Abstract

Doping is a problem that constitutes a danger for both sport and athletes and contravenes the principles of Olympism. Therefore, a legal framework has been set up in order to confront doping. Particularly, sanctions have been imposed to athletes found guilty for violations of the anti-doping rules. From their side, athletes have the legal rights to defend themselves. Certain performance-enhancing substances and training methods are forbidden by the International Olympic Committee (IOC), the International Association of Athletics Federations (IAAF) and the World Anti-Doping Agency (WADA) and other international sport organizations. The current efforts of IOC, IAAF and WADA to enforce general regulations to punish doping violations is proven insufficient because their current policy fails to consider the sports code of ethics and the social aspects of the different national and cultural background from which dopers come. Effective action against doping demands international cooperation in governmental and non-governmental level. In fact, there is a stronger need for harmonization of the sanctions for doping in all countries in order to make a step towards the confrontation of all doping cases.

Key words: doping, doping sanctions, athletes’ rights, harmonization

Doping and its legal framework

Doping contravenes the principles of Olympism and breaks sports and medical ethics code and thus it is forbidden together with any recommendation, proposal, authorization and facilitation of the used of any banned substance (Olympic Movement, 1999). Doping is officially illegal after sports organizations have identified the practice based on the principle of equal opportunities in competition. However, doping does not constitute a criminal offence and thus it is not related to penal law. Even in civil law it is not unchallenged, because an athlete has the right to treat his/her body the way he/she wants but not in a way that has an effect on another athlete. (Luschen, 2000, p. 465)

It is stressed in the Council of Europe’s ‘Anti-Doping Charter for Sport’ that the elimination of drug misuse in sport requires common action by public authorities, each functioning within its section of responsibility. The Council recommended the member states’ governments to implement effective anti-doping regulations, to create and operate doping control laboratories, to encourage and promote suitable research in these drug testing centres and to devise and implement educational campaigns against drug misuse. Finally, the governments were responsible for the financing of doping controls. The national sports organizations are advised by the Council of Europe to adopt the IOC and IAAF anti-doping regulations, procedures and lists of banned drugs, use fully the doping control centre and proceed to the introduction of compulsory drug testing for all their national members. Moreover, the Council of Europe indicated that the national sports organizations shall penalize the athletes who have been found guilty of drug misuse and their assistants (Donohoe & Johnson, 1986, p. 134).
The Anti-Doping Convention conceived doping as a growing problem which threatens the health of the participants and the future of sport. According to the Council of Europe, this problem puts in danger the code of ethics and educational values that exist in the Olympic Charter, in the International Charter for Sport and Physical Education of UNESCO and in the European 'Sport for All' Charter. The themes of the Anti-Doping Convention in Strasbourg were doping in sport, pharmacological classes of doping agents or doping methods and sportsmen and sportswomen (http://europa.eu.int/comm/sport/key_files/doping/b_what_en.htm).

The 1989 Anti-Doping Convention is in force in many European countries, including the UK, France, Switzerland and Italy. The contracting states undertook various obligations in order to fight doping. In Article 7, Convention countries must encourage their sports organizations to harmonize: ‘disciplinatory procedures, applying recognized international principles of suspected sportsmen and sportswomen’. Two important principles are the right to a fair hearing and the right to an appeal of any sports governing body domestic tribunal judgement against the athlete (Wise & Meyer, 1997, p. 247-248).

Rules usually refer to substances with a familiar link as chemically or pharmacologically related compounds. Mostly, this prevents the athlete’s representatives from distinguishing the drug(s) discovered from those specified in the schedules. An alternative to the ever increasing list system would be to look for abnormalities in samples. There was a suggestion that the world governing body assemble a panel of medical and legal experts who would examine samples for irregularities, decide whether they are performance enhancers, regardless of their appearance on the lists of banned substances and sanction the competitors accordingly (Gardiner, 2001, p. 312).

The IOC and the sporting federations require competitors to undergo simple testing procedures. These tests are normally carried out on a random sampling procedure at major sporting events, though administrative bodies are introducing out-of reason-random drug testing programs (Mottram, 1988, p. 24). Testing performs three functions: a) It is relied upon athletes to protect them from other athletes who break the rules, b) it can be the means by which an athlete’s reputation as a drug free athlete is confirmed and c) it may also be the way that the athlete is found to have broken the rules (Verroken, 2001, p. 31).

In doping, there are two basic juridical problems, according to Jean-Philippe Rochat (2004). The judicial system and the anti-doping measures have been developed in a very complicated way. There is a conflict of ideas between the IOC and the sporting federations. A similar conflict takes place among the state legal systems with the introduction of anti-doping rules and the organization of international conferences. Inevitably, the reproduction of the anti-doping rules leads to confusion. The management of a rational anti-doping campaign will only be possible by the harmonization of anti-doping rules (Rochat, 2004, p. 261).

The sanctions for doping

According to the Declaration of Lausanne (2-4 February 1999, Olympic Review, Vol. XXVI, 25, pp 17-18) the World Anti-Doping Agency (WADA) together with governments, governmental and non-governmental organizations, the IOC, the world federations for sport, the National Olympic Committees and the unions of sportsmen indicates the compulsory sanctions in the structure of controls during the sporting events but out of sport as well. According to the sportsmen’s claims, the National Olympic Committees and the majority of world federations, the lowest sanction for the main doping substances and forbidden methods will be a two-year ban from every sporting event for the athlete who had been found guilty. However, the exceptive conditions are to be taken into consideration by the world federations and there is a possibility for the amendment of the two-year ban. Additional
sanctions will be possibly valid and stricter sanctions for the coaches and officials for the violations of the Anti-Doping Code (Tzima-Tzanetopoulou, 2003, p. 221-222).

According to the IAAF regulations, (IAAF Handbook 1996/7, Rule 59) disciplinary action is composed of: a) suspension, b) hearing, c) ineligibility. The athlete shall have the right of hearing before the relevant tribunal of his National Federation before any decision on eligibility is reached. The athlete is informed on this right with a notice, together with a notice of application. Moreover, if an athlete is found to have committed a doping offence and this is confirmed after a hearing or the athlete waives the right to a hearing, he shall be declared ineligible. Finally, the athlete shall be disqualified from that competition and the date of his ineligibility would be the date of the sample’s provision (Gardiner, 2001, p. 317).

The IAAF is operating a system of strict liability. The justification behind the rules of strict liability is that otherwise a coach and horse could be driven out through the policy which underlies the rules: the absolute prohibition on the use of substances which give one competitor an unfair advantage over the other. To require the relevant sports body to establish mens rea would impose upon it a burden which it could not easily discharge, and which could lead to protracted, bitter and ultimately inconclusive hearings (Beloff, 2001, p. 44). Strict liability in doping regulations allows a governing body to ban an athlete without showing that the athlete intended to take the substance based on the positive test. The rules of the IAAF allow exceptionally for the governing body to find an athlete ‘non guilty’ if there is sufficient evidence. However, without such proof it would be insufficient for an athlete to support that he or she was not aware of how the substance got into their urine. Despite the obvious concerns over such a rule, the English High Court in the case of Gasser vs Stinson did hold that a strict liability rule was lawful bearing in mind that it may be the only method of providing a treatment to the doping problem (Beloff, 2001, p. 309). According to Ken Foster, ‘this language allows a perception, that normal legal safeguards to protect the victims of this war, the innocent athletes who suffer injustice and the destruction of their careers, can be ignored or compromised’ (Foster, 2001, p. 181). However, in the case in which the IAAF confirmed bans on British athletes, who were found positive for nandrolone, criminal law is involved. This means that the athletes who were accused of committing a crime have the benefit of any reasonable doubt and should be treated as innocent until proven guilty.

The disagreement of IAAF with the Athletics UK about the doping case of Linford Christie and Dougie Walker shows that the IAAF has taken an extreme position according to which a positive test shows guilt and there are no valid excuses as to why that should not be punished. This position causes Athletics UK further problems for having to practice the IAAF policy while reconciling that policy with its own precarious financial position (Foster, 2001, p. 324). The IAAF insisted that the regulations were followed strictly in countries which are incompatible with national laws. In the case of Linford Christie, the IAAF, unsatisfied by the reluctance of Athletics UK to act on the positive test, followed its own policy. The ban on Christie seems unreasonable because the suspension deals with Christie’s ability to compete, not to coach an Australian athletic team. Moreover, until the IAAF conducted its hearing, Christie could not have been guilty of any offence (Foster, 2001, p. 318).

The increasing legal doubt for the results of chemical analysis and of decision-taking by the authorities shows the necessity for the harmonization of the anti-doping federations and national agencies. The greater harmonization would reduce the chances for legal doubt and guide to the decrease of appeals based on the insufficiency of the federations’ rules (Foster, 2001, p. 300).

In August, 2007 the World Athletics Federation called on the World Anti-Doping Agency to impose tougher sanctions for drug offenders, including four-year bans for serious first-time infractions. IAAF president Lamine Diack said he would not hesitate to seek harsher penalties for his federation alone. “If need be we can take our own measures when we find it necessary to apply four-year sanctions,” Diack said, arguing the harsher bans could be
applied in exceptional circumstances. Four-year sanctions would be more vulnerable on appeal if the current WADA rules are confirmed (ESPN Track and Field, 2007).

Sports like soccer and cycling were already loath to accept a two-year ban, which was instituted in 2004. Any change to tougher sanctions is expected to meet with opposition, including arguments that such penalties will not stand up in civil courts. While doping scandals have centred on cycling and baseball, athletics has suffered too. Justin Gatlin, the double-gold sprint star of the world championships in Helsinki, Finland, two years ago, was not in Japan. Gatlin, also the 100-meter gold medallist at the Athens Olympics, tested positive for testosterone and steroids in April 2006 and is fighting charges that could see him suspended for eight years. Moreover, Russian world record holder Tatyana Lysenko and a fellow hammer thrower tested positive for doping in out-of-competition tests on May 9, 2007 and Russia's team coach was suspended. Finally, Jolanda Ceplak from Slovenia, the 800-meter indoor world record holder, has been suspended after testing positive for the blood-booster EPO. The IAAF promised to carry out the sport's most rigorous anti-doping program to date with more than 1000 tests during the championships (ESPN Track and Field, 2007).

Athletes’ fundamental rights

The athletes are able to defend themselves through various fundamental rights. First, they have the right to be informed of the charges because otherwise they cannot defend themselves. This right was supposed to aim at the parties’ equal treatment to the proceedings (Soek, 2001, p. 61). Moreover, the athlete has the right to appear in person during the proceedings before it is possible to be heard. The principle of audi alteram partem contains the athlete’s right to act in his defence. Not only does this principle include the right to appear in person or through his representative, it also includes the right to present evidence and the right to present witnesses and experts. If the athlete is unable to be present he has the right to defend himself in writing. In addition, the principle has to be explained to include the athlete’s right to give oral statements (Soek, 2001, p. 62-63).

Critique of the sanctions

Athletes’ procedural safeguards are based on the contract between the governing body and the athlete. In many instances, the regulations try to provide the athlete with the right akin to those presented in a national court. However, there is no guarantee for this since ‘the athlete facing doping charges in many cases unable to invoke the rules of procedural fairness, unlike his fellow citizens in proceedings before governmental bodies, if the regulations of the IF (International Federations) in force of in his particular branch of sport do no provide these’ Jan Willem Soek indicates. This might differ only in the doping process started by a national federation or in country which is a party to the Anti-Doping Convention of the Treaty of Europe. Internationally organized sport has to form regulations in order to fill this void and follow the developments in civilization which includes sport (Soek, 2001, p. 73).

The variety of rules and regulations leads to a variety in sports. This variety is a result of the differences between (1) the national regulations and the rules and regulations of sports unions, (2) the rules and regulations of different international sports federations, including IOC, and (3) rules and regulations of different national sports unions. Conclusively, someone could speak about a ‘patch’ of rules and regulations which shows the need for harmonization (Vieweg, 2004, p. 413).

The harmonization of sanctions among national and international federations is an issue that has to be solved. There are people who have doubts for the inappropriate harmonization which tries to handle all sports in the same way and distinguishes the medical
substances into two or three basic categories. They believe that the sanctions should have been more sensitive to the special characteristics of each sport. In most legal systems the punishment is a mixture of obligatory sanctions and sanctions that depend on the court’s judgement and according to the legal directives. Regarding doping there are sports such as cycling and track and field sports whose federations adapt the sanctions proposed by the IOC (Houlihan, 1999, p. 307). Some federations want to adapt the IOC sanctions, a fact which is not a sign of commitment. For others, this will reflect the recognition of dangers connected with the existing sanctions to the athletes and the security which is offered by the practice of a sanction based on a legislation formed by the IOC with the basic federations. The position of IAAF as a great Olympic athletic federation gives special importance. Its decision to provide its sanctions closer to that of the IOC is possible to undermine the specialization of the sanctions. Thus, it will be very different for the other federations to keep the impose of sanctions which overwhelm the IOC line (Houlihan, 1999, p. 309).

The idea of harmonization has the following advantages: (1) athletes competing in different sports will receive the equal treatment in different countries, (2) if an athlete changes sport then the ban can be transferred with the athlete, and (3) athletes who compete abroad will be treated equitably irrespective of jurisdictional competence. However, it may be impossible to take into account the special traits of different sports. So, the existence of one doping regulation system that applies equally to all sports is impossible, because of the differences in the nature of sporting activities. A two year ban on competitors in some sports may effectively be a life ban while in other sports, where competition is less frequent, a two year ban would represent the loss of a few competitions. Also it is inevitable that harmonization will lead to the preference of national laws instead of the international regulations. Currently there are important differences in the rules of the governing bodies since some of them follow the strict liability while others follow the sanctions suggested by the IOC. The present system could lead to little satisfaction of the competitors, if that system does not address the problem of strict liability or an improved system of sample testing or hearings procedure (Gardiner, 2001, p. 326-327).

In harmonization, one is able to identify the problem according to the EU, that inconsistency in the doping regulations of the governing bodies to regulate themselves without legal intervention. The imposition of strict national laws may satisfy the governing bodies but would not resolve the problems found by the competitors or ‘outsiders’ (O’Leary, 2001, p. 259).

Any provision purporting to criminalize doping by competitor themselves would not be subject to a strict liability offence. The establishment of *mens rea* or ‘guilty mind’ dominates in Britain. Section 28(3)(b)(i) of the Misuse of Drugs Act of 1971 makes it clear that a person shall be acquitted if he proves that he neither believed or suspected nor had the reason to suspect that the substance or product in question was a controlled drug. According to Gardiner, ‘*this means that any criminal sanction mirroring the regulations of sports governing bodies would be less effective that those regulations, because the competitor may be able to show a lack the requisite ‘guilty mind’ for such an offence*’ (Gardiner, 2001, p. 328).

Sanctions against athletes must be more fairly and uniformly applied. This does not mean that an athlete should be punished in all cases in which his or her sample was found positive, because there are circumstances in which other factors determine the originality of the drug abuse. Such circumstances should be based on scientific facts or level of uncertainty in the interpretation of the facts and not on irrelevant criteria (Kammerer, 2001, p. 20). Besides, the different views of national and international sport federations concerning sanctions, and the duration of the bans are another obstacle for the establishment of a common anti-doping legislation. For instance, for soccer and cycling, a two-year ban would not be legally enforceable. Richard Pound, the IOC vice-president, said that the two-year suspensions of the professional players were a result of the labour laws’ use. There is a
need for a principle that the same rights apply to every athlete and the establishment of flexible sanctions (Ferstle, 2001, p. 284).

The relationship between an athlete and the governing body is a contractual one. In essence, a doping offence on the part of a competitor is a breach of contract, leaving the competitor subject to the doping penalties imposed by the contract. To criminalize these doping offences would be to impose a criminal sanction for a breach of contract. Besides, sportsmen would be in a disadvantage compared to other citizens. If the list of banned substances were to remain the same, then a competitor may be imprisoned for the consumption of excessive amounts of coffee, while his non athlete companions would face no punishment. If the criminal action omitted caffeine, for instance, then, due to strict liability, the athlete who was found positive for caffeine can face difficulties in disproving the allegation that his fellow citizen (Gardiner, 2001, p. 328).

It is difficult for many countries to criminalize behaviour, which is an employee disciplinary issue, or the cheating of a competitor playing the Game, which provides that individual with an income. For the governing body, criminalization is not a solution. If the state takes the place of the governing body in actions against competitors then it reduces the risk of legal action against governing bodies (Gardiner, 2001, p. 329). However, the creation of CAS shows the effort to ‘create an additional layer of disciplinary hearing in an attempt to achieve what governing bodies are attempting to achieve by a watertight construction of their doping regulations ensuring self autonomy, free from the interference by courts of the law’ as O’Leary argues (O’Leary, 2001, p. 257).

Effective action against doping requires international cooperation between governing bodies and non-governmental organizations. Moreover, there is a need for sports federations and organizations to re-examine anti-doping legislation, the way by which the tests are conducted and the punishments if the tests are positive. In addition, if anti-doping regulations are to be successful, they must have the federation’s support to enforce consistent penalties for the athletes’ doctors or trainers that have been found guilty. The function of dope control is essential to constitute a deterrent rather than a punishment. Besides, doping control does not work in terms of the impossibility of imposing a uniformed system of doping control across a variety of countries and cultures or the provision of the athlete with a system of rights equivalent or better than those that exist under the national legislation.

A basic step towards a solution to the doping problem is the common doping regulations across a range of sports in different countries. In that way, athletes competing in different sports will be faced equally under the law in issues such as duration of ban; the ban will be transferred if the athlete changes sport and athletes who compete in another country will be treated equally regardless of the jurisdictional competence.

All anti-doping policies penalize doping whether the athlete intended to ingest the prohibited substance or not. However, the athletes who clearly did not intend to gain any competitive profit have an advantage. Balanced against this is the concern that permitting exceptions for inadvertent use will finally gut anti-doping policies. Similar concerns take place regarding the therapeutic use though permitting the athlete to register and apply for such use may guide to the limitation of such cases (Buti-Fridman, 2001, p. 148).

Regarding the banned substances which have no real performance-enhancing effects, the final decision for their testing depends on the underlying policy of the related anti-doping code. There is no consensus on this policy. In addition, there is a challenge to the fairness of a contract, embodying rules which authorize testing for non-performance-enhancing substances. Moreover, given the number of cases that have involved athletes’ use of cold and remedies or pain relief, we may consider banning some substances outright. The question of banning recreational drugs is another issue, especially when there is obviously little or no question of any performance enhancement (Buti & Fridman, 2001, p. 146).
Doping is a problem for sport in moral and legal terms. The IOC and the Council of Europe had created regulations that punish athletes who took drugs and their assistant agents. These regulations should respect the athletes’ human rights, such as the right of privacy. The sanctions should be based on moral rules and therefore should not be long term which might mean the end of the athlete’s career. Moreover, there is a need for a change in regulatory policy, so that all governing bodies of sport can provide a common action with the IOC focusing on the international cooperation between the governing bodies of sport. The great step will be the establishment of a common legal policy in all countries regarding doping in order to provide equality under the law and give the opportunity to both international and national regulatory bodies of sport to treat doping properly, defending the eternal principle ‘mens sana in corpore sano’.

References

