'.[10]

Although the IOC has long held these principles sacred, its influence over governing bodies was ineffective. As Beloff explains ' . in my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here; a loft there; a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole.[11]

The history of doping regulation in sport is littered with examples of governing bodies failing to draft their doping codes competently. Little thought was given to the compatibility of doping rules between sports. Also, governing bodies seemed unaware of how previous doping rules of their own sport interacted with new provisions. The danger was that a successful legal challenge could not only call into question the reliability of the testing procedure and encourage other athletes to initiate court action, but could also prove disastrously expensive for the domestic federation.[12] What was required was a effective international standard that could transcend such problems as athlete mobility because 'the problems of undertaking testing among an elite group of athletes who were increasingly mobile and who were likely to be in their native country, and therefore accessible by their national doping control officers, for only part of each year. Indeed there was a growing number of athletes who spent most of their elite career outside their home country. For example, world class Australian road cyclists spent most, if not all, of their time in Europe where the major events and teams were located. Much the same could be said for the increasing number of South American and African track and field athletes who followed the American and European calendar of competitions. Such a high level of athlete mobility required a set of anti-doping regulations that would prevent athletes exploiting the loopholes and inconsistencies found in the anti-doping regulations of various countries and domestic affiliates of international federations'.[13]

As a result of this, sport has harmonised the doping regulations of the various national and international governing bodies.. The rise of the World Anti-Doping Agency (WADA) can be seen as a response to the inadequacies of earlier regimes and a realisation that successful anti-doping policies come at a price. From a jurisprudential perspective WADA might be viewed as one of many quasi-judicial global administrators and 'the extent that they develop a law-like quality, they do so after-the-fact, consequential upon the administrative tasks in which they are engaged. They develop substantive rules of conduct, and also procedural rules for decision-making and decision-accounting, but they lack any constitutive co-ordinates to underpin these substantive and procedural rules. In other words, they are non-autochthonous - unrooted in any state or other stable site of public authority or even at the contested boundaries between different sites of public authority, and instead generate such authority as they have purely out of the regulatory purposes that they pursue and practices that they develop'[14].

The World Anti-Doping Code was first adopted in 2003 and became effective in 2004. The current World Anti-Doping Code became effective as of January 1, 2009. Article 23.1.1 states 'The following entities shall be Signatories accepting the Code: WADA, The International Olympic Committee, International Federations, The International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies'. Such is the influence exerted by WADA and the IOC, that participation by a sport at international level is virtually impossible unless that governing body is a signatory to the Code[15].

The Code consists of a set of model regulations that aims to ensure consistency in the application of anti-doping regulation[16]. In its introduction it explains that 'The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules adopted by each Anti-Doping Organization[17]. While some provisions of the Code must be incorporated without substantive change by each Anti-Doping Organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules'. Article 23.2.2 clarifies which sections of the code must be incorporated 'without substantive change' into the regulations of the governing bodies. They include Art.1 (definition of doping), Art.2 (anti-doping rule violations), Art.3 (proof of doing) and Art.4.2.2 (specified substances). The 2009 Code differs from the 2003 Code in many respects but the key elements remain: out of competition testing, strict liability, proof of doping, banned substances and sanctions. The remainder of this chapter will focus on evaluating the 2009 code under these heads.

Out of Competition Testing

The 2009 code restates the position on out of competition testing introduced by the 2003 Code. Out of competition testing is an important element of anti-doping policy as doping substances and methods used in training my not be detectable at an event. Article 2.4 of the 2009 Code states that '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'.

800 meter runner Christine Ohurugu missed three out of competi-

6 *Bradley v Jockey Club* [2004] EWHC 2164 (QB); *Nagle v Fielden* [1966] 2 QB 633; *McInnes v Onslow-Fane* [1978] 1 WLR 1520; R. (on the application of Mullins) v Jockey Club Appeal Board (No.1) [2005] EWHC 2197 (Admin); Times, October 24, 2005 (QBD (Admin)); R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 1 W.L.R. 909 (CA (Civ Div)); Law v National Greyhound Racing Club [1983] 1 W.L.R. 1302 (CA (Civ Div)); Wilander and Another v Tobin and Another [1997] 2 C.M.L.R. 346

7 Paris, 19 October 2005

8 Article 1

9 Article 2

10 Lausanne, 8 July 1999.

11 Beloff, M, 'Drugs, laws and versapaks', in O'Leary, J (ed), *Drugs and Doping in Sport* (2000), London: Cavendish, 40.

12 Houlihan, B, 'The World Anti-Doping Agency: prospects for success', in O'Leary, J (ed), *Drugs and Doping in Sport* (2000), London: Cavendish Publishing, 128

13 ibid

14 Walker N. Out of place and out of time: law's fading co-ordinates Edin. L.R. 2010, 14(1), 13-46; Casini L. Global hybrid public-private bodies: the World Anti-Doping Agency (WADA) I.O.L.R. 2009, 6(2), 421-446.

15 For an interesting examination or non-compliance see CAS opinion CAS 2005/C/976 & 986, FIFA & WADA

16 The notion of one-size-fits-all is by no means universally popular. See Bailey D. The specificity of sport S.L.A. & P. 2009, Dec, 5-9; Farrow S. Team sports' issues with the WADA Code W.S.L.R. 2009, 7(6), 14-16

17 Charlish P. Cricket pair "not out" in doping row I.S.L.R. 2007, 4(Nov), 57-66

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Katrien Lefever is Senior Legal Researcher at IBBT – The Interdisciplinary Centre for Law and ICT (ICRI), KU Leuven, Belgium.

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Capita Selecta

by

Robert Siekmann

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Lex Sportiva: What is Sports Law?

Edited by

Robert Siekmann and Janwillem Soek

With a Foreword by Dr Hinca Pandjaitan, Executive Director, Indonesia Lex Sportiva Instituta, Djakarta.

This book is the first to focus on the often raised and discussed question whether there is a separate discipline of international sports law and, if so, which criteria should be used to identify it. What belongs to it and what does it involve? So far, the debate has not run along any structured lines, meaning that different points of view and angles have never been systematically compared amongst experts in order to attempt to reach pertinent conclusions.

In the present book highly relevant and critical English-language articles on the question "What is Sports Law?" are brought together with the extended papers and results of the 2010 Djakarta Conference "The Concept of Lex Sportiva Revisited".

The expertise and views of the contributors present an important step in the right direction and form a solid basis for further discussion amongst sports lawyers, academics and researchers on the fascinating Lex Sportiva phenomenon. It is essential reading for all those with an interest in sport and the continually evolving interface and interaction that exists between sport and the law, as well as the different ways how they influence each other.

Prof. Dr. **Robert Siekmann** is Director of the ASSER International Sports Law Centre, The Hague and Professor of International and European Sports Law at the Erasmus University Rotterdam, The Netherlands. Dr **Janwillem Soek** is Senior Researcher at the ASSER International Sports Law Centre.

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tion test and was suspended for 12 months by a UK Athletics disciplinary committee. The impact of the suspension was greater still as another consequence was a lifetime Olympic ban. Her appeal was upheld on the basis of 'significant mitigating circumstances'. It was held that it was irrelevant that Ohurugu had no intention to engage in doping activities or that no notice was given of the test (indeed the Committee upheld the surprise element is an important weapon against dopers). They did however concede that there was insufficient training and instruction available to athletes at the time (now rectified by the UK Anti-doping Advice Card 2010[18]). The Committee, conscious of opening the floodgates, did add that with improved education for athletes, such a ground of appeal would be likely to fail in future. Strong and logical arguments are put forward for the necessity of such a regime, however important issues remain around the validity of a draconian out-of competition testing regime not least the right to privacy and a family life. With all due respect to sports' anti-doping aspirations, these rights, enshrined in the European Convention on Human Rights, are of rather greater importance. It remains the task of sports regulators to ensure that out-of-competition test regulations exhibit due deference to such principles[19].

Strict Liability

The WADA Code 2009 retains the system of strict liability introduced in 2003. This means a positive test remains sufficient in itself to establish liability. The governing body would not have to show that the competitor or another person transmitted into the competitor's body a banned substance with the *aim* of achieving an increase in performance nor that the substance did actually increase performance.

A rule that a positive test leads to an automatic ban is attractive in its clarity and simplicity but denies what many would view as the fundamental right of an opportunity to show a lack of fault, knowledge or intent. In practice this means that even if an athlete could prove that the consumption of the drug was accidental or a result of malice on the part of another, she would still be in breach. Strict liability may appear to be a draconian provision but as the Court of Arbitration for Sport stated in their decision in *Quigley v UIT:*

> It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q, where the Athlete may have taken medication as the result of mislabeling or faulty advice for which he or she is not responsible - particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense 'unfair' for an Athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the Athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair.

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping[20].

The maintenance of the strict liability standard in the 2009 Code is clearly a pragmatic decision. The only problem arises when sport is faced with a set of circumstances where to find fault would be unconscionable; how strict then would strict liability be? Greg Rusedski tested positive for nandrolone that, it was established, derived from supplements given to him by his governing body, the Association of Tennis Professionals (ATP). In the light of these exceptional circumstances, Rusedski was exonerated. Although this appears a humane decision but as Charlish comments:

'However, what this decision has done is add an unnecessary layer of uncertainty to an already difficult area. There must be clarity when dealing with this issue, and the principle of strict liability brought such clarity. The decision of the tribunal, in disregarding the principle of strict liability, and erring on the side of morality and justice rather than clarity and certainty may well have been a satisfactory result for Greg Rusedski, but it is one which individuals such as Dwain Chambers will look upon with a certain amount of anger. Tennis has, by this verdict, left itself open to charges of incompetence at best or cover-up and corruption at worst. It is a course of action that they may come to regret.'[21]

Proof of Doping

The standards of proof in establishing a doping infraction are prescribed in Article 3.1. of the 2009 Code. This appears to mirror the provisions contained in the 2003 Code:

'The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.'

This Article needs to be read in conjunction with Art 3.2.1, which establishes a rebuttable presumption that the accredited laboratory conducted the analysis correctly. The effect is that once a positive finding had been made by the laboratory, the athlete faces an uphill task to disprove the allegations. The idea that the standard of proof is pitched somewhere between balance of probability and reasonable doubt might seem like a reasonable position in that the standard on governing bodies is higher than that required in a civil case but lower than the criminal standard of proof. In practice, however this definition may prove difficult to apply: does the balance lie exactly in the middle of the two standards? How, in practical terms, is this concept to be elucidated?

In addition to what are commonly known as the 'analytical findings' provision contained in the 2003 Code, the 2009 code also enhances important non-analytical methods by which a doping violation might be established[22]. Irrebuttable proof of doping may be 'established by a decision of a court or professional disciplinary tribunal of competent jurisdiction'[23] and that an adverse inference may be drawn from 'the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation'[24]. Non-analytical methods move away from a scientifically verifiable standard. This would allow use of such evidence that emerged from a 2002 US Federal Government's investigation following the BALCO revelations.[25]

18 To be found at the time of publishing at http://www.ukad.org.uk/documents/uk-anti-doping-advice-card-2010/

19 Editorial *BOA Appeals Panel: Christine Ohuruogu v BOA* I.S.L.R. 2008, 2/3, SLR113. See also Soek J. *The athlete's right to respect for his private life and his home.* I.S.L.J. 2008, 3/4, 3-13. Horvath P. & Lording P. *WADA's International Standard for Testing: privacy issues* W.S.L.R. 2009, 7(2), 14-16.; Nicholson G. Anti-doping and the World Anti-Doping Code: does one size fit all and is the whereabouts system fair, reasonable and efficient? S.L.A. & P. 2009, Apr, 8-11.

20 This logic was affirmed byBlackburne J in Gasser v Stinson Lexisnexis, 15 June 1988

21 I.S.L.R. 2004, 3(Aug), 65-68; Taylor J. *The strict liability test in tennis after Rusedski.* W.S.L.R. 2004, 2(3), 3-7; Blackshaw I, Why Strict Liability is Essential in Policing Doping W.S.L.R. 2006, 4(11), 4-5. Ruskin B., Leader J & Sarinsky M. NFL defends anti-doping policy against state employment law challenge S.L.A. & P. 2009, Aug, 7-9

22 Roberts H. BALCO and beyond: the changing landscape in the fight against doping in Sport S.L.A. & P. 2007, Aug, 1-7.

23 Art.3.2.3

24 Art 3.2.4.; Morgan M. *Doping: sample collection - failure to submit to doping control* W.S.L.R. 2009, 7(11),

Banned substances

In order for a governing body to regulate doping in sport it is necessary that it is able to identify accurately those substances which are not permitted. The WADA banned list is exhaustive; giving not only a list of substances outlawed but also their metabolites (further substances present as a result of the body converting banned substances) and other 'related' substances. In most cases this prevents the athlete's representatives from distinguishing the substances discovered from those specified in the schedules.

The WADA Anti-Doping Code gives criteria for a substance's inclusion on the list. Although some may favour an attempt to justify logically why certain substances are on the list, others will see Art 4 as an attempt to justify the unjustifiable. Inclusion on the banned list is dependent on satisfying two of the three categories for inclusion. As the Code states:

> WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.
> 4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:
> 4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;
> 4.3.1. Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;
> 4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.
> 4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.[26]

It is very difficult to define the 'spirit of sport'; a concept that seems inherently subjective. Some cynics may conclude its violation encompasses any unacceptable conduct not caught by the other two categories. On the basis of Article 4.3, it is unlikely that the CAS will be of assistance in it clarifying its boundaries. Such nebulous phrases do little to enhance the credibility of the code. On the other hand, the concepts of unfair advantage and risk to health are well rehearsed.

Enhancing Sport Performance

On a philosophical level it is argued that taking drugs will give the taker an advantage over a competitor who has not taken drugs and therefore constitutes cheating.[27] Therefore, there are two grounds on which the prohibition of performance enhancing drugs may be justified. First, they give some athletes an unfair advantage over other athletes.[28] Secondly, they give the athlete an unfair advantage over the sport. Governing bodies run the risk that the image and validity of their sport would be undermined by a belief that their sport was conducted on an uneven playing field; this knowledge would lead to a damaging loss in popularity.

Whilst we may concur with these sentiments, eradicating all the unfair advantages that one participant may have over another may not only be impossible but also undesirable. Competitive sport is all about one athlete being better than another and therefore it is beneficial to have physiological and psychological differences between the participants[29].

There are many advantages inherent in, for example, the nationality of an athlete. The skier raised in Austria or Switzerland has an advantage over one raised in Belgium; the runner living at altitude over the runner at sea level; the height advantage of the average American basketball player over the average oriental player; or the technological, training and dietary advantages of the rich nation over the impoverished third world county. All of these factors are advantages and may be considered unfair in terms of sporting equality.

An alternative argument is that, rather than cheating fellow competitors, the drug taker is cheating 'the sport' itself. Clearly the essence of a sport would be compromised by certain breaches of the rules. It would be totally unacceptable for Usain Bolt to be beaten in an Olympic 100 metres final by a competitor riding a horse or for Tiger Woods to lose the Masters to a player with a radio controlled golf ball. As Gardner has questioned, 'would allowing unrestricted use of steroids in the 100 metres be somewhat like providing the participants with motorcycles?'[30]

There are two problems with an affirmative answer. First, not all tactical or technical deviations from the norm are prohibited. Indeed there is a lack of uniformity in the equipment used in many sports (boots, racquets, bats etc). Secondly, the question presumes that performance enhancing drugs are an extrinsic aid unrelated to the skills and physical condition of the athlete. However, as their name would suggest, these drugs enhance performance, that is, they allow the athlete to reach their full potential; and so parallels with motorcyclists are difficult to sustain.

Can a competitor truly claim victory if it is achieved with the assistance of drugs? Victory is inextricably linked to rules. It is questionable whether the drug taking athlete has competed in the first place. Successful athletes are afforded a unique place in society. Sporting heroes are society's heroes. By heralding the success of a drugs-assisted athlete we are in danger of undermining society itself.[31]

Health Risks

There is no doubt that doping can damage your health[32]. To some sporting participants the side effects of these drugs outweigh the advantages of taking them. At the highest level, however, the competitive instincts of many participants may blind them to the dangers.

How justified are governing bodies in taking a paternalist approach to protect the welfare of sporting participants?[33] Traditional paternalist jurisprudence would argue that such approach is only valid if the effect of the prohibition is to protect those unable to make an informed and rational judgment for themselves or to prevent harm to others. An obvious example of the former would be a ban on the taking of performance enhancing drugs by children and junior athletes, yet the extension of the ban beyond this point is more difficult to justify. If the governing bodies genuinely wished to protect the health of sportsmen and women would they not introduce a provision which forbade a competitor competing whilst injured? Women's gymnastics would also need to be reviewed bearing in mind the incidence of arthritis and other diseases of the joints suffered by competitors in later life. There are also a number of contact sports which, by the nature of the activity, are likely to cause injury. No doubt the governing bodies of sport would argue that the risks of injury in certain sports are well known and that competitors are in some way consenting to the possibility of harm. The difficulty with this argument is that it could apply equally to doping.

It can be argued that drugs are not taken freely. Athletes are coerced into taking them by a belief that without them they would have little

25 See USADA v Montgomery CAS 2004/O/645,

26 Article 4.3

27 Simon, RL, *Fair Play: Sports, Values and Society* (1991), Boulder: Westview Press, Chapter 4.

28 Gardner, R, 'On performance enhancing substances and the unfair advantage argument (1989) XVI Journal of the Philosophy of Sport 59; Brown, WM, 'Drugs, ethics and sport' (1980) VII Journal of the Philosophy of Sport 15; Brown, WM, 'Fraleigh performance enhancing drugs in sport' (1985) XI Journal of the Philosophy of Sport 23; Brown, WM, 'Comments on Simon and Fraleigh' (1984) XI Journal of the Philosophy of Sport, 14.

29 Oscar Pistorius, a disabled runner bidding to run against able-bodied athletes with the aid of prosthetic legs raised interesting issues of inclusivity and performance enhancement. Wolbring G. *Oscar Pistorius and the future nature of Olympic, Paralympic and other sports*. SCRIPT-ed 2008, 5(1), Internet. FOR MORE ANLAYSIS SEE PAGES XX-XX.

30 *Ibid*.

31 *Ibid*, p 68.

32 Although what is debatable is the quantities needed to do so.

33 Simon, RL, 'Good competition and drug-enhanced performance' (1984) XI Journal of the Philosophy of Sport 6; Brown, WM, 'Paternalism, drugs and the nature of sports' (1984) XI Journal of the Philosophy of Sport 14; Lavin, M, 'Sports and drugs: are the current bans justified?' (1987) XIV Journal of the Philosophy of Sport 34; and Fairchild, D, 'Sport abjection: steroids and the uglification of the athlete' (1987) XIV Journal of the Philosophy of Sport 74.

chance of sporting success.[34] However, there are many training regimes which athletes can and do reject on the basis that they may cause long term physiological damage: if injury is the mischief, it is difficult to understand why drug taking should be treated differently. On what basis then can society be justified in favouring the prohibition of performance enhancing drugs when intervention in an athlete's life can amount to a greater wrong than the risk of illness voluntarily accepted?

As the BALCO Enquiry has shown, no matter how comprehensive the list of banned substances, however, there is always the danger that the chemist will be one step ahead, altering the chemical structure of compounds so as to distinguish the drug from those encompassed by the regulations. An alternative to the ever-increasing list system would be to look generally for abnormalities in samples. This proposition, although clearly attractive in many ways, is fundamentally flawed. An athlete could argue that it becomes impossible to act within the rules of the governing body if it is unclear exactly what those rules are until they are broken. Whilst it is accepted that the introduction of such a system would enable WADA to ensnare the 'cheats', it may be at the expense of many innocent athletes.

Equally, the list contains some substances that would appear to have nothing but a negative effect on sporting performance - the so-called 'recreational drugs' typify this anomaly. For example, former Bath and England Rugby Union prop, Matt Stevens, can return to the game in 2011 following a two-year ban for testing positive for a substance alleged to be cocaine

Sanctions

It is in the area of sanctions that the 2009 Code has redeveloped anti-doping most significantly. Under Article 9 of the Code, a doping violation detected at a specific sport event results in the disqualification of the athlete from that event. However

> If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be disqualified unless the Athlete's results in Competitions other than the Competition in which the antidoping rule violation occurred were likely to have been affected by the Athlete's antidoping rule violation.[35]

Article 10 deals with sanctions above and beyond the immediate event disqualification. The regulations covering sanctions represent the most complex part of the WADA Code as they attempt to deal with a number of variables distinguishing between teams and individuals, different types of doping infractions and the various degrees of culpability. The 2009 Code has built greater flexibility into the system of sanctions, the compromise for which is an even greater degree of complexity: It states:

> The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
> First violation: Two (2) years Ineligibility.[36]
>
> 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 (Refusing or Failing to Submit to Sample Collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility period shall be two (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 (Trafficking or Attempted Trafficking) or 2.8 (Administration or Attempted Administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime Ineligibility unless the conditions provided in Article 10.5 are met. An anti-doping rule violation involving a Minor shall be considered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than Specified Substances referenced in Article 4.2.2, shall result in lifetime Ineligibility for Athlete Support Personnel. In addition, significant violations of Articles 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.
> 10.3.3 For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault.[37]

The Code allows athletes to argue mitigation in respect of the above sanctions depending on the degree of culpability. Sanctions can be reviewed on the grounds that: a specified substance gave the athlete no advantage[38]; where there was no fault or negligence on the part of the athlete such as when an athlete's drinks bottle is contaminated by a rival competitor[39]; or when the there is no significant fault on the part of the athlete[40]. The Code states specifically that the use of mislabelled or contaminated substances; the administration of banned substances by the athlete's trainer or doctor without the athlete's knowledge; or sabotage by one of the athletes circle of associates (including the athlete's spouse) may not be invoked under Art.10.5.1. It is less clear whether these explanations will find favour under Art 10.5.2. as being a good explanation for departing from the expected standard of behaviour. Article 10.5.3 introduces more complex whistle-blowing mitigation:

> An Anti-Doping Organization with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti- Doping Organization, criminal authority or professional disciplinary body which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person. After a final appellate decision under Article 13 or the expiration of time to appeal, an Anti-Doping Organization may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA and the applicable International Federation. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this section must be no less than eight (8) years. If the Anti-Doping Organization suspends any part of the otherwise applicable period of Ineligibility under this Article, the Anti-Doping Organization shall promptly provide a written justification for its decision to each Anti-Doping Organization having a right to appeal the decision. If the Anti-Doping Organization subsequently reinstates any part of the suspended period of Ineligibility because the Athlete or other Person has failed to provide the Substantial Assistance which was anticipated, the Athlete or other Person may appeal the reinstatement pursuant to Article 13.2.[41]

Article 10.5.4 rewards co-operation:

> Where an Athlete or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule viola-

34 Thomas, CE, *Sport in a Philosophic Context* (1983), Philidelphia: Lea & Febiger; Wertheimer, A, *Coercion* (1989), Princeton: Princeton UP.
35 ART.10.1.1
36 ART 10.2
37 Art 10.3
38 ART.10.4
39 ART 10.5.1
40 ART.10.5.2

tion (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable.[42]

The sanctions above are also subject to increase on the grounds of aggravating circumstances[43]. Overall, the system of sanction reflects more intelligently the range of circumstances that anti-doping institutions might face and gives those institutions greater flexibility in matching the appropriate violation with the appropriate sanction. WADA should be applauded for this development. Any system of regulation however must be clear and understandable in order that athletes and other parties might abide by them. The complexity in circumstances where there might be more that one offence either concurrently or consecutively or more that one head of mitigation is frightening. WADA deal with these scenarios with accompanying notes and tables but, no matter how erudite, they illustrate the difficulties in drafting law or regulations that are both just and simple[44].

The sanctions described above are drafted with the intention of ensuring a consistency of duration. They are not however, drafted to provide a consistency of sanction. A two year ban for athletes in some sports where the sporting career is short, gymnastics for example, is akin to a life ban. In other sports noted for the longevity of a competitor's career, equestrianism for example, the sanction merely interrupts a career. This is particularly so in individual competition where there is nothing to prevent the competitor from practicing and refining their skills during whilst banned:

During Ineligibility No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization. An Athlete or other Person subject to a period of Ineligibility longer than four (4) years may, after completing four (4) years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Athlete or other Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event.[45]

The word 'activity' makes it clear that, as well as being banned for competing in competitions in that particular sport, the ban extends to other involvement such as coaching, and to other sports.[46] It is interesting to note that the 2009 Code acknowledges that to deprive an athlete banned for more that four years from undertaking another organised sport for recreational purpose is draconian beyond the point of necessity. Article 11.2 deals with team sanctions:

If more than two members of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athletes committing the anti-doping rule violation.

The Future of Anti-Doping

It is clear from Meca-Medina v Commission of the European Communities that the law is prepared to play an active part in adjudicating on the lawfulness of anti-doping regulations. It is also clear however that the WADA code has been given the green light by the courts. Legal challenges by athletes on the basis of the codes substantive provisions are unlikely to succeed therefore. Challenges will remain possible if the body or bodies charged with giving effect to the code fail to do so. These will be broadly procedural:

WADA's effort might be seen by some as the latest attempt of the sports world to immunise sports from state control. The situation is more complex, however. The adoption of a Code, which complies with the fundamental rights of athletes, was only made possible thanks to a broad consultation of all stakeholders. Indeed, as a result of such consultation, the concerns about fundamental rights were duly taken into account in the course of the drafting process. This represents a major step forward as opposed to an approach that ignores fundamental rights requirements and, thus, leaves the enforcement of such rights to the courts. In that situation, the only rights protected are those of the individual athlete who has access to a court willing to interfere in sports matters and who can afford legal proceedings. By contrast, all the athletes will benefit from the fundamental rights protection incorporated into the Code.[47]

It is difficult to understand why it appears that only 'fundamental rights' are at issue. Why shouldn't a broader raft of rights, such as the right to be treated reasonably, fairly and equitably, be considered? The above authors claim that the code is not designed to immunise against the intervention of law but then justify the Code only in terms of identifiable legal rights. Certainly, in its preamble WADA does not attempt to promote the Code as a document protecting athletes' rights. Indeed, the only 'fundamental right' that the Code acknowledges athletes deserve is to 'participate in doping-free sport and thus promote health, fairness and equality for 'Athletes worldwide'.

Nevertheless, on balance, the 2009 Code is an improvement on the 2003 model, although there may be some interesting legal issues surrounding the imposition of a sanctions regime the complexity of which is daunting. Athletes may still seek legal redress as a matter of principle because an athlete who tests positive but is shown to be entirely without fault has still committed a doping violation (no fault does not vindicate the athlete - it merely goes to the severity of sanction). In any anti-doping code there will always be a degree of irreconcilability between the rights of athletes to compete freely and the rights of sport to regulate competition. The 2009 Code makes a much better attempt at balancing these tensions than the Code of 2003.

Anti-doping is far from a settled legal landscape however. New unresolved legal issues will emerge to ensure anti-doping remains a vibrant and interesting legal area. Some of these issues revolve around the ambit of anti-doping regulation; others relate to the increasing political influence over anti-doping matters. There is still some ambiguity about the culpability of trainers, doctors and other support staff and the degree to which the Code is lawfully binding on their activities[48] There may well be further judicial activity surrounding the termination of a contract of employment following a positive test and the quantum of damages owed by the athlete to the employer as a consequence. The CAS confirmed Chelsea Football Club's right to claim compensation from Adrian Mutu who was dismissed by the club following a positive test for cocaine in 2004.[49] There are also interesting legal issues surrounding privacy[50], free speech and a right to a home life. Given the nature of out-of competition testing which requires athletes to notify the relevant doping control of their whereabouts there are legal questions as to whether the Code complies with the right to privacy in the European Convention on Human Rights 1950 art.8[51] There might also be judicial

41 10.5.3
42 Art 4.5.4
43 ART.10.6
44 Celli A., Valloni L., & Pentsov D. Sanctions for anti-doping rule violations in the revised version of the World Anti-Doping Code I.S.L.J. 2008, 3/4, 36-42
45 10.10.1
46 As long as that other sport is a signatory to the Code.
47 Antonio Rigozzi, A, Kaufmann-Kohler, G, Malinverni, 'Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code' ISLR 2003, 3(AUG), 39-67.
48 Finlay A. Trainers, negligence and anti-doping rules W.S.L.R. 2010, 8(1), 6-7; O'Leary J & Wood R. Doping, doctors and athletes: the evolving legal paradigm I.S.L.J. 2006, 3/4, 62-66
49 Mutu v Chelsea Football Club Ltd Unreported July 31, 2009 (CAS) I.S.L.R. 2009, 4, 138-158
50 Verroken M. WADA's International Standard for the Protection of Privacy D.P.L. & P. 2008, 5(6), 9-11

activity relating to the retrospective impact of revelations of doping impropriety by retired athletes such as in autobiographies[52] Such is the negative public profile of athletes involved in doping such an allegation is likely to lower them in the eyes of right-thinking people. Actions for defamation may well result on a more regular bases as athletes attempt to defend their reputation (and indeed their future commercial prospects) in the face of media allegations reported on the basis of public interest[53]. Such an action was brought successfully by Lance Armstrong in the Court of Appeal against the Times Newspaper following allegations that Armstrong had used doping substances[54].

Perhaps the most significant anticipated development however is the continued politicisation of doping activities. Symbolised by the Helsinki Report on Sport, one might expect greater political engagement with anti-doping which will result in calls for greater criminalisation of doping. The result to date is that many nations have enacted laws which specifically criminalise doping in sport.[55]. There are obvious difficulties in reconciling the WADA code with principles of criminal law at a national level not least the differing standards and burdens of proof and the notion of criminalising activities carried out in sport which would not necessarily be criminal in the non-sporting context. Nevertheless, the movement has already resulted in the increased involvement in anti-doping of international policing bodies such as Interpol and cross-border co-operation on anti-doping. This development, which on the face of it might seem to enhance the harmonisation of anti-doping policies might prove to be divisive in the long-term as countries with more liberal drug laws resist the establishment of global anti-doping crimes.

51 Horvath P. & Lording P. WADA's International Standard for Testing: privacy issues W.S.L.R. 2009, 7(2), 14-16; Soek J. The athlete's right to respect for his private life and his home I.S.L.J. 2008, 3/4, 3-13; Nicholson G. Anti-doping and the World Anti-Doping Code: does one size fit all and is the whereabouts system fair, reasonable and efficient? S.L.A. & P. 2009, Apr, 8-11

52 Grove S. & Parks J. Sanctioning ex-athletes for autobiographical revelations W.S.L.R. 2010, 8(1), 4-5

53 See Reynolds v Times Newspapers Ltd [2001] 2 AC 127; Chapman v Lord Ellesmere and Others [1932] 2 K.B. 431; Cooke J. Doping and free speech E. & S.L.J. 2007, 5(2)

54 Lance Armstrong v Times Newspapers Ltd, David Walsh, Alan English [2005] EWCA Civ 1007

55 See for example Halgreen L. The Danish Elite Sports Act I.S.L.R. 2005, 3(Aug), 74-75; Hufschmid D. & Giesser T. Switzerland: Stricter rules against doping abuse in Swiss legislation project I.S.L.R. 2010, 1, 25-27; Ndlovu P. Anti-doping law in South Africa - the challenges of the World Anti-Doping Code I.S.L.J. 2006, 1/2, 60-63

Criminalization of trade and trafficking in doping substances in the European Union

by **Magdelena Kedzoir**

Introduction

Although the answer to the question whether criminal or administrative sanctions shall be applied against trade and trafficking in doping substances, especially for personal use, remains a matter of political and personal approach[1], there have been clear regulatory steps taken on European level towards criminalization.[2] In the White Book on Sport (2007), under point 2.2., the European Commission clearly called member states to treat trade and trafficking in doping substances as illegal, same like trade and trafficking in illicit drugs.[3] When holding EU presidency Slovenian sport Minister *Miran Zwer* announced very clearly: "*We need to develop one rule for the whole of the EU, so every country treats the issue the same. It cannot be illegal in one country and then not in another because the offenders are clever and exploit this*". On the European Council summit in Athens in May 2009 the Commission once again called member states (which have not done it so far) to criminalize trade and trafficking in doping substances. What is more, the Commission urged member states to criminalize the possession of doping substances with the intention to spread them on the market.[4] Such intention raises crucial questions about EU competence in the field of harmonization and criminalization of trade and trafficking in doping as well as regards the possible legal grounds for common action of the European Union in this field.

These abstract attempts to deliver answers to the question whether the process of criminalization of trade and trafficking in doping substances on the EU level is legally feasible and if so, to what extent. It depicts reasons for the EU involvement in the area of trade and trafficking in doping and analyses the position of the EU Commission on the problem of trade and trafficking in doping substances. Moreover, it shows the outline of legal situation in the different member states of the EU. Finally respective Treaty provisions will be shortly analyzed in order to find possible legal grounds for criminalization of trade and trafficking in doping on the EU level. It is argued that such a common approach is currently possible only in certain aspects of the aforementioned problem.

Reasons for the EU interference

One may wonder why the EU shall interfere with the question of trade and trafficking in doping substances if some international organizations such as Council of Europe or UNESCO have already been involved. Numerous overlaps between the problem of drug trafficking for doping purposes and EU policies shall be mentioned in this context.

The general use and accessibility of drugs enhancing performance in recreational sports create a serious public health threat, especially to younger sportsmen (a subject of the EU policy laid down in article 168 of the Treaty on the Functioning of the EU - consolidated version). Anabolic steroids and other doping substances are relatively easy and

1 More on this subject Chr. McKenzie, The use of criminal justice mechanisms to combat doping in sport, Bond University, Faculty of Law, Sports Law eJournal, August 2007, available at http://epublications.bond.edu.au/slej/4, [Accessed: 12.9.2011]; Further on the use of criminal law and approach to enforcement of anti-doping and anti-drug policy A. Ammos, Anti-Doping Policy: Rationale or Rationalization? The development of Anti-Doping Policy since the 1920s, Lambert Academic Publishing 2009, pp. 124 et seq.

2 This happens after the years of denial of the EU competence in the field of anti-doping, see An Vermeersch, The European Union and the fight against doping in sport: on the field or on the sidelines?, Entertainment and Sports Law Journal [online], April 2006, available at http://go.warwick.ac.uk/eslj/issues/volume4/number1/vermeersch/, [Accessed: 13.10.2011].

3 In the area of general drug abuse the European Pact on international drug trafficking adopted by the Council on 3 June 2010, and the European Pact against synthetic drugs initiated by the Polish Presidency constitute the recent initiatives launched to clamp down on drug trafficking. European Commission, Brussels, COM(2011) 689/2, Communication from the Commission to the European Parliament and the Council, Towards a stronger European response to drugs http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf, [Accessed: 11.10.2011]

4 EU Conference on Anti-Doping, Organized by the European Commission, Athens, Greece, 13 - 15 May 2009 Conclusions of the Conference, available at http://ec.europa.eu/sport/news/doc/athens_conf_conclusions_final_version_en.pdf, [Accessed: 11.10.2011].