Gian Ege | Sena Hangartner
Christian Schwarzenegger | Kanako Takayama (Eds.)

Legal Responses to Doping

DIKE
Nomos
facultas

Gian Ege | Sena Hangartner
Christian Schwarzenegger | Kanako Takayama (Eds.)

Legal Responses to Doping

Legal Responses to Doping

Edited by
Gian Ege
Prof. Dr. iur.
Sena Hangartner
MLaw
Christian Schwarzenegger
Prof. Dr. iur.
Kanako Takayama
Prof. Dr. h. c.

DIKE Nomos facultas

Open Access Gold

Published by:
Dike Verlag
Weinbergstrasse 41
CH-8006 Zürich
www.dike.ch

ISBN (Paperback): 978-3-03891-489-1 (Dike Verlag AG, Zurich/St. Gallen)
ISBN (Paperback): 978-3-7560-0661-8 (Nomos Verlag, Baden-Baden)
ISBN (Paperback): 978-3-7089-2398-7 (Facultas Verlag, Vienna)
ISBN (PDF): 978-3-03929-034-5

DOI: https://doi.org/10.3256/978-3-03929-034-5

Preface

In summer 2021 Japan hosted the Olympic and Paralympic Games. These events captured worldwide attention with their outstanding sporting performances. Unfortunately, not all performances in mega-sporting events are achieved by legal means. Doping in sports is a salient issue often discussed in the news, especially during major events such as the Olympics. However, there are still many uncertainties regarding the appropriate legal response. The different approaches to self-doping serve as an example. In most countries, athletes who engage in such practices only face sanctions from their national sports organizations, in other jurisdictions such practices are defined as criminal offences and are prosecuted by specialized investigation teams. Doping raises fundamental questions in various legal fields. Because of the international nature of sport, there is great need for an in-depth comparative assessment and harmonized legal frameworks.

The University of Zurich organized a Joint Workshop on Legal Responses to Doping together with the Kyoto University. The workshop was held in a hybrid format and took place on the 2nd and 3rd March 2022. It aimed to strengthen the strategic partnership of the two universities and served as a platform to connect Japanese and Swiss academics. In the workshop, experts in the field of doping and sports law came together to analyze the existing antidoping regulations and laws with the objective to identify strengths and shortcomings of the current legal framework. The workshop focused on four key topics: "Horse Doping", "Doping at Mega Sporting Events", "Criminalization of Doping" and "Procedural Aspect of Doping". For each section there were input presentations from speakers of both countries. The presentations served as a basis for the subsequent lively discussions and sparked further research. The results of the workshop are published in this edited volume.

This publication would not have been possible without the relentless enthusiasm and dedication of the authors and supporting staff. Special thanks go to the Faculty of Law of the University of Zurich for the financial support offered by the faculty's Open Access Strategy, which enabled us to publish this volume.

Zurich/Kyoto, February 2023

Gian Ege, Sena Hangartner,
Christian Schwarzenegger,
Kanako Takayama

Table of Contents

Challenges in Criminalizing Sports Doping in Japan

Kanako Takayama*

When Japan started its preparations for the Olympic Games 2020 in Tokyo, there was no criminal offence for "doping in sport" in either the Penal Code or in other special criminal laws. The government ultimately decided not to introduce such an offence, concluding that there were sufficient general criminal provisions to punish various conducts involving doping in sport. Japan also decided to avoid an imbalance between doping in sport and other infringement of competition. Instead, a new administrative body, the "Japan Sports Agency", was established to strengthen the regulation and control of doping-related conduct. Since Japanese law essentially does not punish endangerment of health and bodily injury if the person in question gives consent, punishment of doping-related conduct does not depend on harm to health. This approach will be important to Japan in future discussions, because new types of conduct can emerge that do not harm health but may have serious implications for the future of humanity, such as gene manipulation. So far, Japan has not yet introduced criminal control of gene manipulation, even though it is necessary. We must be aware that enhancement of human physical ability does not always result in damage, but may nevertheless change the natural traits of a human being. The necessity for regulation is not limited to doping control in sport and marks a salient challenge to Japanese legislators.

Table of Contents

* Professor of Law, Kyoto University Law School, Dr. h.c. (University of Hamburg).

I. Introduction

Japan was successful in its bid to host the 2020 Olympic Games in Tokyo. For this purpose, the government made efforts to strengthen doping control either directly or indirectly through private organizations. Then a question emerged: Shall Japan introduce a new specific offense of "doping in sports" in its criminal law? After considering various factors, it decided not to. One of the reasons was that existing general criminal provisions would be able to cover most doping-related conduct. Instead, Japan established a new administrative body in the Japan Sports Agency,[1] whose functional precedent was a part of the Ministry of Education, Culture, Sports, Science and Technology (hereinafter referred to as the "MEXT").

Doping in sport involves a variety of issues with different dimensions, and to address this as a legal system, it is first necessary to analyse the complexities of these issues. National systems vary widely in terms of which aspects of the problem they focus on and may be in transition within a country. In comparative legal research, it is desirable to consider the characteristics of each country's legal system as a whole and to understand exactly how doping control is positioned on top of it. The importance of this fundamental piece of knowledge should be emphasized, while alarm bells should be sounded against superficial comparisons. This is because referring only to the text of the laws and regulations directly related to doping does not tell us about the system of legal sanctions and the relevant legal entities, nor how the system works in the country concerned.

For example, all sports associations in Japan are private entities and their legal qualifications differ greatly. In some countries, those organizations are a part of public administrative bodies. Both criminal and administrative sanctions can be imposed on Japanese legal persons, while some other countries use only the latter. Japanese public prosecutors are not obliged to make an indictment in criminal cases, even if there is enough evidence, and there is no plea-bargaining system equivalent to Anglo-American criminal procedure.

[1] https://www.mext.go.jp/sports/en/about_us/background/ (last visited 06.09.2022).

Therefore, careful attention should be paid to the fact that partial imitation of another legal system may not have the desired effect. This article examines the objectives that Japan should pursue in building an effective anti-doping regime in the future and the effective means to achieve them, while also encouraging consideration of potential adverse effects.

In this regard, the report "On the establishment and strengthening of the anti-doping system – towards the realisation of a clean sport free of doping",[2] published in 2016 by the "Task Force for the Establishment and Strengthening of the Anti-Doping System Towards the realisation of a clean sport free of doping", an experts' group within the government, was an excellent work based on multifaceted analysis, which should be evaluated positively. For example, it is important to note that the report does not simply make short-sighted recommendations, such as stating that many countries have criminal penalties for doping and others should therefore follow suit, but also searches for more effective regulation and concerns from the perspective of human rights protection. Along with its proposal, the "Act on the Promotion of Anti-Doping Activities in Sport",[3] was made in 2018, without including criminalization of a new offense of "doping in sport".

II. Historical Development as the Premise

To make a new legislation work, it is necessary to take the existing conditions into account.

The modern history of Japanese law started toward the end of the 19th century.[4] Before that, Japan had stood under the influence of Chinese law since the 8th century. At the beginning of the new Empire, the government first tried to slightly improve the existing Chinese-styled legal system to catch up with other industrialized countries, but this was shortly abandoned. Then it came upon the idea to copy a developed Western legal system, where French Napoleonic Codes were chosen as the models. Germany was not yet united, and it was not realistic to import Anglo-American case law. While copying French civil law was unsuccessful due to of differences in social and family order, criminal law and criminal procedure were

2 https://www.mext.go.jp/sports/content/1375009_3_2_1.pdf (in Japanese; last visited 06.09.2022).

3 Act No. 58 of 2018. English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3908 (last visited 06.09.2022).

4 ODA, 11 ff., 450 ff.

relatively easy to import. In 1880, the former Code pénal and the Code d'instruction (Criminal Procedure Code) were enacted and then entered in force in 1882.

However, although basic concepts of murder or theft were common in many countries, French-styled provisions that had been designed to limit the criminal court's abuse of power were felt as too precise and sometimes unsuitable to Japanese society. Judges needed more room for interpretation to fit social needs in Japan. Therefore, the so-called New School of punishment theory in Europe became influential to incentivize reform with the purpose of re-socialization of criminals.[5] In 1907, the current Penal Code was enacted, which was strongly influenced by contemporary German criminal law theories.[6] Its provisions were very abstract in wording and very small in number. These features remain until the present, whereas most new offenses, such as cybercrime or child pornography, are punished by special criminal laws outside of the Penal Code. Only those special laws and not the Penal Code can punish legal entities.

Criminal procedure law was amended several times before World War II, but its basic nature was not changed from the accusatorial system as in European law. However, since violation of human rights by state powers had been a serious problem, the new Constitution of Japan changed the structure of criminal procedure greatly by introducing many elements of American law, while previous traits were not eliminated completely.

That all makes Japanese criminal law a mixed legal system. Substantive criminal law has been largely influenced by German law, whilst criminal procedure is a mixture of Continental-European and Anglo-American law. Recently, more and more legislation is being passed in response to international agreements on as counter terrorism, combating organized crime, protection of children, and drug control. Anti-doping policies must be understood in this context.

III. Various Principles

Preparation for Tokyo 2020 required comparative study in doping-control legislations. The aspects considered here can be organized according to the focus on the following basic principles.

---

5 Pedriza, 248.

6 The English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3581 (last visited 06.09.2022).

First, the basic values that apply to all countries in common are: (i) fairness, equity, and transparency in sport for the protection of sport from the perspective of fair competition and (ii) the health and human rights of athletes. These are universal values that are internationally recognized.

Secondly, other values that may differ from country to country include (iii) the autonomy of sports organizations and the diversity of sport. In Japan, where historically sports organizations have been private bodies rather than government bodies, and their forms of organization have been free and diverse, (iii) is also a value that is more important than in many other countries from a comparative legal perspective. In some countries, what would be the activities of private sports organizations in Japan are carried out as activities of the public administration. The autonomy and diversity there differs from those in countries where the focus is on private organizations. In Japan, the regulation of sport is not something that can easily be concretized as part of state activities, and needs to be constructed with attention to its relationship with the principle of private autonomy.

Third, there is also a dimension of perspective that can be described as a "derivative" or secondary value. Educational value is on this level. Although different countries have different ways of establishing basic principles for the treatment of sport in their legislation, at least when organizing Japan, educational values do not exist alongside the first and second perspectives in the same dimension, but are given substance in relation to them. The greatest emphasis is placed on (i), above the perspective of sound youth development education and public enlightenment, but the importance of (ii) and (iii) must also be recognized socially. In other words, it is more appropriate to understand that, in terms of positioning, the values of "sound development" and "education", which are devoid of content by themselves, do not exist independently side by side, but can only be conceived of in terms of sound development and education when the perspectives with content from (i) to (iii) are considered.

In this respect, the term "integrity of sport" should be emphasized. If its specific content is clarified, there is no problem, but if "integrity" appears to be an independent value without any indication of its content, vague feelings such as "trust in sport" or "the desire to participate in sport" may directly enter the protected value, and regulations could be strengthened on this basis. This could, in turn, harm the interests of athletes in some cases. Although there is no disagreement with the direction that is being aimed for, it is thought that the legal principle should be stated in a way that concretely indicates the scope of the regulation.

IV. Other Legislation

A. Importance of General Comparison

From the fiscal year 2008 to the fiscal year 2010, this author participated as a committee member in the MEXT-commissioned project "Research and Study on Arbitration of Doping Disputes" at the Japan Sports Arbitration Agency, and in the fiscal year 2012, she chaired the working group "Research and Study on Legal Sanctioning Systems for Doping", also commissioned by the MEXT at the same agency. With the cooperation of the various committee members, a comparative legal research study was conducted. Since then, and up to the present, following the decision in September 2013 to host the Tokyo Olympics 2020, there have been new legislative developments in other countries. In this paper, some points of discussion will be presented in the context of this study.

During this comparative legal research, it became clear that in both Japan and other countries, there tends to be a strong preference for the early implementation of symbolic criminal legislation. Such a view tends to lead to the short-sighted idea that it would be better to refer to several articles of other countries that already have penal provisions and create penal provisions by simply copying those that seem to be appropriate for Japan. However, there are considerable problems with this. As mentioned earlier, it is meaningless to simply compare articles, as truly effective regulation cannot be achieved without considering how the country's judicial and administrative systems operate.

For example, significant differences arise depending on whether the legal personality of a sports organization is part of the public administration or whether it operates autonomously as a private organization. If sports organizations are part of the state, they are regulated as fulfilling a function of administrative law, but in countries like Japan, where the activities of sports organizations are developed on a private basis, autonomous private control is often considered to be more effective than state mandatory legislation. Another example of regulatory differences between countries is the regulation of corruption. In Japan, the punishment of private corruption and other forms of corruption are regulated by different laws, with different requirements and different effects for public officials and private corruption respectively. However, several former socialist countries and Anglo-American law countries have legislation that punishes corruption in private organizations and corruption in state and local authorities in the same way. Therefore, there is a concern that comparing and imitating only the text of "doping offenses" will not lead to the development of an effective system, if its position in the con-

text of related areas such as association law and corruption regulation is not understood.

B. An Example of Policy Transitions

One of the reasons against legislating doping offenses in a hasty manner is that if only penalties are introduced without knowing what is being punished, it is not clear what direction to take beyond that and the system will continue to be a confused mess.

Taking German law as an example (since the author is studying German law), Germany made a new anti-doping law at the end of 2015.[7] Although it came into force relatively recently, there have been changes in the legal and regulatory approach leading up to this, and that it is not simply a matter of creating doping offenses to sort things out or to solve problems.

In Germany, as in Japan, sports organizations basically operate as private bodies, and initially only their autonomous sanctions were imposed on private bodies for doping. As in Japan, there were no penal provisions under criminal or administrative law. Subsequently, doping offenses were first introduced in the law on pharmaceuticals. Since the purpose of the law is to protect public health, doping was also regulated from the perspective of protecting the health of the people. Here, athletes were positioned as victims and penalties were put in place with only the protection of health at the forefront. Next, however, the scope of doping offenses was broadened in the law on pharmaceuticals, making the simple possession of doping controlled substances partially punishable. This took the form of the offense of "possession in excess of a certain quantity" of doping substances. The reason why "more than a certain amount" was chosen was because it was assumed that self-use was not a criminal offense. In other words, the crime of simple possession became punishable on the basis that possession of doping quantities large enough for use against another person would be harmful to that person's health. At this stage the idea was still in use, in the context of the law on pharmaceuticals, that the basis for punishment was the threat to the goal of health protection.

Later legislation however, including the enactment of a new law, has finally changed this mindset, and the regulatory objective has changed to the "protection of the competitive order" in sport. Of course, health protection is still mentioned, but it

[7] Gross, 13 ff.

is not limited to that. Self-use by athletes and possession, even in small quantities, are now punishable, and doping athletes are now positioned as "culprits who harm fair competition in sport". The law also provides for aggravated penalties for organized acts.[8]

Historically, when the issue of doping first came up for discussion, it was thought to be about improving athletic performance by unfair means, although this was not only the case in Germany. For example, if we consider the example of equestrian athletes administering drugs to horses to improve their performance in competition, the drugs are not directly harmful to human health, because it is the horses that are being doped. This should have been regulated based on the position that it is an act that harms fair competition by unfair means.

However, there has since been a shift in the regulatory focus from competition infringement to health protection, as more serious problems have arisen with athletes' health and several life-threatening cases have emerged. This can be understood as the protection of the athletes themselves, or in some cases the emphasis has been on the people's health or public health.

Furthermore, subsequent trends in Germany and other countries have seen a renewed emphasis in recent years on the aspect of doping as an infringement of fair competition. Above all, there is a growing consensus among scholars, at least internationally, that legal controls should be strengthened, whether in the public or private sphere, against organized and corrupt practices.

V. Theory of Protected Interests

As these examples clearly show, when Japan tries to create a new legal system for the future, from a comparative law perspective, it is necessary not only to compare what provisions exist in foreign laws, but also to focus on what is important as a regulatory objective and how it is to be achieved. The following points also need to be considered: When considering who the direct or potential victims are and what the regulatory objectives should be, for example, the position of athletes has shifted from being victims in terms of preventing damage to their health, to being potential perpetrators in terms of infringing on competition. Many countries use multiple regulatory objectives in combination, but if they do not clearly separate and evaluate which aspects to focus on and what punishments to use, they may end up

[8] See for example, Handbuch Sportstrafrecht, Momsen/Vaudlet, 238 ff.

with vague talk of creating doping offenses anyway. This could lead to failed legislation, which would not be effective in terms of regulation and could lead to concerns about human rights violations.

In terms of health protection, this has certainly involved serious historical and practical problems, but there are several doping cases that do not necessarily fall into this category. Substances and means that do not harm health do not seem to need regulation from a health protection perspective, nor does the use of drugs on animals affect human health. The extent to which substances with little or no impact on health are designated as regulated can vary from time to time. For example, in a real case involving sports arbitration, an ingredient in a "hair-growth product" was for a time subjected to regulation but was subsequently removed from said regulation.[9] If a substance is not particularly harmful to health, but may affect athletic performance, the regulation cannot be explained in terms of health damage and infringement of competition becomes the basis for regulation.

Even in the case of substances for which regulation is based on harm to health, it must be considered in relation to the scope of other criminal penalties. This is because self-injury to oneself is not a criminal offense.[10] Paternalistic restrictions on self-harm assume that the subject is a person who is incapable of making normal decisions. A typical example is youth protection. Due to lack of sufficient decision-making capacity in some local authorities, youth protection ordinances punish tattooing young people. Alternatively, considering victims who are trafficked in trafficking offenses, the victim may be unaware of the circumstances or may know them and be the subject of the trafficking. The penalty is based on the premise that a person, like this victim, who is an adult and who is in financial distress, is incapable of making the normal decisions that should be made.[11]

---

[9] The substance finasteride was listed in 2005 and removed from the list in 2009. Other ingredients in beard growth products are subject to regulation.

[10] Only consensual homicide and participation in suicide are punishable (Art. 202 of the Penal Code). Although the case law dictates that informed consent given for an illegal purpose is invalid, no law declares doping in sport as illegal.

[11] In some regulated areas, such as prostitution and paid surrogacy (which is not punishable in Japan), the very act of buying and selling a human body for money is considered "against human dignity", or at least against public order and morals. However, in the case of trafficking in persons, the content of the labor at the place of employment itself is not necessarily illegal (for example, entertainment at a brothel can be legal in itself), so the distinction between illegal "buying and selling" and legal "contracting" (travel, employment, mediation) depends on whether the subject person is considered to have

Many athletes are adults and have no problems with their judgement. It is therefore theoretically highly problematic whether they can nevertheless be subject to paternalistic protection for being mentally trapped in an organization and damaging their own wellbeing.

Furthermore, even from the perspective of preventing infringements against fair competition in the sense of "rule breaking", there may be a position that understands doping as a crime of fraud[12] or a violation of antitrust law[13] focusing on its economic effects, or there may be a way of focusing on it as a violation of cultural values such as fair play. The perspective of protecting order is also not uniform and can have nuances depending on the country.

VI. Application of Existing Offenses

A. Obstruction of Business

Whether an independent offense category of "doping offenses" is required depends on the scope covered by other offense categories. As far as Japan is concerned, there are many cases where malicious cases can be punished under existing law without the introduction of such an offense type.

One reason is the existence of a criminal offense that has developed uniquely in Japan: obstruction of business. The origin of the Japanese obstruction of business offense is an offense that existed in the previous Code pénal, which was influenced by French criminal law, but had a very narrow scope. This was replaced by a comprehensive article in the current Penal Code enacted in 1907. Art. 233 stipulates that: "A person who damages the credibility or obstructs the business of another person by spreading false rumors or by the use of fraudulent means is punished by imprisonment for not more than three years or a fine of not more than 500.000 yen."[14]

fully valid consent. The distinction between illegal "sales" and legitimate "contracts" (travel, employment, mediation) depends on whether the subject has fully valid consent.

12 Art. 246 of the Penal Code.

13 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 47 of 1954). English Translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/2746 (last visited 06.09.2022).

14 Its definition is similar to that of § 108 in Austrian Penal Code (Täuschung), but contrary to that, Japanese sabotage does not require real damage as a result of the offense.

At the time of enactment, it was thought that official acts subject to another offense, "obstruction of official business" in Art. 95 of the Penal Code, that required either violence or threat as a mean were not subject to this "obstruction of business" offense in Art. 233 and 234, but later case law was changed, and the "obstruction of business" offense was made broadly applicable to official acts as well.[15] Although countries that have later imitated Japanese law may have similar offense types, this is a comprehensive offense typethat was originally unique to Japan and did not exist in other countries. In normal cases, the maximum sentence is three years imprisonment, the same maximum as the free sentence for the current doping offense in Germany.[16] The crime of obstruction of business under Japanese law includes deception as a means, and acts such as falsifying information can be a means.

The court decisions have adopted the "abstract endangerment theory" in interpreting the crime. This means that no actual harm is required and only the act of obstruction is an attempt, which has led to a wide range of cases.[17]

In 2017, a canoe athlete put a prohibited substance (metandienon) into his rival athlete's drink and was charged with "obstruction of business". The Japan Anti-Doping Agency (JADA) imposed eight years of disqualification on him. The prosecutor refrained from the official indictment to continue criminal procedure.[18]

In recent news, there have also been cases of touching "oden" sold in a convenience store with fingers, and of cheating in the Kyoto University's entrance examinations,[19] which have not resulted in punishment, but have been charged with obstruction of business. Although there are criticisms in academic theory, this

---

15 For example, Supreme Court, Decision on February 17, 2000, Keishu (Supreme Court Reporter in Criminal Matters) Vol. 54, No. 2, p. 38. English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=507 (last visited 06. 09. 2022).

16 § 3 Abs. 1 Anti-Doping-Gesetz of 2015, BGBl. I S. 2210 (Nr. 51).

17 For example, Supreme Court, Decision on July 2, 2007, Keishu Vol. 61, No. 5, 379. English translation is available at https://www.courts.go.jp/app/hanrei_en/detail?id=897 (last visited 06. 09. 2022).

18 Japanese Code of Criminal Procedure gives very wide discretion to the public prosecutor (Art. 248). English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3739 (last visited 06. 09. 2022).

19 In 2011, during the entrance examination of Kyoto University, questions were sent to the outside and the sender, also a minor, came under criminal investigation under the same charge and was not officially prosecuted. In January 2022, an applicant to the National United Examination for Higher Education, a minor, sent questions to the outside during the examination in order to obtain correct answers. She and an outside

crime type is applied quite widely in practice, so it is thought that if the position of judicial precedents is followed, cases of doping control violations may also be considered to fall under this category.

Although there has not been a self-doping case in which criminal investigation commenced, Japanese law enforcement agencies think that athletes' own use of doping substances can constitute the same offence as in cases of entrance examinations, because it "obstructs the business of another person", namely the organizer of the sports event, "by the use of fraudulent means".

B. Other Offenses

There are a variety of other penalties, typically organized offenses, and these can be found in laws other than the Penal Code, such as the crime of bribery of foreign and international public officials under the Unfair Competition Prevention Act, which is the crime of bribing public officials in charge of sports work in foreign countries.[20] Even in Japan, there is a bribery offense in the Companies Act that covers joint stock companies and is called the "commercial bribery offense".[21] The Organized Crime Punishment Act includes organized fraud and organized obstruction of business as aggravated categories, with sentences of up to five years in prison for organized obstruction of business, which is relatively widely understood, as discussed earlier.[22] If the deception leads to property gains, then the consideration of fraud, which has an even heavier statutory penalty than this, with a maximum penalty of ten years in prison under the Penal Code and twenty years under the Organized Crime Punishment Act, will also be considered.

Although a relatively minor offense category, tampering with or destroying specimens or their data is also a general offense category that is punishable. Namely, the Penal Code provides for the offenses of destruction of property (including concealment), destruction of documents and electromagnetic records (electronic

cooperator came under criminal investigation. Their charge was "obstruction of business by fraudulent means."

20 Act No. 47 of 1993. English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3629 (last visited 06.09.2022).

21 Act No. 86 of 2005 (Art. 967). English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3207 (last visited 06.09.2022).

22 Act No. 136 of 1999. English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3587 (last visited 06.09.2022).

data), forgery or alteration of documents, and unauthorised creation of electromagnetic records.[23]

Furthermore, the handling of methamphetamine, cocaine, and other narcotics, as well as substances falling under the category of poisonous or deleterious substances, is punishable. The penalties under the Act on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical Devices also apply.[24] In cases of unwanted health damage to athletes, it constitutes a negligent offense causing bodily injury in professional activities under the Penal Code.[25]

Thus, for malicious types of doping cases, it is likely that some existing penal legislation could already be applied. Careful consideration should be given to the establishment of a new "doping offense". As noted earlier, athletes are in a position where they can be both victims and perpetrators of doping. Where there are already strict sanctions against doping by private sports organizations at national and international level, the establishment of further criminal penalties could threaten the human rights of athletes through the intervention of state investigative powers. For athletes, the inability to perform at certain times of the year is fatal. Even if compulsory investigation is made possible, easy criminalisation will only bring disadvantages unless adequate human rights guarantees and remedies are still in place.

VII. Conclusions

A. Efficacy of Regulations

In summary, if a new legal system for doping control is to be created in Japan in the future, it is necessary to clarify what and how it should be shaped in the first place. There is a fear that introducing criminal penalties unnecessarily to internationally demonstrate that "penalties have been created" in a symbolic way will be harmful and futile.

This is not only a question of substantive regulation (the content of the definition of what is considered a criminal offense), but also of the nature of the procedure. It has been pointed out by sports law lawyers that, from the perspective of effectiveness, it is not feasible to "burn-in" the police and prosecutors, who do not necessa-

[23] Art. 261, 259, 159 and 161bis of the Penal Code.

[24] Act No. 145 of 1960 (Former Act on Pharmaceuticals). English translation is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3213 (last visited 06.09.2022).

[25] Art. 211 (Causing Death or Injury due to Negligence in the Pursuit of Social Activities).

rily have expertise in sports, and say: "We have introduced penalties and now it is up to them to take care of it." It would be easier to acquire more expertise if doping control were to be handled by sports organizations and administrative bodies. Considering, for example, the area of competition law violations, it is clear who can impose sanctions more effectively: the Fair-Trade Commission or the police and prosecutors. In both areas, the entry of police powers would not only lead to a lack of expertise, but also to more time-consuming procedures. Athletes have time constraints, and even though there is a "presumption of innocence", a quick resolution would be hampered, and human rights would be severely restricted. It is not enough to simply criminalize and deploy the police, but a comprehensive examination of how investigations should be conducted is needed from the perspective of imposing effective regulations.

In the end, Japan has decided to avoid imbalance between doping in sport and other infringements of competition.

B. Issues Ahead – Human Modification?

Finally, I would like to touch on the issue of "human body modification", which has not been discussed much in the field of sports law in the past and has been examined mainly by experts in legal philosophy and bioethics. Classical doping was conducted through drug use which was detected, for example, by urine tests. However, in "blood doping", which enhances the function of one's own blood, and "gene doping", which exploits muscle-enhancing gene therapy, substances are difficult to detect. Some of these methods may lead to health risks. However, this is not necessarily the case. Even if such methods could be used by all athletes on equal terms and without any health risks, unrestricted human modification would not be considered permissible. In such a case, the possible legal and regulatory basis would be neither the protection of fair competition nor the protection of health.

Some of these "modifications" may have only a one-off effect and others may be genetically inherited. An example of the former is muscle building, which raises issues analogous to the traditional distinction between exceptional medication authorisations (TUEs, therapeutic use exemptions) for the treatment of diseases and doping.

The latter requires more sophisticated consideration. For example, "breeding" -people with birthmarks may not be doping and may not directly cause a health risk per se. If couples continue to give birth to children who say, "I have watermarks on my hands and I want to marry someone with similar watermarks", then

watermarks may develop. The choice of partner and conceiving a child is an individual choice. There are many examples of athletes of the same discipline marrying and giving birth to children who become athletes. At the same time, however, the production of "genetically modified humans" is also included in the definition of crime in many countries as a "crime of eugenics".[26] The reason for punishing eugenics is that this destroys the constitutional value of "equality before the law" (or rather the premise of the legal order), historically due to the Nazi slaughter of disabled people and Jews. At the same time, however, there is room for the scientific importance of maintaining "intraspecific diversity" as well as "species diversity" in terms of protecting the survival of humans as a species. Recently, there is also a view that people's individuality needs to be protected to maintain democracy.

How to deal with the conflicting values of "respect for individuality" and "competition on equal terms" is, in fact, something that has probably always been considered in Paralympic rulemaking from the outset. It should be noted that the same perspective will be a general issue from now on, even outside the Paralympics.

Bibliography

Cherkeh Rainer T./Momsen Carsten/Orth Jan F. (eds.), Handbuch Sportstrafrecht, München, 2021 (cit. Handbuch Sportstrafrecht, Author).

Gross Verena, Gesetzlich bestimmte Strafbarkeit des Eigendopings, Tübingen, 2020.

Japan Sports Agency, https://www.mext.go.jp/sports/en/index.htm (last visited 25.10.2022).

Oda Hiroshi, Japanese Law, 4th edition., Cambridge, 2021.

Pedriza Luis, Lectures on Japanese Law from a Comparative Perspective, Osaka, 2017.

Takayama Kanako, Doping in Sport as a Criminal Offence in Japan, HED Matters, 5(1)/2022, 26–30.

[26] For example, Art. 214-1 of French Code pénal.

Measures against Doping in the Swiss Sport Promotion Act (SpoPA)

Sena Hangartner*

This paper gives an overview of the measures against doping in the Swiss Sport Promotion Act (SpoPA). The SpoPA is the only federal act containing criminal law provisions explicitly regulating doping cases in Switzerland. For a better understanding of the material, the article first gives a historical overview of the doping regulations in Switzerland. The main part analyzes measures against doping regulated in Art. 19 ff. SpoPA. The focus lies on Art. 22 SpoPA, which is the main criminal provision and has a broad catalogue of offences prohibiting activities related to doping. The provision is directed against the entire unauthorized traffic of substances associated with doping. Since the enactment of the new SpoPA, the personal scope of application is no longer limited to the participation in a regulated competition. This means that not only athletes, but everyone falls under the SpoPA. However, self-doping is still not punishable according to the existing regulations. Art. 22 para. 4 SpoPA explicitly excludes liability for personal consumption. At the moment in Switzerland, neither self-consumption nor possession for personal use is prohibited by criminal law.

Table of Contents

* MLaw Sena Hangartner is a member of the academic staff at the University of Zurich and is writing her PhD thesis on combating doping in Switzerland.

I. Introduction

The Federal Act on the Promotion of Sport and Exercise (Sport Promotion Act, SpoPA) is the only federal act containing criminal law provisions explicitly regulating doping cases in Switzerland.[1] Since 2000, doping via third parties is punishable in Switzerland, whilst self-doping is not sanctioned under criminal law. However, several of Switzerland's neighboring countries now criminalize both forms of doping.[2] Based on international law, there is no obligation of states to punish self-doping.[3] This article aims to give an overview of the measures against doping in the Swiss SpoPA. First, the history of the doping fight in Switzerland (II.) and the constitutional basis for the fight against doping are discussed briefly (III.A.), before today's SpoPA is examined in more detail (III.B. ff.).

1 Federal Act on the Promotion of Sport and Exercise, Sport Promotion Act of 17 June 2011, CC 415.0.

2 Bericht des Bundesrates, Selbstdoping, 2.

3 Bericht des Bundesrates, Selbstdoping, 2.

II. Historical Overview of the Doping Regulations in Switzerland

A. First discussions about the fight against doping in Switzerland

The first discussions about combating doping in Switzerland began early in the 1960s, with various doping-related deaths in cycling.[4] In 1963 and 1967 the "Directives on Combating Doping" were drawn up by a group of national and international experts.[5] At the same time, as part of the fight against doping, a doping laboratory was established at the research institute of the then Swiss Federal Sport School in Magglingen (now the Federal Office of Sport, FOSPO).[6] From March 1992 on, the tests were conducted by the "Laboratoire Suisse d'Analyse du Dopage" (LAD[7]) at the University of Lausanne.[8]

Originally, the responsibility for the fight against doping was regulated according to the so-called "three-pillar concept". The private-law and public-law shared responsibility for the following three areas: (1) control, (2) information and prevention and lastly (3) research. Swiss Olympic[9] was responsible for the first pillar and the federal government primarily for the other two pillars.[10] Since 2008, the various tasks fall solely into the responsibility of the Anti-Doping Switzerland Foundation (ADCH).[11] The ADCH is a private foundation according to Art. 80 ff. Swiss Civil Code (CC) and is the National Anti-Doping Organization (NADO) responsible for the fight against doping based on private law in Switzerland.[12] In January 2022, the Foundation was renamed "Swiss Sport Integrity" (SSI) and now handles ethical

4 For example, Tom Simpson, who died of dehydration at the 1967 Tour de France after taking amphetamines and alcohol. Kamber, N 1; Natsch, 61.

5 The "Directives on Combating Doping" were replaced by the Doping-Statute of 18. November 1989.

6 Botschaft Europaratskonvention, 7754; Kamber, N 1; Natsch, 61.

7 In English: Swiss Laboratory for Doping Analyses.

8 Kamber/Steffen, 35; https://www.curml.ch/en (last visited 11.09.2022).

9 Swiss Olympic is the umbrella organization of Swiss sport and the National Olympic Committee, for more information view https://www.swissolympic.ch/ (last visited 19.08.2022).

10 Natsch, 71; Schweizer, 266 f.; Vouilloz, N 23.

11 Botschaft SpoFöG/IBSG, 8222; Natsch, 80; Schmidt, 2; Vouilloz, N 23.

12 https://www.sportintegrity.ch/en (last visited 02.09.2022); see further Suigiyama/Hangartner, 245.

violations as well.[13] The aim was to create an anonymous reporting office, independent of the influence of sport organizations, which could not only identify abusive behavior, but also sanction it.[14] The legal basis of those ethical rules is the new "Ethics Statute of Swiss Sport".[15] Swiss Olympic and its member associations and partner organizations are obliged to accept and implement the Ethics Statute of Swiss Sport's new rules into their own statutes.[16]

B. The Federal Law of 17 March, 1972 on the Promotion of Gymnastics and Sport (SFG)

The events at the 1998 Tour de France led to national and international changes in the fight against doping.[17] In Switzerland, several parliamentary initiatives called for a legal regulation to combat doping.[18] It was demanded that the environment of elite athletes should be subjected to stricter criminal provisions with higher penalty.[19] A series of measures to combat doping were drawn up within the framework of the new Therapeutic Products Act (TPA).[20] The anti-doping criminal provisions in the Federal Law on the Promotion of Gymnastics and Sport came into force on

---

13 For more information about the SSI visit https://www.sportintegrity.ch/en (last visited 19.08.2022).

14 Netzle, 234.

15 The Ethics Statute of Swiss Sport was enacted on 1. January 2022, https://www.swissolympic.ch/dam/jcr:b1b9076f-1f41-4b5c-b0a0-b3a6955806c5/Ethik-Statut%202022_final_Webversion_DE.pdf (last visited 17.08.2022).

16 Art. 4.1 para 1 Ethics Statute of Swiss Sport.

17 In 1998 a whole network of systematic drug programs was detected. There were doping revelations in cycling and the common suspicion that doping substances were widely used at that time were confirmed by retrospective tests and rider's confessions.

18 For example, interpellation 98.3371 "Spitzensport statt Spritzensport" by Paul Günter, 21. September 1998, AmtlBull NR 1998 2920 f.; interpellation 98.3372 "Abgabe von Dopingmitteln durch Ärzte" by Roland Ostermann, 21. September 1998, AmtlBull NR 1998 2922; motion 98.3373 "Gesundheitsschutz für Sportler und Kampf gegen das Doping. Bundesgesetz" by Roland Ostermann, 21. September 1998, AmtlBull NR 2000 II annex 77 f.; motion 98.3427 "Dopingbekämpfung" by Christian Grobet, 1. Oktober 1998, AmtlBull NR 2000 II annex 85 ff.; parliamentary initiative 98.433 "Bestrafung von Dopingvergehen" by Rolf Büttiker, 7. October 1998, AmtlBull SR 1999 annex 22 ff.

19 Botschaft Europaratskonvention, 7756; Botschaft UNESCO-Konvention, 6492; Botschaft HMG, 3569. The environment may include doctors, counselors, coaches, managers, physical therapists, trainers, but also officials, sponsors, relatives, or teammates.

20 Botschaft HMG, 3569 ff.; see further Jörger, Strafbarkeit von Doping, 15 f.

1 January, 2002, together with the TPA.[21] At the same time, the Disciplinary Chamber for Doping Cases[22] was established, which oversees all Swiss doping cases as a court of first instance.[23] On the international level, the World Anti-Doping Agency (WADA) was created on 10 November, 1999, institutionalizing the fight against doping under association law.[24]

C. The Sport Promotion Act (SpoPA) of June 2011

In June 2011, the SFG was completely revised and renamed the "Sport Promotion Act".[25] The penal provisions against the doping environment of athletes were tightened and the already existing conducts regulated in Art. 22 para. 1 SpoPA were supplemented by the terms "acquisition, export, conveyance, market and possession".[26] With the modification of the secondary criminal law[27] to the new sanction system of the criminal code, the maximum penalty has been adapted.[28] The basic offence now provides for imprisonment of up to three years or a monetary penalty.[29]

However, the primary responsibility of sport associations to sanction athletes is still applicable and no rule directly criminalizing athletes has been introduced.[30] It was argued that sanctions by sport federations have a higher general preventive effect than the mere threat of the state's punishment. Additionally, in the case of first-time offenders in criminal proceedings, often only a monetary penalty can be imposed, whereas in association law an athlete can be banned for up to two years, even as a first-time offender.[31]

---

21 AS 2001 2790.

22 For more information on the disciplinary proceedings see https://www.sportintegrity.ch/en/anti-doping/laws/disciplinary-proceedings (last visited 10.10.2022).

23 See Kamber/Steffen, 52 ff. As a court of second instance an appeal to the Court of Arbitration for Sport (CAS) is possible. See for further information https://www.tas-cas.org/en/general-information/index/ (last visited 17.08.2022).

24 See Kamber/Steffen, 55.

25 AS 2012 3953.

26 Botschaft SpoFöG/IBSG, 8240; see for a further analysis of Art. 22 SpoPA, chapter III. F.

27 The secondary criminal law includes all criminal provisions that are not contained in the Criminal Code (core criminal law), but in other legal provisions.

28 Botschaft SpoFöG/IBSG, 8240.

29 Art. 22 para. 1 SpoPA.

30 Botschaft, SpoFöG/IBSG, 8221.

31 Vouilloz, Le nouveau droit suisse, N 14 f.

Moreover, a new legal basis for the exchange of data with national and international anti-doping agencies was established.[32] Art. 23 ff. SpoPA, which enable the information exchange between the involved parties, are crucial for an effective doping prosecution.[33] The Federal Act of 19 June, 2015, on the Federal Information System of Sport (FISSA) further regulates the information system.[34]

Art. 1 SpoPA sets out the objectives of sport promotion. They are to strengthen physical fitness and health of the population, holistic education, and social cohesion.[35] The goal is to encourage behavior that establishes the positive values of sport in society and to combat undesirable side effects.[36] The measures against doping are regulated in the second section of the fifth chapter "Fairness and Safety", Art. 19 ff. SpoPA.

The Sport Promotion Ordinance (SpoPO), which was issued in May 2012 based on the SpoPA, regulates further measures against doping in Art. 73 ff.[37] The SpoPO supplements and specifies the statutory provisions with regulations in the area of programs and projects (Art. 1 ff. SpoPO), education and research (Art. 46 ff. SpoPO), competitive sport (Art. 71 f. SpoPO) and doping (Art. 73 ff. SpoPO).

III. Measures Against Doping

The following section explains the existing measures against doping in Switzerland and highlights some problems that could arise. Since the SpoPA is the only national regulation overseeing doping, each article will be assessed separately. As will be seen, for an effective prosecution of doping a close collaboration between the SSI, criminal prosecution and customs authorities is necessary. Before starting the analysis of the principle for measures against doping regulated in Art. 19 SpoPA, the constitutional basis for the fight against doping will be briefly explained and the doping measures differentiated from competition rigging.

---

32 Art. 23 ff. SpoPA. See Schnydrig/Koch, 74 ff. of this volume.

33 This will be outlined under chapter III. F.-H.

34 CC 415.1. Relevant in this context is Art. 32 lit. h FISSA which states that the national agency combating doping should receive all information including sensitive personal data from criminal procedures if there is a breach of the SpoPA, see further Sugiyama/Hangartner, 252 f.

35 Art. 1 para. 1 SpoPA. For more information on the interest and goals of the sport promotion legislation see Botschaft SpoFöG/IBSG, 8229 f.; Zollinger, 172 ff.

36 Art. 1 para. 1 lit. d SpoPA; see further Botschaft SpoFöG/IBSG, 8230. Examples for undesirable side effects are violence at football games or doping.

37 Ordinance of 23 May 2012 on the Promotion of Sport and Exercise, CC 415.01.

A. Constitutional basis for the combating against doping (Art. 68 FC)

The sport-related distribution of competences is governed by Art. 68 of the Federal Constitution of the Swiss Confederation (FC).[38] According to Art. 68 para. 1 FC, the Confederation shall encourage sport, in particular sport education.[39] In Art. 68 para. 2 FC, the federal sport school and in para. 3 sport for young people and school sports are standardized.[40] The concept of "sport" is not defined in the constitution but presupposed.[41] The systematic position of the regulation and the goal of the sport's promotion as a whole, however, imply a broad understanding of sport.[42] The general regulatory competence lies with the cantons and the Confederation only acts as a subsidiary promoter, meaning that the constitutional mandate to facilitate sport must be understood in a restrictive manner.[43] The constitution thus protects the right of sport associations to regulate their own internal affairs, which is particularly important in combating doping.[44] However, the federal government is also becoming increasingly active regarding the promotion of professional youth athletes and clean sport.[45] This is a very positive tendency since doping can be only fought effectively with the combined efforts of sport associations and state measures.

The Swiss promotion of sport as laid out by the constitution includes the public's protection from the negative aspects of sport from which a constitutional duty to combat doping can be derived.[46] This constitutional mandate is implemented in Art. 19 ff. SpoPA and Art. 73 ff. SpoPO.[47]

---

38 Art. 68 FC is the continuation of Art. 27^{quinquies} FC of 29. May 1874.

39 See Botschaft Europaratskonvention, 7762. The sports promotion article essentially dates to 1970, see BSK FC-Hänni, Art. 68, N 1; FC Commentary-Biaggini, Art. 68 N 1.

40 See further, Zollinger, 88 f.

41 Neither Art. 68 FC nor any other regulation in the FC defines the concept of sport. A legal definition is also missing in the SpoPA, see Bericht des Bundesrates, Selbstdoping, 11; FC Commentary-Biaggini, Art. 68 N 3.

42 Bericht des Bundesrates, Selbstdoping, 13; Zollinger, 86 f.

43 BGer, 2C_383/2010, 28.12.2010, E. 2.4; BSK FC-Hänni, Art. 68, N 3; FC Commentary-Biaggini, Art. 68 N 3.

44 Bericht des Bundesrates, Selbstdoping, 12.

45 BSK FC-Hänni, Art. 68, N 3.

46 Bericht des Bundesrates, Selbstdoping, 12; FC Commentary-Biaggini, Art. 68, N 4; SGK FC-Zen-Ruffinen, Art. 68 FC, N 7 f.; Zollinger, 88. Specific comments on the constitutional basis for the federal government's fight against doping are missing in the "Botschaft", see Bericht des Bundesrates, Selbstdoping, 13 f.

47 Before it was regulated in Art. 11b-11f SFG.

B. Differentiation from "competition rigging"

The doping offences under Art. 22 SpoPA[48] must be distinguished from the "Measures to combat Competition Rigging" regulated in Art. 25a ff. SpoPA.[49] Those regulations have been in force since 1. January 2019 and manage the criminal provision[50], the prosecution[51] and the exchange of information[52] between the competent prosecution and judicial authorities and the inter-cantonal supervisory and executive authority[53] to fight competition rigging. The term "competition rigging" might imply an applicability to doping cases, however the criminal provision of Art. 25a SpoPA is only relevant to sports betting.[54] In addition, unlike Art. 22 SpoPA, the scope of application only covers sports competitions and not amateur sport.[55]

C. Principle (Art. 19 SpoPA)

Art. 19 SpoPA regulates the principle for measures against doping. Para. 1 describes doping as the "abuse of substances and methods to increase physical performance". The prohibited substances and methods are exhaustively regulated in the annex of the SpoPO.[56] They are mainly substances which are frequently used, and which pose a great danger to the athlete's health.[57]

The same article imposes an obligation on the Confederation to support the fight against doping, in particular by means of education, advice, documentation,

48 Art. 22 SpoPA will be discussed in chapter III.F.

49 AS 2018 5103; BBl 2015 8387. For the analysis of criminal law approaches against match-fixing and betting manipulation before the introduction of the Art. 25a ff. SpoPA see Trunz, 230 ff.

50 Art. 25a SpoPA.

51 Art. 25b SpoPA.

52 Art. 25c SpoPA.

53 The inter-cantonal supervisory and executive authority is the Swiss Gambling Supervisory Authority (Gespa), see for more information on the Gespa https://www.gespa.ch/en (last visited 31.08.2022).

54 See wording of Art. 25a SpoPA: "Any person who, for his own benefit or for the benefit of a third party, offers, promises or grants an undue advantage to a person who exercises a function at a sport competition at which sports betting is offered in order to falsify the outcome of that sport competition (indirect competition rigging), shall be liable for a custodial sentence not exceeding three years or a monetary penalty."

55 For the scope of application of Art. 22 SpoPA see BGE 145 IV 329, E. 2.4.2.

56 Art. 19 para. 3 SpoPA.

57 Art. 74 para. 2 SpoPO.

research, information, and testing. This obligation is mostly fulfilled through the financial support of the SSI.[58]

The legal basis to delegate the authority to take measures against doping to the SSI or a possible successor institution was created with Art. 19 para. 2 SpoPA.[59]

According to Art. 19 para. 3 SpoPA, the Federal Council regulates the punishable doping substances and methods, taking international developments into account. The current doping list is set out in the annex of the SpoPO and its content is almost identical with the WADA's prohibited list.[60] Unlike the SpoPO list, the performance enhancing effect is not necessarily required on the WADA's list. In practice however, this has no specific effect since all substances and methods in the SpoPO's annex are also on the WADA's prohibited list. Conversely, this can lead to situations where athletes are not allowed to take certain substances, whilst the general population is.

D. Restriction of the availability of substances and methods of doping (Art. 20 SpoPA)

Art. 20 SpoPA restricts the availability of doping substances and methods by laying down a legal basis for the collaboration of the involved authorities in the fight against doping. The authorities are the Swiss Agency for Therapeutic Products (Swissmedic), the Federal Office for Customs and Border Security (FOCBS), the responsible cantonal law enforcement authorities and the SSI.[61]

According to para. 2, the FOCBS is obliged to report findings of suspected violations of the SpoPA to the cantonal prosecution authorities.[62] In practice, such reports are first transmitted by the FOCBS to the SSI.[63] The SSI checks the suspicion and only reports the findings to the cantonal prosecution authorities if the

---

58 Since the fight against doping is most effectively pursued through an independent agency, see Contat et al., 164.

59 Botschaft SpoFöG/IBSG, 8238. Former Art. 18 of SFG, see further BASPO, Erläuternder Bericht 1972, 32.

60 Art. 74 SpoPO; Botschaft SpoFöG/IBSG, 8238. WADA's prohibited list is updated annually and can be accessed under https://www.wada-ama.org/en/prohibited-list (last visited 17.10.2022).

61 Art. 20 para. 1 and 2 SpoPA; see further Vouilloz, N 26 f.

62 This provision corresponds in principle to Art. 66 para. 5 TPA.

63 See Art. 20 para. 3 SpoPA. This rule builds the legal basis for the "detour" via the SSI; see further Kreit, 25 f.

suspicion is substantiated.[64] This intermediate step is sensible, since the import of doping substances exclusively for personal consumption is not punishable under Art. 22 para. 4 SpoPA. In this way, an unnecessary burden on both the cantonal prosecution authorities and also athletes can be avoided.[65] In this context it is unclear when exactly the initial suspicion is given. According to Art. 309 para. 1 of the Criminal Procedure Code (CrimPC)[66], a criminal proceeding can be only opened with reasonable suspicion that an offence has been committed.[67] As a rule, retained mail[68] does not constitute grounds for reasonable suspicion pursuant to Art. 20 para. 2 SpoPA, whereas a trunk full of prohibited substances discovered during an entry check does.[69]

According to para. 3, the FOCBS is entitled to hold on to doping substances at the border or in customs warehouses and to involve the SSI for measures against doping.[70] According to para. 4, the SSI may order the confiscation and destruction of doping substances irrespective of sporting activities. The intended purpose of the illegal substance's use is not relevant. Even substances for personal use can be confiscated and destroyed.[71] It is argued that the purpose of restricting the availability of doping substances and methods already requires a prohibition of the import of all banned substances.[72]

64 Kreit, 26.

65 See further Kreit, 26.

66 Swiss Criminal Procedure Code, Criminal Procedure Code of 5 October 2007, CC 312.0.

67 For this topic, see, Schnydrig/Koch, 77 f. of this volume.

68 In this context retained mail means postal items stored in a post office during the time someone is absent.

69 Contat et al., 165.

70 This provision is of practical importance, as it means that criminally relevant information is available to the SSI without delay.

71 https://www.sportintegrity.ch/en/anti-doping/laws/import-ban (last visited on 15.6.2022). In exceptional cases, when a medically justified purpose for the importation can be provided, the prohibited substance may be released.

72 Art. 20 para. 3 SpoPA; BVGE 2015/46, E. 3.4.3; There are no "allowances", and the SSI destroys prohibited substances for a fee. See https://www.sportintegrity.ch/en/anti-doping/laws/import-ban (last visited 15.06.2022).

E. Doping controls (Art. 21 SpoPA)

Doping controls are regulated in Art. 21 SpoPA. Any person taking part in sport competitions may be required to undergo a doping test.[73] This legislation was included to provide a legal basis for the restriction of the fundamental right to personal freedom.[74] Previously, doping controls in association law were based on a voluntary declaration of the athlete's consent, which was problematic considering the right to personal freedom.[75] Doping controls affect personal rights, which is unlawful according to Art. 28 para. 2 CC, unless justified by the consent of the person whose rights are infringed, by overriding private or public interests or by law.[76] With the enactment of Art. 21 para. 1 SpoPA, there is a legal basis to test athletes even without their consent.[77]

Art. 21 para. 2 SpoPA details the authorities carrying out doping controls in Switzerland. These are on the one hand the SSI, but also international agencies for the fight against doping (lit. a), Swiss Olympic, IOC[78], WADA (lit. b) or the promotor of the sport event in which the athlete takes part (lit. c). Those bodies may carry out their tests simultaneously at the same sport event and on the same athlete.[79] Para. 3 regulates the processing and forwarding of personal data collected and para. 4 the sharing of results of their controls with the SSI. Art. 21 SpoPA is further specified by Art. 75 f. SpoPO.

1. Possible period of doping controls and definition of "sport competition" (Art. 75 SpoPO)

In principle, there is no time limit to conduct doping tests if the athlete belongs to a sport association.[80] However, the possible period of controls "in-competition" is from twelve hours before the start of the competition until the time necessary for

---

73 Art. 21 para. 1 SpoPA.

74 See BASPO, Erläuternder Bericht 1972, 32.

75 SGK FC-Zen-Ruffinen, Art. 68 FC, N 8. If athletes refused to give their consent to testing, they were excluded from competition, which made the requirement to consent legally questionable in view of Art. 28 para. 2 CC.

76 See further SGK FC-Zen-Ruffinen, Art. 68 FC, N 8.

77 SGK FC-Zen-Ruffinen, Art. 68 FC, N 8.

78 International Olympic Committee; for more information about the IOC see https://olympics.com/ioc/overview (last visited 19.08.2022).

79 Botschaft SpoFöG/IBSG, 8240.

80 https://www.sportintegrity.ch/en/anti-doping/testing/testing-system (last visited 01.09.2022).

the controls' execution after the competition's end has passed.[81] "Out-of-competition" controls are only possible under association law.[82] Therefore, if an athlete is not subject to the doping statute, only a control at the competition's venue is possible.[83] The distinction between controls "in-competition" and "out-of-competition" is important, since more substances are prohibited during the "in-competition" period.[84]

Art. 75 para. 2 SpoPO further defines the term "sport competition". Accordingly, sport competitions are all sport events that are held by either an umbrella organization of Swiss sport and its affiliated sport associations or their sub-associations and clubs (lit. a), or those events organized in accordance with the regulations of an international or national sport association (lit. b).

2. Requirements for doping controls (Art. 76 SpoPO)

Art. 76 SpoPA determines the requirements for doping controls. According to its para. 1, the SSI shall draw up an annual testing plan which regulates the number of tests conducted (lit. a), the effective and risk-appropriate allocation of the tests to the individual sport (lit. b), the allocation to training and to competition tests (lit. c) and the annual program (lit. d). The selection of athletes has to be independent of the sport and must not be predictable for the testing persons and their environment.[85] For this purpose, the SSI creates so-called "control pools", into which athletes or teams are divided depending on the sport and performance level.[86] The "Implementation Regulations on Doping Controls and Investigations"

---

81 Art. 75 para. 1 SpoPO.

82 Art. 75 para. 1 SpoPO does not provide for doping controls outside of the scheduled competition time slot, for training and competition controls in COVID-times, see Haug, 151 f.

83 See Art. 5.2 and Art. 5.3 Doping-Statut 2021. The Doping-Statut 2021 is available at https://www.swissolympic.ch/dam/jcr:7a1d6e43-cfe8-4671-9ad3-f1dcaba272ca/10.1_Doping-Statut_2021.pdf (last visited 23.06.2022).

84 Art. 4.2.1 WADC; https://www.sportintegrity.ch/en/anti-doping/testing/testing-system (last visited 01.09.2022).

85 Art. 76 para. 2 SpoPO.

86 SSI has six different control pools. For athletes, there are the National Registered Testing Pool (NRTP), the National Testing Pool (NTP) and other testing pools. For teams, a distinction between the whereabouts of the team sport I, team sport II and team sport III pools are made. For more information about the control pools see https://www.sportintegrity.ch/en/anti-doping/testing/whereabouts-pools (last visited 21.06.2022).

serves as the basis for classification.[87] If one is assigned to a control pool, so-called "whereabouts" are necessary. The athletes must provide information on their place of residence, work and education, training and training camps, competitions, and other regular activities.[88] Since those data contain important information about a person's life, the whereabouts regulations – especially the willingness to submit to them – have been criticized, though an infringement of personality rights has been denied. The whereabouts scheme is considered necessary to ensure testing can take place at any time and without prior notification of the athlete.[89] Otherwise, an effective testing is not possible. An exception to unannounced controls exists according to Art. 76 para. 3 SpoPO in the case of follow-up examinations. In addition, the controlled person's privacy must be protected.[90] Controls involving invasions into athletes' bodies[91] must be carried out by a person with professional training.[92] Finally, the procedure, the material, and the transport to the analytical laboratory must comply with WADA's International Standards.[93]

3. Analysis and use of the analysis's results (Art. 77 SpoPO)

According to international standards, the analysis of the results of doping samples must be carried out by an internationally accredited doping laboratory.[94] The accredited doping laboratory in Switzerland is the LAD in Lausanne.[95] If there is a positive result, the laboratory prepares an analysis report for the Doping Control Authority. The report must be credible and comply with international standards.[96]

---

87 The Implementation Regulations are available at https://www.sportintegrity.ch/sites/default/files/abde_2021_de.pdf (last visited 21.06.2022). Doping controls are regulated in Art. 4 of the Implementing Regulations.

88 https://www.sportintegrity.ch/en/anti-doping/testing/whereabouts (last visited 06.09.2022).

89 Art. 76 para. 3, first sentence SpoPO.

90 Art. 76 para. 3, second sentence SpoPO.

91 For instance, blood or tissue sampling.

92 Art. 76 para. 4 SpoPO.

93 Art. 76 para. 5 SpoPO. There are currently eight international standards. The relevant ones for doping tests are the "International Standard for Testing and Investigation" (ISTI) and the "International Standard for Laboratories" (ISL); an overview of the International Standards is accessible under https://www.wada-ama.org/en/what-we-do/international-standards (last visited 01.09.2022).

94 Art. 77 para. 1 SpoPO; https://www.wada-ama.org/sites/default/files/resources/files/international_standard_isti_-_2021.pdf (last visited 01.09.2022).

95 https://www.curml.ch/en/swiss-laboratory-doping-analyses (last visited 21.06.2022).

96 Art. 77 para. 2 SpoPO.

Additionally, in accordance with Art. 77 para. 3 SpoPO, the LAD shall immediately report the positive results to the disciplinary body of the responsible federation (lit. a) and to the responsible prosecution authority (lit. b).

F. Criminal provisions (Art. 22 SpoPA)

The criminalizing doping legislation in Switzerland can be found in Art. 22 ff. SpoPA. In addition to the SpoPA, the Therapeutic Products Act (TPA) and the Narcotics Act (NarcA) may apply to doping cases.[97]

1. Elements of crime

The main criminal provision is Art. 22 SpoPA and reads as follows:[98]

> [1]Any person who manufactures, acquires, imports, exports, conveys, distributes, sells, prescribes, markets, administers or possesses doping substances under Article 19 paragraph 3 or applies methods under Article 19 paragraph 3 to third parties is liable to a custodial sentence not exceeding three years or a monetary penalty.
> [2]In serious cases, a custodial sentence not exceeding five years may be imposed; a monetary penalty shall be combined with the custodial sentence.
> [3]A case is considered serious in particular if the offender:
> a. acts as a member of a group formed to pursue the activities set out in paragraph 1;
> b. seriously endangers the health or the life of athletes in an action listed in paragraph 1;
> c. distributes, sells, prescribes or administers substances under Article 19 paragraph 3 to children and young people under 18 years old or uses methods under Article 19 paragraph 3 on these persons;
> d. makes a large turnover or a considerable profit from commercial trade.
> [4]If the manufacture, acquisition, import, export, conveyance or possession of doping substances are exclusively for personal consumption, the person is not liable to a penalty.

Art. 22 para. 1 SpoPA has a broad catalog of offenses prohibiting activities related to doping. Doping is defined as a "misuse of substances and methods to increase physical performance in sport".[99] The definitions of the WADA differ slightly in that it provides a list defining occurrences of anti-doping violations.[100]

---

97 Relevant are Art. 86 TPA and Art. 19 ff. NarcA. This topic will not be discussed further in this essay since it would go beyond the intended scope.

98 This article replaces Art. 11f SFG.

99 Art. 19 para. 1 SpoPA.

100 List of Art. 2.1–Art. 2.11 WADC, for example the presence of a prohibited substance in an athlete's sample (Art. 2.1 WADC) or a whereabouts failure by an athlete (Art. 2.4 WADC) is considered as doping. See further above, chapter III.B.

Under Art. 22 para. 1 SpoPA almost all forms of doping-related activities, from production to importation, are punishable.[101] The provision is thus directed against the entire unauthorized traffic of substances associated with doping. The legislator wanted to prevent or at least reduce the unlawful distribution of doping substances in the same way it has been done for narcotics.[102] Furthermore, the offender is referred to as "any person" and the wording does not limit the scope of application. Art. 22 SpoPA is thus a common offense.[103] Anyone can be a perpetrator, even the athlete him- or herself, as long as Art. 22 para. 4 SpoPA is not applicable.[104]

2. Protected legal interest

The question of the protected legal interest in the German legal area is important since it legitimizes criminal law provisions. Criminalization of a field of law should always be the "ultima ratio" and new rules should only be enacted if there are no other proportionate measures in place. Thus, when introducing a new regulation there is always the need to define the protected legal interest beforehand.

Legal scholars hold various views on the legal interest protected by anti-doping regulations. The three most common ones are the protection of the athlete's health, maintaining fairness and equal opportunities for all athletes, and the protection of national health.[105] In the newest report of the Swiss Federal Council from December 2021, the "integrity of sport competition" is viewed as the main protected legal interest.[106] The protection of honest competition is the main goal, and athletes should be able to trust in their competitors' rule compliance.[107]

3. Scope of application

The material scope of application is limited to the list in the Annex of SpoPO due to the definition of doping.[108] The personal scope of application is no longer lim-

---

101 One exception is that the consumption is not punishable according to Art. 19 para. 4 SpoPA.

102 See further BSK BetmG-Hug-Beeli, Art. 19, N 1 ff. Art. 19 NarcA aims to protect all traffic with narcotics.

103 Donatsch/Godenzi/Tag, 102.

104 See Jörger, Postulate, N 9.

105 Botschaft SpoFöG/IBSG, 8229 f.; Gattiker, 201 f.; Hangartner, 9; Zollinger, 47 f.; Tauschwitz, 84 ff.

106 Bericht des Bundesrates, Selbstdoping, 2.

107 Bericht des Bundesrates, Selbstdoping, 2.

108 Contat et al., 167; Gattiker, 201.

ited to the participation in a regulated competition. Since the enactment of the new SpoPA, not only athletes but everyone falls under the SpoPA.[109] The previous restriction for regulated competition has been deleted without any replacement of the rule, therefore extending the criminal liability to amateur sport as well.[110] For serious cases pursuant to Art. 22 para. 3 and 4 SpoPA special conditions may apply.

The extension of the scope of application leads to some difficulties in the applicability of doping rules. For example, the risk of criminal liability for healthcare professionals has evolved, since with this broad definition of "sport" any activity may fall under the term "sport" and thus every prescription of medication with performance enhancing qualities can amount to doping under Art. 19 para. 1 SpoPA.[111] This, however, was certainly not the idea intended when introducing this rule.

4. Basic offence according to para. 1

The conduct of the basic offence under para. 1 is criminalized with a custodial sentence not exceeding three years or a monetary penalty.[112] The wording shows that neither self-consumption nor possession for personal use is prohibited.[113] The goal when introducing this regulation was to target those supplying doping substances to athletes to make access to them more difficult.[114]

5. Serious cases according to para. 2

Serious cases are regulated in para. 2 where a custodial sentence not exceeding five years may be imposed and where the monetary penalty shall be combined with the custodial sentence.[115] A serious case is given when the offender acts as a member of a group, seriously endangers the health or the life of athletes, administers substances to children or by commercial trade with a considerable profit.[116] The list of grounds for qualification mentioned is merely exemplary and not exhaustive. For

---

109 Since 1. October 2012, there is a general criminal liability for doping in sport. No rule explicitly states that the doping violation must occur "in a regulated competition". See also Bericht des Bundesrates, Selbstdoping, 28.

110 For further information on the scope of Art. 22 SpoPA view BGE 145 IV 329, E. 2.4.2.

111 For the risk of criminal liability for healthcare professionals see Diethelm et al., 115 ff. of this volume.

112 Art. 22 para. 1 SpoPA.

113 See Art. 22 para. 4 SpoPA.

114 Botschaft Europaratskonvention, 7756; Botschaft HMG, 3568; Hangartner, 8.

115 Art. 22 para. 2 SpoPA.

116 Art. 22 para. 2 SpoPA. See for further information Sugiyama/Hangartner, 247 f.

the determination of further qualification grounds, the wrongfulness and culpability in each case is decisive.[117]

Under current legislation, procedural measures for the surveillance of post and telecommunications and for undercover investigations are only possible in serious cases.[118] Swiss authorities are currently struggling with detecting doping cases. It is undisputed that doping exists – even in amateur sport – especially in bodybuilding.[119] However, exposing underground laboratories without being allowed to effectively use procedural measures remains a difficult task. A solution to this problem could be, as Germany has, to criminalize self-doping.[120] This would enable the use of procedural measures in cases of the basic offence regulated in para. 1.

G. Prosecution (Art. 23 SpoPA)

Prosecution is detailed in Art. 23 SpoPA. According to para. 1, prosecution is a cantonal matter, however the SSI and the FOCBS can be called in for any investigation.[121] Para. 2 as well as Art. 77 para. 3 lit. b SpoPO oblige the agency carrying out the control[122] to inform the prosecution authorities responsible if prohibited substances or methods are identified in doping controls.[123] In principle, this also applies to cases of personal consumption which are not punishable. The criminal prosecution authority then decides whether there are grounds for suspicion of an act that goes beyond personal consumption in accordance with Art. 6 para. 2 CrimPC.[124]

---

117 Compare the wording "in particular", see further BSK BetmG-Hug-Beeli, Art. 19, N 840.

118 Art. 269 para. 2 lit. i CrimPC for the surveillance of post and telecommunications and Art. 286 para. 2 lit. h CrimPC for undercover investigations.

119 Bericht des Bundesrates, Selbstdoping, 2 f.

120 Bericht des Bundesrates, Selbstdoping, 35 ff.; see also Hangartner, 10.

121 This regulation has been in force since 1 October 2012. Cooperations especially in the larger cantons have improved since then, because previously there was no communication between the SSI and the authorities involved, see also Botschaft, SpoFöG/IBSG, 8241.

122 Agencies regulated in Art. 21 para. 2 SpoPA.

123 The exchange of data is regulated in the Federal Act of 19 June 2015 on the Federal Information Systems for Sport (FISSA), CC 415.1. According to Art. 32 lit. h FISSA, the SSI receives data on criminal proceedings for violations of the SpoPA.

124 If it is merely a case of personal consumption, a no-proceedings order will be issued in accordance with Art. 310 CrimPC.

Pursuant to Art. 23 para. 3 SpoPA, the SSI has party rights within the meaning of Art. 104 para. 2 CrimPC.[125] According to Art. 104 para. 2 CrimPC, the Confederation and the cantons may allow full or limited party rights to other authorities that are required to safeguard public interests. Official party rights are granted because specialized administrative authorities are more qualified to detect and prosecute violations of administrative norms.[126] The prerequisite for this is that the party status is expressly permitted in a formal law, which is fulfilled by Art. 23 para. 3 SpoPA.[127] The SSI can therefore, on the one hand, order an appeal against discontinuation and no proceedings orders (lit. a) and, on the other hand, file an objection to summary penalty orders (lit. b) and file an appeal and accessory appeal against judgments (lit. c). It is unclear whether these party rights can already be claimed during the investigation or only after the conclusion of the criminal investigation. According to Contat/Pamberg/Pfister/Steiner, the usage of party rights, such as the right to access records, is also possible during the investigation in order to increase the effectiveness of the fight against doping.[128]

H. Information (Art. 24 SpoPA)

Art. 24 SpoPA regulates the exchange of information between the responsible prosecution and judicial authorities and the SSI. According to this article, the responsible prosecution and judicial authorities are obliged to notify the SSI of doping violations.[129] This provision is the "counterpart" of Art. 23 para. 2 SpoPA, which obliges the SSI to inform the competent law enforcement authorities about positive doping tests. Art. 78 para. 2 SpoPO conclusively determines which information is to be passed on. These are the personal data of the accused (lit. a), the type of sport and discipline (lit. b), the personal data of the coaches, doctors and other support staff of the accused (lit. c), the reason for the initiation of the criminal investigation (lit. d), information on the seized doping substances, narcotics or medicines (lit. e),

125 BGE 144 IV 240, E. 2.4.3; see further SK StPO-Lieber, Art. 104, N 15.

126 BSK StPO-Küffer, Art. 104, N 23. The term "public authority" includes decentralized administrative bodies representing specific public interests, provided that they are subject to appropriate state control when performing their assigned tasks, see SK StPO-Lieber, Art. 104, N 18a.

127 BSK StPO-Küffer, Art. 104, N 24; SK StPO-Lieber, Art. 104, N 16.

128 Contat et al., 170. The same authors argue that the SSI may use criminal and administrative information obtained during its private law activities, see Contat et al., 172 f.

129 Through this means the SSI receives important information, enabling a more efficient fight against doping, see Botschaft SpoFöG/IBSG, 8241.

interrogation records (lit. f), information on previous convictions in the area of the SpoPA (lit. g), decisions necessary for the election of party rights according to Art. 23 para. 3 SpoPA (lit. h) and further information suitable for combating the abuse of doping (lit. i). In this context, lit. i appears to be critical with regard to the definiteness of the regulation in the case of an exhaustive enumeration. According to Contat/Pamberg/Pfister/Steiner, the ordinance is allowed to have such a regulation, since Art. 24 SpoPA only stipulates on the legal level that the Federal Council determines which information is to be passed on. This regulation ensures that the SSI is in possession of all necessary information for an effective fight against doping.[130] The information may only be disclosed if the personal rights of third parties are not affected, and the purpose of the criminal investigation is not jeopardized.[131]

In 2021, the SSI received 54 notifications pursuant to Art. 24 SpoPA. Of these notifications, 30 were from the Canton of Zurich, seven from the Canton of Aargau and three from the Canton of Vaud.[132] As these numbers show, the exchange of information between the authorities varies depending on the canton. Not all cantons have experts in the field of doping, and even if they have the knowledge, there is usually a lack of resources to fight doping effectively. Furthermore, even though the exchange of information has a lot of positive effects, one downside is that private law disciplinary proceedings are often delayed. The SSI must withhold their own investigations in order to not endanger states' measures. This goes against the sport association's interest to solve disputes as quickly as possible.[133]

I. International exchange of information (Art. 25 SpoPA)

Art. 25 SpoPA regulates which data the SSI may exchange in an international context. To combat doping effectively, personal data and personality profiles requiring special protection may also be exchanged internationally.[134] However, data may only be exchanged with recognized foreign or international anti-doping agencies for the purpose of combating doping and only if such an exchange is

130 Contat et al., 171.

131 Art. 78 para. 2 lit. a and b SpoPO.

132 Internal dossier from SSI, received on 3.3.2022 by e-mail from Mr. Hanjo Schnydrig.

133 For this topic Schnydrig/Koch, 86 f. of this volume.

134 Further regulations are contained in the IBSG, such as Art. 34 para. 1 lit. d IBSG, which stipulates that the SSI shall disclose data to foreign or international anti-doping agencies.

necessary.[135] According to Art. 25 paras. 2 and 3 SpoPA, only personal data that is indispensable to fulfill the mandate to combat doping may be shared.[136] Para. 4 stipulates that the SSI must ensure that the transmitted data is not disclosed to unauthorized third parties. In addition, it must refuse to pass on any data if there is a risk of personal rights being violated.[137] In practice, the international exchange of data is usually made through WADAs Anti-Doping Administration and Management System (ADAMS) platform.[138] ADAMS is designed to be a secure web-based system that centralizes doping control-related information such as athlete whereabouts, testing history, laboratory results, the Athlete Biological Passport (ABP), Therapeutic Use Exemptions (TUEs) and information on Anti-Doping Rule Violations.[139]

IV. Concluding Remarks

The goal of this article was to provide an overview of the existing measures against doping in the Swiss Sport Promotion Act. It can be concluded that in Switzerland there are already some regulations in place to combat criminal doping. Furthermore, new measures to combat competition rigging have just recently been put into place, which shows that manipulation in sport is taken seriously.

According to Art. 22 para. 1 SpoPA, all kind of unauthorized traffic in substances classified as doping is prohibited. The aim in introducing this legislation was to prevent unauthorized distribution of doping substances. In addition, the exchange of information between the responsible prosecution and judicial authorities and the SSI has been strengthened, which is a positive trend. If those changes are enough to efficiently combat doping is however unclear.

Self-doping is explicitly excluded from criminal liability (Art. 22 para. 4 SpoPA). At the moment, the problem Swiss authorities are facing is that numerous doping cases remain undetected. With the criminalization of personal consumption, pro-

135 Art. 25 para. 1 SpoPA. Recognized bodies are those officially designated by the respective countries as "anti-doping bodies", see Botschaft SpoFöG/IBSG, 8241.

136 In practice there are only a few cases where an international exchange of information takes place.

137 For Art. 25 SpoPA view further, Contat et al., 171 f.

138 https://www.wada-ama.org/en/what-we-do/adams (last visited 16.09.2022).

139 https://www.wada-ama.org/en/what-we-do/adams (last visited 16.09.2022).

cedural measures could be used more efficiently, which according to Art. 22 para. 2 SpoPA are currently only possible in serious cases.[140]

To conclude, the system in place is complicated and still faces practical challenges, since the state measures presented in this article are accompanied and supplemented by a multitude of private regulations. The state's involvement in the fight against doping in an international context is necessary. However, if, when, and how Switzerland will introduce a new legislation criminalizing self-doping remains to be seen.

Bibliography

Bericht des Bundesrates in Erfüllung des Postulats 19.4366 Dobler vom 27. September 2019, Strafbarkeit des Selbstdopings im Sport vom 10. Dezember 2021, https://www.newsd.admin.ch/newsd/message/attachments/69523.pdf (last visited 18.10.2022) (cit. Bericht des Bundesrates, Selbstdoping).

Biaggini Giovanni, BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft, 2. Aufl., Zürich 2017 (cit. FC Commentary-Author).

Botschaft über die Internationale Konvention gegen Doping im Sport (07.069) vom 5. September 2007, https://www.admin.ch/opc/de/federal-gazette/2007/6489.pdf (last visited 20.10.2022) (cit. Botschaft UNESCO-Konvention).

Botschaft zum Sportförderungsgesetz und zum Bundesgesetz über die Informationssysteme des Bundes im Bereich Sport (09.082) vom 11. November 2009, Bundesblatt Nr. 48 vom 1. Dezember 2009, 8189 ff., https://www.admin.ch/opc/de/federal-gazette/2009/8189.pdf (last visited 22.06.2022) (cit. Botschaft SpoFöG/IBSG).

Botschaft über das Zusatzprotokoll zur Konvention des Europarates gegen Doping (03.068) vom 29. Oktober 2003, https://www.admin.ch/opc/de/federal-gazette/2003/7751.pdf (last visited 23.06.2022) (cit. Botschaft Europaratskonvention).

Botschaft zu einem Bundesgesetz über Arzneimittel und Medizinprodukte (99.020) vom 1. März 1999, Bundesblatt Nr. 21 vom 1. Juni 1999, 3453 ff., https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10055092 (last visited 10.10.2022) (cit. Botschaft HMG).

[140] See for example Art. 269 para. 2 lit. i CrimPC for the surveillance of post and telecommunications and Art. 286 para. 2 lit. h CrimPC for undercover investigations.

Bundesamt für Sport (BASPO), Erläuternder Bericht zur Totalrevision des Bundesgesetzes vom 17. März 1972 über die Förderung von Turnen und Sport, https://biblio.parlament.ch/e-docs/149309.pdf (last visited 10.10.2022) (cit. BASPO, Erläuternder Bericht 1972).

Contat Laurent/Pamberg Christoph/Pfister Stefan/Steiner Marco, Dopingbekämpfung durch Staat und Private in der Schweiz, Causa Sport 2016, 159–179.

Donatsch Andreas/Godenzi Gunhild/Brigitte Tag, Strafrecht I, Verbrechenslehre, 10. Aufl., Zürich 2022.

Donatsch Andreas/Lieber Viktor/Summers Sarah/Wohlers Wolfgang, Kommentar zur Schweizerischen Strafprozessordnung (StPO), 3. Aufl., Zürich 2020 (cit. SK StPO-Bearbeiter).

Ehrenzeller Bernhard/Schindler Benjamin/Schweizer Reiner J./Vallender Klaus A., Die Schweizerische Bundesverfassung, St. Galler Kommentar, 3. Aufl., Zürich 2014 (cit. SGK FC-Author).

Gattiker Monika, Die rechtliche Stellung des Arztes bei Doping und Heilmittelmissbrauch, in: Oliver Arter (Hrsg.), Sport und Recht, Bern 2003, 193–241.

Hangartner Sena, Criminalization of Doping in Switzerland, HED Matters, Enhancement Drugs and the Criminal Justice System, 5(1)/2022, 8–10.

Haug Tanja, Neue Formen der Dopingbekämpfung im Zuge von COVID-19, Causa Sport 2020, 151–154.

Hug-Beeli Gustav, Basler Kommentar zum Bundesgesetz über die Betäubungsmittel und psychotropen Stoffe vom 3. Oktober 1951, Basel 2016 (cit. BSK BetmG-Hug-Beeli).

Jörger Werner, Die Strafbarkeit von Doping nach dem Bundesgesetz über die Förderung von Turnen und Sport, Diss. Zürich 2005, Bern 2006 (cit. Jörger, Strafbarkeit von Doping).

Jörger Werner, Die Strafbarkeit von Doping nach schweizerischem Recht, Postulate de lege ferenda, Jusletter of 20. February 2006 (cit. Jörger, Postulate).

Kamber Matthias, Die UNESCO Konvention gegen Doping als Chance für die zukünftige Dopingbekämpfung in der Schweiz?, Jusletter of 20. February 2006.

Kamber Matthias/Steffen Benjamin, Der vergiftete Sport, Siege und Niederlagen im Kampf gegen Doping, Zürich 2020.

Kreit Boris, Bekämpfung der Heilmittelkriminalität, Leitfaden für die Praxis, Bern 2016.

Natsch Markus, Dopingbekämpfung und Unschuldsvermutung, Die Rechtsprechung der Disziplinarkammer für Dopingfälle von Swiss Olympic unter besonderer Berücksichtigung der Unschuldsvermutung, Diss. Bern 2008, Bern 2009.

Netzle Stephan, "Swiss Sport Integrity" seit Anfang 2022 in Betrieb, Spurt 4/2022, 233–238.

Niggli Marcel Alexander/Heer Marianne/Wiprächtiger Hans, Schweizerische Strafprozessordnung/Jugendstrafprozessordnung, Basler Kommentar, 2. Aufl., Basel 2014 (cit. BSK StPO-Author).

Schmidt Juana, Zur Strafbarkeit von Doping im Sport, Perspektiven für einen Anti-Doping-Tatbestand, in: Eckner Martin (Hrsg.), Recht des Stärkeren, Recht des Schwächeren, Analysen und Perspektiven von Assistierenden des Rechtswissenschaftlichen Instituts der Universität Zürich, Zürich 2005, 1–21.

Schweizer Eva, Aktuelle Rechtsentwicklungen in der Dopingbekämpfung, in: Arter Oliver (Hrsg.), Sport und Recht, 2. Tagungsband, Bern 2005, 235–273.

Sugiyama Shoichi/Hangartner Sena, Ahead of the Tokyo 2020 Olympic Games – The Fight against Doping in Japan and in Switzerland at a Glance, Causa Sport 2019, 243–253.

Tauschwitz Moritz, Die Dopingverfolgung in Deutschland und Spanien, Eine strafrechtliche und kriminologische Untersuchung, Berlin 2015.

Trunz Mirjam, Ein globaler Lösungsansatz zur Bekämpfung der Spiel- und Wettspielmanipulation im Sport, Diss. Zürich 2016, Zürich 2016.

Vouilloz François, Le nouveau droit suisse du dopage, Aspects de droit pénal et de droit du sport, Jusletter of 9. September 2013.

Waldmann Bernhard/Belser Eva Maria/Epiney Astrid, Bundesverfassung, Basler Kommentar, 1. Aufl., Basel 2015 (cit. BSK FC-Author).

Zollinger Marco, Die rechtlichen Rahmenbedingungen der staatlichen Sportförderung in der Schweiz, Unter besonderer Berücksichtigung des Leistungssports, Diss. Bern 2019, Zürich/St.Gallen 2019.

Criminal Responsibility for Doping in Austria

Jakob Hajszan*

Doping is widespread both among top athletes as well as in the amateur sector. To counteract the use of doping, sports federations resort to measures like competition bans or fines. The Austrian, German, and Swiss legislatures have been pushing the fight against doping for the last decades. As a result, doping scandals that occurred in top international sport have recently been brought before Austrian courts, which has revived the discussion regarding the criminal responsibility of doping.

Regarding the criminal classification of the use of doping, there are various offences of the Criminal Code, but also other provisions outside the Criminal Code, which may be applicable. Coaches, doctors, or teammates could be liable for assault if the application of doping substances or methods causes injuries to an athlete's health. However, they may be exempt from liability if their actions are a mere participation in the athlete's self-endangerment or in case of minor injuries if they apply the substances or methods with the athlete's informed consent. Additionally, the putting into circulation, application on others, and possession of certain substances or methods can be punished under § 28 ADBG 2021.

Athletes who administer doping substances to themselves cannot be immediate perpetrators of § 28 ADBG 2021, however, criminal liability as a participant could be considered. A special penal provision that prohibits so-called self-doping – essentially, the use of doping as well as the possession or acquisition of doping substances for personal use by athletes themselves does not exist in Austria. However, athletes could be liable for fraud. The legislature considers this offence to be applicable, which is why an aggravated offence specifically aimed at doping was introduced as § 147 (1a) StGB/AT in 2009. However, the examination of the individual elements of this offence poses difficulties.

* Mag. iur., PhD-Candidate and Research Assistant; Chair of Univ.-Prof. Dr. Ingeborg Zerbes, Department of Criminal Law and Criminology, University of Vienna, Austria.

Table of Contents

I. Introduction

Doping is both widespread among top athletes, as well as in the amateur sector. To counteract the use of doping, sports federations resort to measures like competition bans or fines. The Austrian,[1] German,[2] and Swiss[3] legislatures have been push-

[1] For an overview of the development of anti-doping measures in Austria cf. Sautner, 65 ff.; Zeinhofer, 326f; Müller/Nürnberger/Sammer, 5 ff.

[2] HK AntiDopG-Rössner, Vor §§ 1 ff. N 1 ff.

[3] See Hangartner, 20 ff. of this volume.

ing the fight against doping over the last decades, which has led to criminal proceedings in Austrian courts.[4]

Regarding the criminal classification of the use of doping, there are various offences of the StGB/AT,[5] but also other provisions outside the Criminal Code, which may be applicable. Administering doping substances or methods can be a criminal offence for doctors, coaches, and teammates according to § 83 StGB/AT (assault).[6] Additionally, putting certain substances or methods into circulation, applying them to others and possessing them can be punished according to § 28 ADBG 2021[7] (formerly § 22a ADBG 2007).[8] Athletes who administer doping substances to themselves cannot be immediate perpetrators of § 28 ADBG 2021, however, criminal liability as a participant could be considered.[9] A special penal provision that prohibits so-called "self-doping", i.e. the use of doping as well as the possession or acquisition of doping substances for personal use by athletes themselves does not exist in Austria, unlike for certain top athletes in Germany.[10] However, athletes could still be liable for fraud.[11] The legislature considers this offence to be applicable, which is why an aggravated offence specifically aimed to fight doping was introduced as § 147 (1a) StGB/AT in 2009.[12]

4 I.a., OGH 15 Os 105/14a, in: EvBl 2015/20; 11 Os 49/20w, in: EvBl 2021/84. Abbreviations of Austrian Courts: VfGH = *Verfassungsgerichtshof*/Constitutional Court; OGH = *Oberster Gerichtshof*/Supreme Court; OLG = *Oberlandesgericht*/Higher Regional Court; LG(S) = *Landesgericht (für Strafsachen)*/Regional (Criminal) Court; BG = *Bezirksgericht*/District Court.

5 Criminal Code, BGBl 60/1974 as amended (cit. StGB/AT).

6 See i.a. Flora, 134 ff. and below III. B.

7 Federal-Anti-Doping Act 2021, BGBl I 152/2020 (cit. ADBG 2021).

8 Cf. WK StGB-Tipold, § 28 ADBG and in-depth below II.

9 According to § 12 StGB/AT a person who directs another to commit a crime or contributes to a crime in any way is liable to the same punishment as the immediate perpetrator.

10 Cf. HK AntiDopG-Putzke, § 4 N 12 ff.; MüKo StGB-Freund, §§ 1–4a AntiDopG N 30 ff.

11 See Hajszan, 276 ff.; JB WiStr 13-Tipold, 72 ff. and below III. A.

12 Promulgated by BGBl I 142/2009.

II. Provisions outside the Criminal Code: The Federal Anti-Doping Act

A. Development of anti-doping-provisions

The first criminal provisions targeting doping in sports in §§ 5a, 84a AMG/AT,[13] were supposed to implement the Anti-Doping Convention.[14] Subsequently, the distribution or application of medicinal products containing doping substances on others was prohibited in § 5a AMG/AT. However, these actions were only illegal if the objective was doping in sports.[15] The provisions were repealed in 2008 and similar criminal offences were introduced into the ADBG 2007[16] to consolidate anti-doping regulations into the same act.[17]

Thereafter, anybody who *applied* substances or methods prohibited by the annex to the Anti-Doping Convention on others or *put* such substances *into circulation* for the *objective of doping in sports* committed a criminal offence. Furthermore, the *possession* of larger amounts of specific substances was also illegal. Contrary to the offences in § 84a AMG/AT, the new § 22a ADBG 2007 did not require the substances used for doping-related actions to be medicinal products.[18] Furthermore, the application of prohibited doping related methods – blood and gene doping – on others was included in sec. 1 No. 2. The new provision was already amended in 2009, when the scope of its application was reduced to substances *prohibited in all sports*.[19] § 22a ADBG 2007 was last amended in 2014 when the wording "objective of doping in sports" was changed to "in connection with any sporting activity". In 2021 the ADBG 2007 was repealed and the criminal offences were integrated into § 28 of the new ADBG 2021 almost unchanged.[20]

---

13 Medicinal Products Act, BGBl 185/1983 as amended (cit. AMG/AT).

14 Sautner, 78; WK StGB-Tipold, Vor §§ 28–31 ADBG N 4; Zeder, 69; Zeinhofer, 326.

15 Cf. OLG Graz 9 Bs 94/12k, 15.2.2012; Markowetz, 421.

16 Federal Anti-Doping Act 2007, BGBl I 30/2007, repealed by BGBl I 152/2020 (cit. ADBG 2007).

17 JB BT 09-Wessely, 64; WK StGB-Tipold, Vor §§ 28–31 ADBG N 10.

18 JB BT 09-Wessely, 69.

19 Therefore § 22a ADBG 2007 was no longer applicable to alcohol, a substance prohibited in some sports, WK StGB-Tipold, Vor §§ 28–31 ADBG N 11.

20 L/S NebG-Salimi, § 28 ADBG N 2; WK StGB-Tipold, Vor §§ 28–32 ADBG N 12/1; in depth cf. Petschinka/Reifeltshammer, 207 ff.

B. Common aspects of the offences under the ADBG 2021

All offences under the ADBG 2021 are only applicable if certain substances or methods are involved and if the offender acts with the *objective* of *doping* in *connection* with any *sporting activity*.

1. Protected legal interests

The question of the legal interest(s) protected by anti-doping provisions is a particularly controversial issue. An examination of § 1 (1) ADBG 2021 may bring some clarity, as it stipulates that doping is a violation of the principle of fairness in sporting competitions as well as an offence to sportsmanship and can also be harmful to health. While the Austrian doctrine either views the *athlete's individual health*[21] or *public health*[22] as protected legal interests, parts of the German doctrine consider the *competitor's individual health* to be the protected legal interest.[23] However, the fact that the ADBG 2021 only protects health from damages caused by doping substances in the context of sporting activity may violate the *principle of equality* in Art. 7 B-VG.[24] Therefore, § 28 ADBG 2021 could be unconstitutional.[25] In addition to the athlete's or public health, *fairness* in sporting competitions is also protected by § 28 ADBG 2021.[26] However, some authors also doubt that the protection of *fairness* and *sportsmanship* in sporting competitions justifies criminal provisions banning doping in sports.[27] In the context of doping, other people's property is only protected by the aggravated fraud offence in § 147 (1a) StGB/AT, but is not named in § 1 ADBG 2021 and therefore not protected by § 28 *leg cit*.[28]

2. Doping in connection with any sporting activity

According to the beginning of its first sentence, § 28 ADBG 2021 only punishes certain behaviour specified in sec. 1 and 2 if the offender acts with the objective of *doping in connection with any sporting activity*. In this context, "doping" means the

---

21 JB BT 15-Wessely, 38; WK StGB-Tipold, § 28 ADBG N 19.

22 L/S NebG-Salimi, § 28 ADBG N 3. BGH 4 StR 389/17, in: NStZ 2018, 475 (Putzke); HB SportStrR-Vaudlet, Ch. 4 N 10.

23 W/K/M BtMG-Kornprobst, § 1 AntiDopG N 9; HK AntiDopG-Putzke, § 3 N 47.

24 Federal Constitutional Act, BGBl 1/1930 as amended (cit. B-VG).

25 JB BT 15-Wessely, 38; WK StGB-Tipold, § 28 ADBG N 21.

26 JB BT 15-Wessely, 37 f.; WK StGB-Tipold, § 28 ADBG N 21.

27 JB BT 15-Wessely, 37 f.; WK StGB-Tipold, § 28 ADBG N 25.

28 WK StGB-Tipold, § 28 ADBG N 24.

unnatural performance enhancement or increase in performance through the use of pharmacological substances or methods.[29] Furthermore, it also includes the use of substances such as *diuretics*, which can falsify doping control results or help athletes to lose weight in a short amount of time.[30] The limitation of the scope of application to actions for doping related purposes clarifies the exclusion of the usage of pharmacological substances or methods for doping unrelated ends, such as medical or academic purposes.[31]

Sporting activity signifies physical activity that primarily serves the purpose of physical exercise or increasing physical performance. As a result, neither physical activity for other purposes nor intellectual activity are grounds for criminal responsibility.[32] The question whether *esports*-disciplines are included in the term "sporting activity" or not remains controversial and has not yet been decided by the courts.[33] The phrase "*any* sporting activity" underlines the inclusion of leisure sports and amateur athletes.[34] It was introduced as a reaction to a ruling by the Higher Regional Court of Vienna which excluded leisure sports,[35] and in order to clarify[36] that § 22a ADBG 2007 was also applicable on sportive activities outside of competitions such as training or bodybuilding.[37] Whether the "sporting activities" mentioned in § 28 (1) ADBG 2021 only include sports with governing bodies which organize competitions, or also refers to sports without organized contests, is controversial.[38]

---

29 OLG Wien 19 Bs 306/13h, 15.10.2014; OLG Graz 9 Bs 48/12w, 6.3.2012; L/S NebG-Salimi, § 28 ADBG N 16; Flora, 141.

30 Cf. W/K/M BtMG-Kornprobst, § 2 AntiDopG N 8 with references.

31 Flora, 141; L/S NebG-Salimi, § 28 ADBG N 16; WK StGB-Tipold, § 28 ADBG N 4.

32 Flora, 141; L/S NebG-Salimi, § 28 ADBG N 17; WK StGB-Tipold, § 28 ADBG N 5; likewise HK AntiDopG-Putzke, § 4 N 55.

33 In favour L/S NebG-Salimi, § 28 ADBG N 17; Ruppert, 107 f.; against E/K NebG-Wussler, § 2 AntiDopG N 6.

34 L/S NebG-Salimi, § 28 ADBG N 18.

35 OLG Wien 21 Bs 397/12d, 17.5.2013; similar LGS Wien 82 Hv 104/13h, 27.11.2013; BG Hernals 9 U 177/12 s, 7.2.2013.

36 The legislature and courts saw bodybuilding included in the term "sport" in the original § 22a ADBG 2007; ErläutRV 320 BlgNr 25. GP, 19; OLG Innsbruck 6 Bs 153/15y, 29.7.2015; OLG Wien 19 Bs 306/13h, 15.10.2014; 17 Bs 233/15m, 8.9.2015 and prior to 2014, OGH 14 Os 41/12d, 16.5.2012; OLG Graz 9 Bs 48/12w, 6.3.2012; LGS Wien 131 Bl 44/13m, 11.4.2013.

37 WK StGB-Tipold, Vor §§ 28–32 ADBG N 12; Zeder, 70; L/S NebG-Salimi, § 28 ADBG N 18.

38 While L/S NebG-Salimi, § 28 ADBG N 18 includes sports without competitions; WK StGB-Tipold, § 28 ADBG N 5 and Flora, 141 exclude such sports.

3. Substances and methods

The different forms of conduct specified in § 28 ADBG 2021 are only punishable if the substances or methods used are mentioned on the so-called *Prohibited List*,[39] which is included in the annex to the Anti-Doping-Convention of the Council of Europe and updated regularly. The offences in § 28 ADBG 2021 are therefore dependent on said convention and list. Consequently, a court's verdict must contain the specific substances or methods mentioned in the *Prohibited List* used by the offender.[40] However, different from the German[41] or Swiss[42] anti-doping provisions, § 28 ADBG 2021 excludes substances named on the *Prohibited List* if they also fall into the scope of the SMG/AT,[43] e.g., heroin or cannabinoids.[44]

Criminal responsibility can only arise if the doping agents used by the offender appear on the version of the *Prohibited List* in force at the time of commission. Due to frequent changes of the substances listed, the court always has to examine if the indicted actions involve substances or methods included in the *Prohibited List* at the time of the alleged crime.[45] In case they are not mentioned, the punishment of the acting person would violate the principle of *nulla poena sine lege* stipulated in § 1 StGB/AT and Art. 7 ECHR,[46] because – due to the absence of the method or substance from the list – the conduct involving said substance was not prohibited at that time. The *prohibition of retroactivity*[47] therefore prevents the application of an updated version of the *Prohibited List* being used on cases prior to its update.[48] The question whether the substances or methods are prohibited at the time of the incriminating act has to be answered using the list promulgated in the Federal Law Gazette at the respective time. An earlier date of the list entering into force mentioned in the promulgation is irrelevant because of the *prohibition*

---

39 OGH 15 Os 105/14a, in: EvBl 2015/20; L/S NebG-Salimi, § 28 ADBG N 6 f.; WK StGB-Tipold, § 28 ADBG N 8; Flora, 141.

40 OGH 15 Os 105/14a, in: EvBl 2015/20; WK StGB-Tipold, § 28 ADBG N 8.

41 See i.a. W/K/M BtMG-Kornprobst, Einl AntiDopG N 27.

42 See Hangartner, 34 of this volume.

43 Narcotic Drugs Act, BGBl I 112/1997 as amended (cit. SMG/AT).

44 I.a., Stricker, 221; Venier, 40.

45 OGH 15 Os 105/14a, in: EvBl 2015/20; LG Innsbruck 24 Hv 96/19k, 27.1.2020; WK StGB-Tipold, § 28 ADBG N 9; L/S NebG-Salimi, § 28 ADBG N 7.

46 The ECHR has the rank of constitutional law (Art. II No. 7, BGBl 59/1964).

47 See e.g., Grabenwarter, Art. 7 ECHR N 6 f.; Satzger, § 9 N 82 ff.

48 OGH 15 Os 105/14a, in: EvBl 2015/20; LG Innsbruck 24 Hv 96/19k, 27.1.2020; L/S NebG-Salimi, § 28 ADBG N 7; WK StGB-Tipold, § 28 ADBG N 9; Tipold, 89.

of retroactivity.[49] Therefore, if the *Prohibited List* should come into effect on January 1, but is not promulgated until January 24,[50] actions concerning newly mentioned substances or methods cannot lead to criminal liability prior to the day following the promulgation.[51] A new version of the *Prohibited List* can only produce retroactive effects if substances or methods included are removed from the list.[52] In this case, §§ 1, 61 StGB/AT mandate the retroactive application of more lenient criminal provisions.[53]

Due to the somewhat unspecific designation of substances and the use of blanket clauses, e.g. the term "non-approved pharmacological substances" (S0 of the *Prohibited List*), the reference to said list also poses problems regarding the *principle of clarity*.[54] Therefore, the reference to the *Prohibited List* is to be interpreted restrictively and consequently only substances or methods explicitly named can establish criminal liability.[55]

C. The offences in § 28 ADBG 2021

1. § 28 (1) ADBG 2021

§ 28 (1) ADBG 2021 punishes the application of substances or methods named in the *Prohibited List* on athletes or others, as well as putting said substances into circulation, if the offender acts to the objective of doping in sports in connection with any sporting activity. Due to the wording "on athletes or others" the self-application of doping substances or methods is not punishable.[56] Doped athletes could therefore only be liable as participants but not as immediate perpetrators.[57]

---

49 L/S NebG-Salimi, § 28 ADBG N 7; WK StGB-Tipold, § 28 ADBG N 10.

50 As it happened in 2018, cf. BGBl III 1/2018.

51 WK StGB-Tipold, § 28 ADBG N 10.

52 WK StGB-Tipold, § 28 ADBG N 10.

53 I.a. Fuchs/Zerbes, Ch. 4 N 41.

54 LG Innsbruck 24 Hv 96/19k, 27.1.2020. Cf. Grabenwarter, Art. 7 ECHR N 10 f.; Satzger, § 9 N 80 with information on this principle.

55 L/S NebG-Salimi, § 28 ADBG N 13 f.; WK StGB-Tipold, § 28 ADBG N 11.

56 Hajszan, 274; L/S NebG-Salimi, § 28 ADBG N 23; WK StGB-Tipold, § 28 ADBG N 25, 29; concerning § 22a ADBG 2007 e.g. Stricker, 220.

57 Hajszan, 274; L/S NebG-Salimi, § 28 ADBG N 35; WK StGB-Tipold, § 28 ADBG N 52 f.; Tipold, 91; different Flora, 143; Kienapfel/Schmoller, § 147 N 102; Venier, 42; Zeder, 70.

a. Objective element

The objective element of § 28 (1) ADBG 2021 requires the putting into circulation of doping substances or the application of substances or methods on athletes or others. Different from the AMG/AT, the ADBG 2021 contains no definition of the term "putting into circulation". In accordance with § 2 (11) AMG/AT, the government's proposal regarding § 22a ADBG 2007 viewed "stockpiling" as "putting into circulation",[58] even though this point of view overstretches the wording of the law. It would also make the offence of possession of doping substances in § 28 (2) ADBG 2021 useless and would consequently cause difficulties in distinguishing the offences from each other.[59] According to doctrine, substances are put into circulation when the offender transfers them to others with or without pay.[60] The mere promotion or offering of doping substances for sale is insufficient, even for an *attempt*,[61] which would require acts immediately preceding the transfer.[62]

The *application* of prohibited methods or substances on athletes or others means administering said means or performing the illicit method on other people, e.g. through injections.[63] Because of the inclusion of the term "others", the offence is not limited to the application on sportspeople as defined in § 2 No. 26 ADBG 2021 but also protects leisure and amateur athletes.[64]

b. Commission regarding certain substances

The administration on others or the putting into circulation of certain prohibited substances – which are more harmful to health than the rest – is more severely

---

58 ErläutRV 561 BlgNR 23. GP, 7.

59 Flora, 139 f.; L/S NebG-Salimi, § 28 ADBG N 21; Venier, 44; WK StGB-Tipold, Vor §§ 28–31 ADBG N 8. On the contrary OLG Innsbruck 6 Bs 153/15y, 29.7.2015; OLG Graz 9 Bs 48/12w, 6.3.2012; OLG Wien 19 Bs 306/13h, 15.10.2014 view stockpiling as *putting into circulation*.

60 L/S NebG-Salimi, § 28 ADBG N 20; WK StGB-Tipold, § 28 ADBG N 26; similar MüKo StGB-Freund, §§ 1–4a AntiDopG N 50. Venier, 43 f. requires a certain degree of dissemination of the substance.

61 According to § 15 StGB/AT the attempt of every criminal offence is punishable, cf. Fuchs/Zerbes, Ch. 28 N 1.

62 L/S NebG-Salimi, § 28 ADBG N 21; Venier, 44; WK StGB-Tipold, § 28 ADBG N 28.

63 Flora, 140; L/S NebG-Salimi, § 28 ADBG N 22; Venier, 44; WK StGB-Tipold, § 28 ADBG N 29.

64 Flora, 140 f.; L/S NebG-Salimi, § 28 ADBG N 23; WK StGB-Tipold, § 28 ADBG N 30.

punished by § 28 (3) ADBG 2021.[65] Those are anabolic agents (S1), peptide hormones, growth factors and mimetics (S2), hormones and metabolic modulators (S4). If said substances are involved, the offender faces up to one year of imprisonment or a fine. Because of the comprehensive enumeration and the higher penalty, it is essential that the prosecution and subsequently the courts specify the exact substances used by the offenders. The mere use of the *verba legalia* does not meet this requirement, because it must be mentioned which of the substances mentioned under the terms in § 28 (3) ADBG 2021 were used.[66]

c. Subjective element

Both alternatives, the putting into circulation of substances and the application of substances or methods on others, require *intention* as a subjective element.[67] Negligent commission on the contrary cannot establish criminal liability. According to § 5 (1) StGB/AT[68], one acts with intent if one is aware of a substantial risk that the offence will occur and nonetheless takes the risk *(dolus eventualis)*. The intention must cover all parts of the objective element of the respective offence.[69]

Therefore, the offender must at least be aware of the substantial risk that the used substances or methods are included on the *Prohibited List* in force at the time of their actions.[70] Because of the frequent changes to the *Prohibited List*, offenders could lack intent regarding recently included substances.[71] Furthermore, the intent, at least in form of *dolus eventualis*, must include the "commission" to the "objective of doping in connection with any sporting activity".[72]

Additionally, § 28 (3) ADBG 2021 requires the perpetrator's intent to cover the fact that the substance used is one of the doping agents listed. If offenders are only

---

65 OLG Wien 19 Bs 306/13h, 15.10.2014; Flora, 138 f.; L/S NebG-Salimi, § 28 ADBG N 12; Stricker, 221 f.; WK StGB-Tipold, § 28 ADBG N 1; Venier, 49.

66 OGH 15 Os 105/14a, in: EvBl 2015/20; WK StGB-Tipold, § 28 ADBG N 24.

67 L/S NebG-Salimi, § 28 ADBG N 28; WK StGB-Tipold, § 28 ADBG N 40. According to § 7 StGB/AT (which by virtue of Art I StRAG [BGBl 422/1974] is applicable on all criminal offences outside the StGB/AT) "intention" is the default subjective element in Austrian criminal law, cf. Schloenhardt/Eder/Höpfel, 14.

68 Translation see Schloenhardt/Eder/Höpfel, 20.

69 Fuchs/Zerbes, Ch. 14 N 14 ff.; Kienapfel/Höpfel/Kert, N 11.3 f.

70 Flora, 141; L/S NebG-Salimi, § 28 ADBG N 29; Venier, 45; WK StGB-Tipold, § 28 ADBG N 40.

71 L/S NebG-Salimi, § 28 ADBG N 29; Venier, 45; WK StGB-Tipold, § 28 ADBG N 40.

72 L/S NebG-Salimi, § 28 ADBG N 29; WK StGB-Tipold, § 28 ADBG N 40. Flora, 142 and Venier, 45 require *purpose* (§ 5 (2) StGB/AT).

aware of the risk that the substance is prohibited but not that it is named in § 28 (3) ADBG 2021, they are responsible for a violation of sec. 1 No. 1, but do not fulfil the subjective requirements of sec. 3.[73]

2. § 28 (2) ADBG 2021

Because of the higher health risks of certain substances, § 28 (2) ADBG 2021 further punishes the possession of the doping agents also named in sec. 3 "contrary to administrative regulations". However, criminal liability can only arise if the offender possesses large quantities of said substances. The amount necessary *(threshold quantity)* varies from substance to substance. In order to determine if the amount possessed by the offender surpasses the threshold quantity, only the *raw substance*[74] of the doping agent is taken into account.[75] The threshold quantities are specified in the annex to an ordinance[76] issued by the Federal Minister of Sport in accordance with the Federal Minister of Health and the Federal Minister of Justice, as stipulated in § 28 (7) ADBG 2021. They must consider the suitability of each substance to endanger the lives or health of people on a large scale when issuing said ordinance.[77] The original ordinance came into force in August 2009, a year after § 22a ADBG 2007 was promulgated. Consequently, § 22a (2) ADBG 2007 was not applicable during that time due to the lack of a threshold quantity ordinance.[78]

In the context of § 28 (2) ADBG 2021 the word "possesses" is to be interpreted in the same way as the term in § 27 (1) No. 1 SMG/AT.[79] Therefore, a person possesses substances if they have them in their custody, even for a short period.[80] The possession violates administrative regulations if it breaches provisions regulating the handling of doping substances,[81] such as the AMG/AT or the Prescription Requirement Act[82].

---

73 Flora, 142; L/S NebG-Salimi, § 28 ADBG N 30; WK StGB-Tipold, § 28 ADBG N 41.

74 This is the pure amount of the prohibited substance in the doping agent.

75 L/S NebG-Salimi, § 28 ADBG N 27; WK StGB-Tipold, § 28 ADBG N 37.

76 Threshold Quantity Ordinance 2015, BGBl II 384/2014.

77 L/S NebG-Salimi, § 28 ADBG N 27; Stricker, 222.

78 OGH 15 Os 105/14a, in: EvBl 2015/20.

79 L/S NebG-Salimi, § 28 ADBG N 24; WK StGB-Tipold, § 28 ADBG N 33.

80 L/S NebG-Salimi, § 28 ADBG N 24; Venier, 47; WK StGB-Tipold, § 28 ADBG N 33.

81 L/S NebG-Salimi, § 28 ADBG N 26; Stricker, 222; Venier, 47; WK StGB-Tipold, § 28 ADBG N 39.

82 Prescription Requirement Act, BGBl 413/1972 as amended. This act also includes anti-doping provisions, cf. WK StGB-Tipold, § 6a RezeptpflichtG N 2 ff.

The subjective element of § 28 (2) ADBG 2021 requires intent, at least in form of *dolus eventualis*. The intent must cover the fact that the respective substance is named in sec. 2, that the possession infringes administrative provisions, and also the transgression of the threshold quantity.[83] Furthermore, the offender has to act with the "extended intent"[84] that the possessed "substances will be put into circulation or applied on others" for the objective of doping in connection with any sporting activity.[85]

3. Aggravated offences

The anti-doping-provision in § 28 ADBG 2021 also contains aggravated offences. § 28 (4) No. 1 ADBG 2021 stipulates one offence punishing the commission regarding particularly vulnerable people with a more severe penalty while No. 2 seeks to combat the commercial commission of conduct prohibited by sec. 1.

"Particularly vulnerable people" as defined in § 2 Z 4 *leg cit* are: any person under 16 years of age, a person under 18 years of age if they have never participated in international competitions and are not a member of the top segment of a testing pool, and furthermore every person not legally competent for reasons other than age.[86] Additionally, it is an aggravated offence if the victim is under 18 years of age and the offender is at least two years older than the victim.[87] Since the victim being particularly vulnerable, underage, and having the requisite age difference are all part of the objective element, the intent of the offender has to cover said facts.[88]

The aggravated offence in § 28 (4) No. 2 ADBG 2021 punishes infractions against sec. 1 with more severe penalties if the offender has already committed "three such offences" in the "past twelve months" and acts with the "purpose" (§ 5 (2) StGB/AT) "to obtain an ongoing income through the recurring commission". According

---

83 Flora, 142; L/S NebG-Salimi, § 28 ADBG N 31; Venier, 48; WK StGB-Tipold, § 28 ADBG N 42.

84 *Extended intent* is the intent which covers elements not part of the objective side of the crime, cf. Kienapfel/Höpfel/Kert, N 11.23.

85 L/S NebG-Salimi, § 28 ADBG N 31; WK StGB-Tipold, § 28 ADBG N 43. Flora, 142 and Venier, 48 require *purpose*.

86 L/S NebG-Salimi, § 28 ADBG N 38; WK StGB-Tipold, § 28 ADBG N 47.

87 WK StGB-Tipold, § 28 ADBG N 47/1. L/S NebG-Salimi, § 28 ADBG N 39 interprets the age difference as an additional requirement to the vulnerability, not as another variant of the aggravated offence.

88 L/S NebG-Salimi, § 28 ADBG N 42; WK StGB-Tipold, § 28 ADBG N 47 f.

to doctrine, the offender has to act with the specified purpose whilst committing all four offences.[89]

§ 28 (5) ADBG 2021 then stipulates higher penalties if an act described in sec. 4 involves certain – especially harmful – substances (cf. sec. 3). This aggravated penalty increases even more if the acts committed involve amounts surpassing the threshold quantity.[90] The commercial commission as described in § 28 (4) No. 2 ADBG 2021 is only liable to the aggravated penalty in sec. 5 2nd variant if all four offences involve an amount lager than the threshold quantity.[91]

III. Doping and the Austrian Criminal Code

In addition to the offences in § 28 ADBG 2021 doping related behaviour could also be criminally liable according to provisions of the StGB/AT, specifically the offences of fraud or assault.

A. Doping and fraud

1. Basic offence in § 146 StGB/AT

Fraud according to § 146 StGB/AT requires a deception that provokes a misconception which causes the deceived person to tolerate or omit an act. This action or omission must cause a financial loss to the deceived person or a third party.[92] The subjective element not only requires the offender to act with the intention of fulfilling the objective element but also with the "extended intent" to gain an unlawful material benefit for himself or another person.[93]

In the context of doping most questions arise regarding the determination of the financial loss, but the existence of a deception and misconception may also be unclear in certain cases.[94] As the professional – but also amateur – sporting-community involves many different actors, there is no generally valid answer to the

89 L/S NebG-Salimi, § 28 ADBG N 46; Venier, 49; WK StGB-Tipold, § 28 ADBG N 48. Different OGH 15 Os 105/14a, in: EvBl 2015/20.

90 L/S NebG-Salimi, § 28 ADBG N 47; WK StGB-Tipold, § 28 ADBG N 50 f.

91 OGH 15 Os 105/14a, in: EvBl 2015/20; L/S NebG-Salimi, § 28 ADBG N 46; Venier, 50; WK StGB-Tipold, § 28 ADBG N 51

92 Translation see Schloenhardt/Eder/Höpfel, 141 f.

93 See SbgK StGB-Kert, § 146 N 321.

94 Hajszan, 275 with references.

question whether doping is punishable as fraud. Therefore, in assessing the criminal liability of doping related actions, a distinction needs to be made between the possible victims.[95]

Doctrine almost unanimously denies criminal liability for fraud against *spectators*. Although the public expects athletes to be doping-free and therefore can be deceived,[96] visitors of sporting events do not suffer any financial loss. As they buy tickets to see a sporting event and indeed witness a competition, they suffer no loss, because the mere fact that doped athletes are participating does not reduce the value of the "product" – in this case the competition – let alone makes it worthless.[97]

Regarding the other *competitors*, criminal liability is also broadly rejected, even though the competition – deceived about the use of doping substances or methods by the winner – loses their claim to the prize money awarded to the doped winner and subsequently suffers a material loss. However, the unfair winner does not want to gain a financial benefit because of his competitor's omission to claim the prize money, but already wants to achieve it through the award of the prize money. Therefore, the financial loss of the competitors and the material benefit gained by the doped athlete are not "materially equal", which hinders criminal liability.[98]

On the other hand, fraud at the expense of *organizers* of sporting events with regard to the *prize money*, is predominantly affirmed by Austrian jurisprudence and literature.[99] The financial loss of the organizer could consist in the prize money erroneously paid to the unfair winner without being legally bound to do so.[100] Other authors argue the organizer suffers a financial loss because the prize money would not have been paid, or would have been paid to someone else, had the breach of the competition rules been known.[101]

---

95 Hajszan, 286.

96 Hagn, 410; Markowetz, 418; Reisinger, 45.

97 Flora, 146; Kienapfel/Schmoller, § 146 N 207; Reisinger, 60; Stricker, 224; JB WiStr 13-Tipold, 75. SbgK StGB-Kert, § 146 N 320 and Venier, 51; also deny criminal liability but for different reasons.

98 Flora, 146; JB WiStr 13-Tipold, 75; Pirnat, 169; Reisinger, 89; Stricker, 224; Tipold, 95.

99 OGH 11 Os 49/20w, in: EvBl 2021/84; 15 Os 3/20k, in: ZWF 2021, 259 ff. (Boyer); JB WiStr 13-Tipold, 77f; further references cf. Hajszan, 275. Different Reisinger, 66 and Venier, 52.

100 JB WiStr 13-Tipold, 78; Flora, 147.

101 Pirnat, 168; SbgK-Kert, § 146 N 320; cf. HB SportStrR-Vaudlet, Ch. 4 N 137.

Criminal liability regarding the athlete's relationship to *employers* or *sponsors* is particularly controversial and unclear. In those relationships there will usually be at least an implicit deception. The deception consists in signing the contract in a doped state or with the intention of doping at a later point in time,[102] or – in case of doping after signing the contract – participating in competitions in a doped state.[103] The crucial problem in determining responsibility of the athletes is that the *value* of the *doped athlete's performance cannot be measured*.[104] However, this does not mean that the performance of a doped athlete is always worthless; rather, it depends on whether, from the employer's or sponsor's point of view, the athlete's *performance is useable*.[105] Most of the time this should be the case and therefore a pecuniary loss must be denied in these instances.[106]

When considering these constellations – especially regarding the question of pecuniary loss – the problems and difficulties of classifying doping under the offence of § 146 StGB/AT become evident. The recent decisions of the Supreme Court on doping cases make clear that these difficulties are also reflected in the decisions of first instance courts on the question of liability of doping as fraud.[107]

2. Aggravated penalty for *doping-fraud*

Should athletes be liable under § 146 StGB/AT for doping related fraud, the aggravated offence of so-called *doping-fraud* – § 147 (1a) StGB/AT – could also be applicable. This provision is the subject of heavy doctrinal critique, as it is not clear why deception concerning the use of doping justifies the severe penalty foreseen in § 147 (1a) StGB/AT. Furthermore, the necessity of this provision is questioned, because in most doping cases the aggravated offences in § 147 (2) or (3) StGB/AT are also applicable.[108] Additionally, § 147 (1a) StGB causes the problem that courts now could feel obliged to punish doping under the offence of fraud, although the liability under the basic offence of § 146 StGB/AT is often unclear itself.[109]

---

102 Hajszan, 277; Reisinger, 35 ff.

103 Hajszan, 278; regarding § 263 StGB/DE OLG Stuttgart 2 WS 39/11, in: ZWH 2013, 112 ff. (Voss/Soyka); Ott, 100. Different Cherkeh, 95 ff.

104 Boyer, 261; Hajszan, 283; Jahn, 182 f.

105 OGH 14 Os 119/20m, in: RZ 2021, 201 ff. (Danek); 14 Os 63/21b, 14.9.2021; Hajszan, 283.

106 In-depth OGH 14 Os 119/20m, in: RZ 2021, 201 ff. (Danek) and Hajszan, 277 ff.

107 Cf. the criticism of first instance courts in OGH 14 Os 63/21b, 14.9.2021; 14 Os 119/20m, in: RZ 2021, 201 ff. (Danek).

108 Kienapfel/Schmoller, § 147 N 103; Pirnat, 169; SbgK StGB-Kert, § 147 N 15.

109 Boyer, 260 f.; Hajszan, 274.

A person is liable for aggravated fraud if they deceive about the use of substances or methods named on the *Prohibited List* for the objective of *doping in sports*. Because this provision refers to the *Prohibited List*, it also faces the problems examined regarding § 28 (1) ADBG 2021.[110] As an additional requirement, the fraud committed by the athlete must cause a more than merely minor damage. This threshold is set at approx. EUR 100,[111] and each separate act must bring about such a damage; otherwise, the actions are only punishable under the basic offence.[112] The subjective element requires intent – at least *dolus eventualis* – covering all parts of the objective element of the crime.[113]

B. Doping and assault

1. Application of doping on others as assault?

As doping substances or methods can have serious consequences to an athlete's health, doctors, coaches or teammates who administer those substances or methods to others could therefore be liable for assault.

a. Assault § 83 StGB/AT

The offence of assault stipulated in § 83 (1) StGB/AT establishes criminal liability for those who cause "physical injury" or "injury to the health" of another person. Injuries caused by doping can include thrombosis or blood clots as side effects of EPO[114], shrinking of male testicles, suppression of menstruation and ovarian functions due to hormone changes induced by anabolic steroids,[115] or addiction to doping substances like narcotics.[116] Whether the puncture with an injection needle per se constitutes a physical injury is disputed.[117] As the side effects of doping may only appear a significant time after the application itself, the proof of *causation* could

110 Cf. Pirnat, 170 and above II. B. 3.

111 Pirnat, 169; SbgK StGB-Kert, § 147 N 170; Tipold, 95 f.; WK StGB-Kirchbacher/Sadoghi, § 147 N 58/3.

112 OGH 14 Os 119/20m, in RZ 2021, 201 (Danek); 14 Os 63/21b, 14.9.2021.

113 SbgK StGB-Kert, § 147 N 177.

114 Markowetz, 411.

115 BGH 5 StR 451/99, in: NJW 2000, 1506 ff.; Ahlers, 29 ff., 38 f.

116 Ahlers, 38; Markowetz, 411.

117 While OGH 12 Os 63, 64/01, 6.12.2001 affirms the qualification as a physical injury, Kienapfel/Schroll, § 83 N 9 view the puncture as bodily harm, which according to § 83 (2) StGB/AT can only establish criminal liability if the offender negligently causes an injury through the application of bodily harm.

face difficulties. If causation cannot be proven, the offender is not criminally liable for assault, but could be responsible for offences in § 28 ADBG 2021, where the causation of an injury is not part of the objective element of the crime.[118]

The subjective element of § 83 (1) StGB/AT requires *intent*; therefore, the offender has to be aware of a substantial risk that the athlete could suffer injuries and has to take the risk, even regarding those circumstances. If the person who applies the doping agents or methods lacks this intent, they may be punishable for *negligent assault* according to § 88 StGB/AT.[119]

b. Serious assault § 84 StGB/AT

If the assault causes serious physical injury, serious injury to health, or an incapacity to work lasting longer than 24 days, the offender is liable for serious assault according to § 84 (4) StGB/AT. Whether the bodily harm or injury to health is "serious" depends on different factors, such as the importance of the affected part of the body, the uncertainty and length of recovery or the risk of complications.[120] In the context of doping in sports such serious injury to health could consist in damages to athletes' livers or kidneys caused by the use of anabolic steroids.

Furthermore, some side effects or consequences of the use of doping substances and methods could incapacitate an athlete's ability to work. Athletes are incapacitated if they cannot exercise their profession at all, or at least not without endangering further healing or without unreasonable complications.[121] Work as understood by § 84 StGB/AT is the victim's entire field of social activity,[122] and therefore includes professional sports. Consequently, the aggravated offence is applicable if athletes cannot engage in sporting activity as a result of the administration of doping methods or substances for more than 24 days.[123]

c. Assault causing grievous bodily harm § 85 StGB/AT

In some cases, the use of doping can cause particularly severe and long-lasting consequences to an athlete's health. If such effects correspond to those listed in § 85 (1) StGB/AT and last "forever" or at least for a "long time", then the offender commits

---

118 Tipold, 86. On the problem of the proof of causation Ahlers, 50; Fiedler, 47 f.
119 Flora, 136; Markowetz, 412; Tipold, 86.
120 Kienapfel/Schroll, § 84 N 12 with references.
121 E.g., OGH 15 Os 106/20g, 11.12.2020; Kienapfel/Schroll, § 84 N 39.
122 I.a. OGH 13 Os 98/86, in: SSt 57/56; L/S StGB-Nimmervoll, § 84 N 11.
123 Hagn, 408; Markowetz, 412.

assault occasioning grievous bodily harm as defined in said provision. Grievous bodily harm can consist in the "loss or severe damage" to the "fertility" as mentioned in sec. 1 No. 1. Infertility of athletes can be caused by irreversible masculinization of young female athletes or hormonal changes affecting male athletes due to the continued use of anabolic steroids.[124] The aggravated offence specified in § 85 StGB/AT could furthermore be applicable if an athlete's "incapacity to work" due to the use of doping lasts for a long time. In this context it must be considered that careers in professional sports inevitably end at a certain age. As the required duration of the incapacity for a "long time" means the existence of the impediment for an essential part of the athlete's further life,[125] it can only be applied to young athletes. Furthermore, the doping induced kidney or liver failure constitutes a "serious mutilation" as named in sec. 1 No. 2, as the StGB/AT includes the loss of organs under the term of "serious mutilation".[126]

2. Consent of the victim

In Austrian Criminal Law, the violation of legal interests may not be unlawful if it occurs with the *consent* of the legal interest's bearer. This fact is widely accepted for almost all legal interests although only stipulated by law in § 90 StGB/AT in the context of assault and imperilment. Therefore, the *application* of doping substances or methods could be *justified* if the *athlete consents* to the doping actions.[127] However, the conduct is only justified if the general requirements of the defence of consent are met. Regarding doping, one especially essential condition is that the athletes are provided with *sufficient information* regarding health risks as well as potential side effects and consequences of the doping methods or agents used.[128]

Another requirement of consent regarding the infringement of physical integrity – which in the context of doping is controversially discussed – is the *accordance* of the assault or imperilment per se with "common decency" (§ 90 (1) StGB/AT). As a general principle minor injuries are not contrary to morality, while *serious injuries* or injuries with permanent consequences *generally* do offend common decency unless they serve a legally positive purpose.[129] Nonetheless, the Supreme Court

[124] Hagn, 408; Markowetz, 412; Ahlers, 198; Fiedler, 143.
[125] OGH 14 Os 9/20 s, in: EvBl-LS 2021/37; WK StGB-Burgstaller/Schütz, § 85 N 18.
[126] OGH 11 Os 102/81, in: EvBl 1982/54; Kienapfel/Schroll, § 85 N 9.
[127] Fuchs/Zerbes, Ch. 16 N 6.
[128] Flora, 135; Hagn, 404; Markowetz, 414 f.; Tipold, 86.
[129] OGH 11 Os 134/06z, 23.1.2007; WK StGB-Schütz, § 90 N 78; SbgK-Zerbes, § 90 N 169.

and some authors hold that because of the ban on narcotic drugs in the SMG/AT, the application of such drugs on others always offends common decency.[130] In Germany, this point of view is submitted regarding the ban on doping in §§ 2, 3 AntiDopG/DE.[131] It is also argued that doping offends common decency because it is incompatible with the principles of fair competition.[132]

In my opinion however, the dependency of the test of immorality on the severity of the injury – thus the irrelevance of a simple legal prohibition – must also apply to the treatment of injuries caused in connection with the use of doping.[133] If statutory prohibitions of a certain activity were sufficient to cause the immorality of the infringement of physical integrity, the legislature could always alter the general rule – which in Austrian case law and literature is widely accepted – that minor injuries do not offend common decency, at their discretion. Therefore, *minor injuries* as consequences of doping are *justified* because of the victim's consent. Serious injuries on the other hand, as defined in § 84 (1) or § 85 (1) StGB/AT, indicate immorality of the assault or imperilment. As the purpose of improvement of physical performance through doping is not a legally accepted and positive purpose – here the ban in § 28 ADBG 2021 can be used as an argument for an offence to common decency – the *consent to serious consequences* of doping *cannot exclude criminal liability.*[134]

3. Self-application by athletes

Athletes who apply potentially harmful doping substances or methods to themselves are not punishable for assault, because § 83 StGB/AT only punishes the causation of injuries on others.[135] In this case the person who provides the athletes with the doping substances or helps them in applying the agents or methods could also be exempt from criminal responsibility, because the *participation* in another's "self-responsible self-endangerment" is not punishable.[136] However, the self-application of doping can only be considered as self-responsible if the athlete knows

[130] OGH 12 Os 63, 64/01, 6.12.2001; 13 Os 102/02, in: EvBl 2003/79; L/S StGB-Nimmervoll, § 90 N 16b; WK StGB-Lewisch, Nach § 3 N 232.

[131] I.a. HK AntiDopG-Putzke, § 4 N 78; HB SportStrR-Vaudlet, Ch. 4 N 75; Heger, 79.

[132] Markowetz, 415 f.

[133] Flora, 135 f.; Kienapfel/Schroll, § 90 N 55, 67; Steininger, Ch. 11 N 95; Tipold, 86; WK StGB-Schütz, § 90 N 84.

[134] Flora, 135 f.; Hagn, 404 f.; Kienapfel/Schroll, § 90 N 67; Tipold, 87.

[135] Flora, 134 f.; Hagn, 403; Tipold, 86.

[136] I.a. Steininger, Ch. 11 N 95.

about the positive as well as the negative effects of the doping substances used. Therefore, the doctor, teammate or coach who provides the athlete with doping substances or aids them in applying doping methods is only exempt from criminal liability if he does not possess better knowledge than the athlete.[137] Therefore, coaches who pretend to provide athletes with vitamin pills which in reality are doping substances are liable for assault, even though the substances are self-administered by the victims.[138] However, even if the offender is not liable for assault because of the athlete's self-responsible self-endangerment, they still may be liable for putting into circulation prohibited substances according to § 28 ADBG 2021.[139]

IV. Possible developments: self-doping-offence?

As shown above, courts and doctrine face certain difficulties in assessing the criminal liability for fraud, especially regarding the requirement of a financial loss. It is questionable whether the abolition of the so-called "doping-fraud-provision" in § 147 (1a) StGB/AT and the introduction of a new offence explicitly covering self-doping, e.g. a new § 28a ADGB 2021, could eliminate those problems. However, such a self-doping offence needs to be examined closely, especially with regard to its necessity and the *ultima-ratio-principle*. When formulating the offence, referring to pecuniary damage to other persons as well as undefined terms should be avoided.[140] The provision could instead require the intent to gain financial benefits as a part of the subjective element. Constitutional concerns could also hinder the implementation of a self-doping offence. For example, the differentiation between doping of professional and amateur athletes as well as the limitation of the offence on doping in sports must meet the requirements of the *principle of equality* and the requirement of *objectivity* in Art. 7 B-VG. Likewise, the penalisation of an athlete's use of doping on themselves could possibly violate the "fundamental right to free self-determination" recently elaborated by the Austrian Constitutional Court.[141] Also, when drafting a self-doping-offence the existing problems of the criminal provisions aimed at doping in § 147 (1a) StGB/AT and § 28 ADBG 2021 – such as

137 Flora, 135; Hagn, 403; Kienapfel/Schroll, § 90 N 67; Tipold, 87.
138 BGH 5 StR 451/99, in: NJW 2000, 1506 ff.
139 Kienapfel/Schroll, § 90 N 67; cf. above II. C.
140 Hajszan, 275 f.
141 VfGH G 139/2019, in: JBl 2021, 164 ff.; for possible consequences on criminal law cf. Schmoller, 147 ff.

the difficulties in interpreting the term "for the objective of doping in sports" – must be taken into account.[142]

Such a special offence aimed at self-doping could only eliminate the application problems that arise in the context of fraud and doping if its relationship to § 146 StGB/AT is clearly regulated in the sense of displacing fraud. In Germany – in absence of a statutory regulation – it has become apparent that the courts are attempting to circumvent the difficulties of classification under the offence of fraud by only examining criminal liability according to the AntiDopG/DE.[143] As legal certainty cannot be created this way, an explicit regulation would be preferable.[144]

V. Summary

Doping scandals that occurred in top international sports have recently been brought before Austrian courts and the discussion regarding the criminal responsibility of doping has been revived.[145] Coaches, doctors or teammates could be liable for – under some circumstances even aggravated – assault if the application of doping substances or methods causes injuries to the athlete's health. However, they may be exempt from liability if their actions are a mere participation in the athlete's self-endangerment, or in case of minor injuries, if they apply the substances or methods with the athlete's informed consent. Furthermore, they may be liable to criminal sanctions stipulated in § 28 ADBG 2021. This provision prohibits administrating drugs to others and putting prohibited substances into circulation. Even the mere possession of some substances is punishable. Some elements of this provision – especially the reference to the *Prohibited List* issued by the Council of Europe – complicate the application of § 28 ADBG 2021, even posing constitutional problems.

The assessment of criminal liability of athletes in case of self-application of doping substances or methods is – in part – still controversial. Since so-called "self-doping" is not subject to any special penal provision, the legislature, courts, and doctrine examine the liability for fraud according to § 146 StGB/AT. However, the examination of the individual elements of the offence poses difficulties. Due to the

142 Hajszan, 276.

143 See OLG Köln 2 Ws 122/19, in: SpuRt 2019, 134; OLG Karlsruhe 1 Rv 35Ss 690/21, in: SpuRt 2022, 50 (Wussler).

144 Hajszan, 276.

145 Cf. Boyer, 259; Danek, 204 f.; Hajszan, 273 ff.

diversity of interests of the possible victims of fraud and their relationship to the doped athlete, a solution can only be found through a differentiated consideration of the individual case details. The difficulties that arise in this context illustrate the problems of classifying doping as fraud. The repeal of § 147 (1a) StGB/AT and the simultaneous introduction of a self-doping offence could facilitate the handling of doping cases in practice. However, such a special provision does not come without problems in terms of criminal policy.

Bibliography

Ahlers Rainer, Doping und strafrechtliche Verantwortlichkeit, Baden-Baden 1994.

Boyer Theresa, Dopingbetrug nach § 147 Abs 1a StGB, ZWF 2021, 259–263.

Cherkeh Rainer, Betrug (§ 263 StGB) verübt durch Doping im Sport, Frankfurt/Main 2000.

Cherkeh Rainer/Momsen Carsten/Orth Jan (eds.), Handbuch Sportstrafrecht, Munich 2021 (cit. HB SportStrR-Author).

Danek Michael, Case Note OGH 27.4.2021, 14 Os 19/20m, RZ 2021, 204–205.

Erb Volker/Schäfer Jürgen (eds.), Münchener Kommentar zum StGB Band VII, 4. ed, Munich 2022 (cit. MüKo StGB-Author).

Erbs Georg/Kohlhaas Max (eds.), Strafrechtliche Nebengesetze, Munich (cit. E/K NebG-Author).

Fiedler Adrian, Das Doping minderjähriger Sportler, Berlin 2014.

Flora Margarethe, Doping im Radsport – strafrechtliche Konsequenzen, in: Manfred Büchele/Michael Ganner/Lamiss Khakzadeh-Leiler/Peter Mayr/Gert-Peter Reissner/Alexander Schopper (eds.), Aktuelle Rechtsfragen des Radsports, Vienna 2017.

Fuchs Helmut/Zerbes Ingeborg, Strafrecht Allgemeiner Teil I, 11. ed., Vienna, 2021.

Grabenwarter Christoph, European Convention of Human Rights, Munich 2014.

Hagn Kerstin, Die rechtliche Beurteilung des Dopings, ÖJZ 1993, 402–412.

Hajszan Jakob, Arbeitsverträge, Sponsoring und Doping: Strafbarer Betrug?, JBl 2022, 273–286.

Heger Martin, Zur Strafbarkeit von Doping im Sport, JA 2003, 76–83.

Höpfel Frank/Ratz Eckhard (eds.), Wiener Kommentar zum Strafgesetzbuch, 2. ed., Vienna 2022 (cit. WK StGB-Author).

Jahn Matthias, Doping als Sportbetrug, JuS 2012, 181–183.

Kienapfel Diethelm/Höpfel Frank/Kert Robert, Strafrecht Allgemeiner Teil, 16. ed., Vienna 2020.

Kienapfel Diethelm/Schmoller Kurt, Studienbuch Strafrecht Besonderer Teil II, 2. ed, Vienna 2017.

Kienapfel Diethelm/Schroll Hans Valentin, Studienbuch Strafrecht Besonderer Teil I, 4. ed, Vienna 2016.

Lehner Michael/Nolte Martin/Putzke Holm (eds.), Anti-Doping-Gesetz Handkommentar, Baden-Baden 2017 (cit. HK AntiDopG-Author).

Leukauf Otto/Steininger Herbert (eds.), Strafgesetzbuch Kommentar, 4. ed., Vienna 2016 (cit. L/S StGB-Author).

Markowetz Klaus, Strafrechtliche Risiken des Doping, JBl 2004, 409–422.

Müller David/Nürnberger Michael/Sammer Alexander, Das österreichische Anti-Doping-Bundesgesetz, ÖJZ 2016, 5–10.

Ott Steffen, Strafwürdigkeit und Strafbedürftigkeit des Selbstdopings im Leistungssport, Baden-Baden 2013.

Petschinka Patrick/Reifeltshammer Sebastian, Wesentliche Neuerungen im österreichischen Anti-Doping-Recht, SpuRt 2021, 207–210.

Pirnat Carlotta, Zum Sportbetrug, JSt 2010, 165–171.

Reisinger Thomas, Betrug durch Doping, Vienna/Graz 2012.

Ruppert Felix, Drei Tage wach? Zur Strafbarkeit von Doping im eSport, SpuRt 2020 106–111.

Satzger Helmut, International and European Criminal Law, Munich 2012.

Sautner Julia, Anti-Doping-Recht, Vienna 2019.

Schloenhardt Andreas/Eder Johannes/Höpfel Frank (eds.), Strafgesetzbuch – Austrian Criminal Code, 2. ed, Vienna 2021.

Schmoller Kurt, Sterbehilfe und Autonomie – Strafrechtliche Überlegungen zum Erkenntnis des VfGH vom 11.12.2020, JBl 2021, 147–156

Steininger Einhard, Strafrecht Allgemeiner Teil, Band I, 3. ed., Vienna 2019.

Stricker Martin, Strafrecht, in Franz Marhold/Gustav Schneider (eds.), Österreichisches Sportrecht, Wien 2017.

Stricker Martin/Tipold Alexander (eds.), Leukauf/Steininger Strafrechtliche Nebengesetze Kommentar, 3. ed, Vienna 2022 (cit. L/S NebG-Author).

Tipold Alexander, Doping- und Wettbetrug, in Peter Lewisch (ed.), Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit 2013, Graz 2013, 71–87 (cit. JB WiStr 13-Tipold).

Tipold Alexander, Strafrechtliche Aspekte des Dopings, in Wolfgang Berger/Doris Hattenberger (eds.), RECHT SPORTlich 2, Vienna 2013, 83–97.

Triffterer Otto/Rosbaud Christian/Hinterhofer Hubert (eds.), Salzburger Kommentar zum Strafgesetzbuch, Vienna 2022 (cit. SbgK StGB-Author).

Venier Andreas, Von Dopingtäter und Dopingbetrügern, in Ulrich Torggler (ed.), Rechtsprobleme von Sportveranstaltungen, Vienna 2012, 39–53.

Weber Klaus/Kornprobst Hans/Maier Stefan, Betäubungsmittelgesetz, 6. ed, Munich 2021 (cit. W/K/M BtMG-Author).

Wessely Wolfgang, Neuerungen im Nebenstrafrecht, in Ingrid Mitgutsch/Wolfgang Wessely, Jahrbuch Strafrecht Besonderer Teil 2009, Graz 2009, 63–78 (cit. JB BT 09-Wessely).

Wessely Wolfgang, Neuerungen im Nebenstrafrecht, in Ingrid Mitgutsch/Wolfgang Wessely, Jahrbuch Strafrecht Besonderer Teil 2015, Graz 2015, 33–45 (cit. JB BT 15-Wessely).

Zeder Fritz, "Eigendoping" in Österreich strafbar? Keineswegs!, JRP 2019, 68–71.

Zeinhofer Claudia, Rechtliche Grundlagen der Dopingbekämpfung in Österreich, Causa Sport 2010, 326–338.

The Prosecution of Doping Offences in Swiss Practice

Hanjo Schnydrig[*] / Patrick Koch[**]

The fight against doping is not only a matter for private organizations in sport, but also for the state. In principle, doping is prohibited, but in some countries, self-consumption is exempt from punishment, as it is in Switzerland. This exemption from criminal punishment is currently being discussed by politicians. In the following essay, the authors will show the task of the national anti-doping agency in Switzerland, Swiss Sport Integrity Foundation, in the context of the criminal law provisions, and examine the latter concerning specific topics such as the legal interest protected and the scope of application, as well as the notion of suspicion, which is a prerequisite for opening an investigation. Finally, the legal interaction between private and state bodies, in this case specifically Swiss Sport Integrity Foundation and the prosecution authorities, will be examined, as well as the specific topic of admissibility of evidence collected by private individuals in criminal proceedings and the opportunities and risks of this legal interaction.

Table of Contents

[*] Hanjo Schnydrig, MLaw, CAS Sports Management, DAS Associations/NPO Management, is head of legal of the former Antidoping Switzerland Foundation and its successor organization Swiss Sport Integrity in Bern since 2017.

[**] Patrick Koch, MLaw, attorney-at-law, CAS International Sports Law, CAS Forensics, is a public prosecutor in the canton of Aargau since 2021. From 2013 to 2017, he was head of legal of the former Antidoping Switzerland Foundation.

I. Introduction

The fight against doping in Switzerland has a dualistic structure. On the one hand, there are state regulations; on the other hand, it is up to the sport organizations to enact and enforce anti-doping rules under private law. The state legal provisions are found in the Federal Act on the Promotion of Sport and Exercise (SpoPA) and the associated Ordinance on the Promotion of Sport and Exercise (Sportförderungsverordnung [SpoFöV]).[1] In terms of private law, there is the World Anti-Doping Program (WADP) of the World Anti-Doping Agency (WADA), which is implemented in Switzerland by Swiss Olympics as the national Olympic Committee and umbrella organization of over 83 sports federations with the Swiss Olympic Doping Statute.[2] This set of rules applies to all organizations affiliated with Swiss Olympic and is implemented to a large extent by the Swiss Sport Integrity Foundation (formerly the Antidoping Switzerland Foundation)[3] as the National Anti-Doping Organization (NADO).

[1] Articles 19 to 25 SpoPA and Articles 73 to 78 SpoFöV are authoritative. There is no version of the SpoFöV in English. Therefore, the authors use the German abbreviation.

[2] The Doping Statute implements the World Anti-Doping Code in Switzerland. By way of introduction, it defines the anti-doping bodies and their responsibilities in Switzerland. It is a set of rules of private or disciplinary law that is binding for all Swiss Olympic affiliated sport federations, their federations, clubs, athletes, and athlete support personnel.

[3] On 1 January 2022, Antidoping Switzerland became Swiss Sport Integrity, which now also deals with ethics violations in addition to doping violations. Swiss Sport Integrity

II. The Role of Swiss Sport Integrity in the Fight Against Doping in General

Swiss Sport Integrity plays various roles in the fight against doping. On the one hand, as the NADO, it implements the anti-doping regulations under private law by ensuring that doping controls (testing), investigations, and results management procedures are carried out for the member federations of Swiss Olympic. The latter can result in disciplinary sanctions, in particular multi-year suspensions for doping in sport. On the other hand, Swiss Sport Integrity also has state responsibilities based on the SpoPA. According to the framework agreement concluded with the federal government,[4] it is the national agency for fighting doping within the meaning of Art. 19 para. 2 SpoPA. As the national competence center for the fight against doping in Switzerland, it has the competence to take measures against doping, which in particular includes the confiscation and destruction of doping substances and methods. In practice, this mainly involves imports into Switzerland, which – apart from legitimate medical purposes – are prohibited from an administrative law perspective, regardless of an athlete's status and the quantity involved.[5] In addition to its tasks under administrative law, Swiss Sport Integrity by law also has an active role in criminal law. Although the prosecution of criminal offences is the responsibility of the cantonal prosecution authorities, they may involve Swiss Sport Integrity in their criminal investigations at any time (Art. 23 para. 1 SpoPA). In addition, Swiss Sport Integrity has various rights as a party in criminal proceedings. These include the possibility to lodge an appeal against a decision not to prosecute or to suspend proceedings, to lodge an objection against a penalty order, and to lodge an appeal or a cross-appeal against a judgement (Art. 23 para. 3 SpoPA).

III. The History of Criminalization of Doping in Switzerland

For a long time, doping was not a direct criminal offence in Switzerland, but was instead only punishable under criminal law if substances covered by the Narcotics

continues the tasks and activities of Antidoping Switzerland. In particular, it acts as a national anti-doping agency within the meaning of Art. 19 para. 2 SpoPA, as a NADO within the meaning of the WADP and as an anti-doping body in accordance with the Doping Statute.

4 Available at www.baspo.admin.ch/de/aktuell/themen--dossiers-/dopingbekaempfung.html#dokumentation (last visited 31.08.2022).

5 Cf. also Federal Administrative Court decision C-2493/2020 of 04.06.2021, E. 3.2 f., 4.3.2 f. and 4.5.2 with further references.

Act were used, or if individual legal interests, such as life and limb, or property, were affected.[6] In order to correct this, on 1 January 2002, the Federal Act on the Promotion of Sport and Gymnastics (Sport and Gymnastics Act) introduced a criminal provision in Art. 11f para. 1, which read as follows (free translation from German):

"Anyone who manufactures, imports, brokers, distributes, prescribes or dispenses substances for doping purposes, or uses methods for doping purposes on third parties, shall be punished with imprisonment or a fine of up to 100 000 Swiss francs".

This meant that those behind the doping were punished, but not the athlete who doped themself. Consequently, the athlete remained unpunished under criminal law. However, according to Art. 11c Sport and Gymnastics Act, only those doping substances and methods that were listed in the ordinance of the Federal Department of Defence, Civil Protection and Sport (DDPS) or its annex, were prohibited. Moreover, this criminal provision was – in contrast to today – limited only to "regulated competitive sport".[7]

With the ratification of the International Convention against Doping in Sport (UNESCO Convention) on 23 October 2008, Switzerland committed itself to introducing stricter criminal provisions for doping offences at state level.[8] This was one of the reasons for the revision of the Sport and Gymnastics Act and the introduction of the SpoPA on 1 October 2012. The already existing criminal provision from Art. 11f Sport and Gymnastics Act was transferred to Art. 22 para. 1 SpoPA with an expanded scope, although Switzerland already fulfilled the requirements according to the UNESCO Convention. As a result, the criminal liability for doping is no longer limited to regulated competitive sport, but applies to all sport, including recreational sport.[9] Likewise, with the introduction of the serious case according to Art. 22 para. 2 SpoPA, a qualified criminal offence has been introduced, with strong parallels to narcotics legislation.[10] Art. 22 para. 4 SpoPA, which explicitly upholds the previous impunity of self-doping or self-consumption of

6 Rehberg/Flachsmann, 30.

7 Cf. section IV below.

8 Cf. Federal Council Dispatch on the SpoPA and the Bundesgesetz über die Informationssysteme des Bundes im Bereich Sport from 11 November 2009, BBl 2009 8189, 8221. The authors use the German term for the Federal Act on Information systems of the Federal Government in the area of sport as there is no English translation.

9 Cf. BBl 2009 8189, 8221; Contat et al., 167.

10 Cf. Art. 19 para. 2 Federal Act on Narcotics and Psychotropic Substances (NarcA); In contrast to Art. 19 para.92 NarcA, however, the legislator refrained from introducing a minimum custodial sentence of one year in Art. 22 para. 2 SpoPA.

doping, is of great importance. The principle according to which athletes should be criminalized and sanctioned for doping offences through disciplinary proceedings by sport associations, instead of by state prosecution authorities, has been retained.[11]

This impunity of self-doping has always been the subject of political debate.[12] Most recently, National Councilor Marcel Dobler submitted Postulate 19.4366 "Dopingkonsum soll strafrechtlich verfolgt werden können" (translated: Doping consumption should be able to be prosecuted under criminal law) on 27 September 2019[13]. On 27 November 2019, the Federal Council requested the acceptance of the postulate, which the National Council approved on 20 December 2019. The Federal Council was thus instructed to record in particular the advantages and disadvantages of criminalizing self-doping in a report. On 10 December 2021, the Federal Council issued the corresponding postulate report and instructed the DDPS to examine an amendment to the SpoPA with a view to introducing the criminal liability of self-doping and to submit a proposal to the Federal Council by the end of December 2023 at the latest on how to proceed.[14]

IV. Criminalization of Doping in Switzerland De Lege Lata

A. Criminal provision according to SpoPA

According to Art. 22 para. 1 SpoPA, anyone "who manufactures, acquires, imports, exports, conveys, distributes, sells, prescribes, markets, administers or possesses doping substances under Art. 19 para. 3 or applies methods under Art. 19 para. 3 to third parties is liable to a custodial sentence not exceeding three years or a monetary penalty".

According to para. 2, the penalty in serious cases is imprisonment for up to five years, combined with a fine. According to para. 3, a serious case is deemed to exist if the offender:

---

11 Cf. BBl 2009 8189, 8221.

12 See for example Motion 04.3485 of 30 September 2004 by the then Councilor of States, Rolf Büttiker, with the aim of making self-doping a punishable offence. The Federal Council proposed the rejection of the motion, which the National Council followed on 28 November 2005.

13 Cf. www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20194366 (last visited 31.08.2022).

14 Bericht des Bundesrates, Selbstdoping, 9.

a) "acts as a member of a group formed to pursue the activities set out in para. 1;

b) seriously endangers the health or the life of athletes in an action listed in para. 1;[15]

c) distributes, sells, prescribes or administers substances under Art. 19 para. 3 to children and young people under 18 years old or uses methods under Art. 19 para. 3 on these persons;

d) makes a large turnover or a considerable profit from commercial trade."[16]

According to paragraph 4, the perpetration remains unpunished "if the manufacture, acquisition, import, export, conveyance or possession are exclusively for personal consumption". Thus, unlike in Switzerland's neighboring countries, self-doping is not currently punishable. The legislator's basic idea is that doping athletes should be sanctioned by the sport federations, because such federation sanctions are, according to experience, more effective than punishments by state judicial authorities.[17] In the opinion of the authors, this view is now outdated (cf. section VI below in particular).

---

15 As far as the authors are aware – in contrast to the narcotics legislation, which has a similar criminal provision – there is no case law on the quantity of a certain doping substance or the use of a certain doping method that poses a serious risk to health. However, the quantity of doping should only be one criterion for serious endangerment. It is likely important whether a doctor or a medical layman administers or uses doping substances or methods, since the latter lacks medical expertise. The misuse of insulin, for example, poses an acute danger to life. It is also likely important whether the doping substances are original medicines or counterfeits, since the latter are regularly contaminated, incorrectly dosed, or falsely declared.

16 In terms of legal certainty, it makes sense to refer to the established case law on narcotics and money laundering legislation with regard to turnover and profit. Accordingly, a large turnover is defined as CHF 100 000 and a substantial profit is CHF 10 000. According to the case law of the Federal Supreme Court, professional activity is deemed to be commercial. In this context, it is of decisive importance how much time and what means the offender spends on his criminal activity, the frequency of the individual acts within a certain period of time, and the income achieved. It is essential that the offender has set themself up to obtain relatively regular income through criminal activities, which represents a considerable contribution to financing his standard of living (Federal Supreme Court decision 6B_600/2020, of 7 September 2020, E. 4.8).

17 BBl 2009 8189, 8221, Doping athletes would be punished with sport bans of two to four years, whereas criminal sanctions, especially for first-time offenders, would only be a fine or even a penalty. Moreover, the convicted athletes would be banned by the federation not only from competing but also from training in an organized setting. Finally, such association sanctions could be pronounced and implemented more quickly than state sanctions. This assessment or view would be shared by the vast majority of the international community.

The basic offence of Art. 22 para. 1 SpoPA is a simple offence of activity (schlichtes Tätigkeitsdelikt), which means that the offence is completed with the commission of one of the listed variants of action. Success beyond this is not required.[18] The qualified offence of Art. 22 para. 3 let. b SpoPA is an abstract endangering offence (abstraktes Gefährdungsdelikt).[19] The elements of the offence are therefore already fulfilled without an athlete being endangered or even harmed by the respective act.

It is important to emphasize that the prohibited substances covered by the SpoPA are not identical to those on the Prohibited List of private sport organizations. The SpoPA only criminalizes the so-called "hard" doping substances that pose a great danger to health. Especially important among these are anabolic substances, hormones such as EPO,[20] or growth hormones. The prohibited methods, especially blood doping,[21] are almost identical to the aforementioned list (Art. 19 para. 3 SpoPA in conjunction with Art. 74 SpoFöV).

According to the legal definition of Art. 19 para. 1 SpoPA, "doping" is defined as the misuse of means and methods to enhance physical performance in sport. This explicitly requires a connection to sport or the intention to increase physical performance in sport. The scope of the SpoPA does not include so-called "everyday doping", i.e. the enhancement of performance through the use of substances foreign to the body in professional and private life (work, school, study and leisure). However, substances used for this purpose, such as methylphenidate (Ritalin/Concerta), cocaine, or ephedrine, may be subject to other legal provisions, namely the Therapeutic Products Act[22] or the Narcotics Act.

The only punishable offence is the direct commission (or dolus eventualis) of the offence within the meaning of Art. 12 para. 1 Swiss Criminal Code (SCC), which is what the legislator intended to express with the term "for doping purposes".[23] Neg-

18 Federal Supreme Court decision 6B_734/2020 of 7 September 2020, E. 4.2.3.

19 BBl 2009 8189, 8240.

20 EPO stands for erythropoietin and is a hormone produced in the kidneys that stimulates the formation of red blood cells (erythrocytes) in the bone marrow, which ultimately leads to an increase in endurance performance and a shorter recovery time.

21 This is understood to mean both autologous and homologous blood doping, which has the effect of artificially increasing the hemoglobin concentration in the athlete's blood, thereby improving the oxygen uptake and oxygen transport capacity of the blood. This in turn enables an increase in endurance performance.

22 Federal Act on Medicinal Products and Medical Devices (TPA).

23 Cf. BBl 2009 8189, 8240 and Federal Supreme Court decision 6B_734/2020 of 7 September 2020, E. 4.3.5.

ligent commission of the offence would fail anyway because it is not expressly punishable under the law (cf. Art. 12 para. 1 SCC).

Finally, due to the applicability of the General Part of the SCC, attempt (Art. 22 SCC) and participation (incitement and complicity, Art. 24 and Art. 25 SCC) in doping offences are also punishable under Art. 22 SpoPA.

In summary, any person who increases the physical performance of a sportsperson – irrespective of his or her level of performance, participation in competitions, and membership of a sport club – or enables them to do so, by knowingly and willingly performing an act described in Art. 22 SpoPA in connection with prohibited doping substances or methods, is liable to prosecution.

B. Legal interest protected

According to the Federal Council, the aim of anti-doping criminal law is to protect undistorted sporting competition and thus the integrity of sporting competition. The health of the athlete is not protected.[24] The authors do not agree with the latter. According to the opinion expressed here, the health (at least) of the sporting population is also a protected legal interest. This is highlighted by the legislator's intent on the one hand, and the actual wording of the law on the other. Already under the regime of the Sport and Gymnastics Act, the legislator recognized that the promotion of physical fitness and health is a main purpose of state activity.[25] The Federal Council Dispatch on the SpoPA then states that not only equal opportunities and fair competition are worth protecting, but also health-enhancing physical activity. For this reason, it is in the public interest to avoid the use of performance-enhancing substances and methods in the practice of sport.[26] The 1999 Dispatch on the then Therapeutic Products Act – when there was no specific law on sport yet – already expressed concerns about the health risks of long-term doping.[27] It is in the light of the above that the purpose of Art. 1 SpoPA is to be understood, according to which the legislator, in the interest of the physical fitness and the health of the population, the holistic education and the social cohesion, aims to promote behavior – with which the positive values of sport are anchored in society, and undesirable side effects are combatted. In Art. 22 para. 3 lit. b and c SpoPA, the legislator places

[24] Likewise, Contat et al. 169.
[25] See also Jörger, N 37 with further references.
[26] BBl 2009 8189, 8220 and 8229.
[27] Federal Council Dispatch on the TPA of 1 March 1999, BBl 1999 3571.

a criminal act under a qualified threat of punishment if it endangers the health or life of athletes in a particularly serious manner, or if (doping) substances are administered to children and young people under the age of 18, or (doping) methods are used on them. This makes it unambiguously clear that the criminal provision does not exclusively protect the integrity of sporting competition, but also human health. Finally, the Federal Supreme Court shares this opinion when it considered in summary that the revised SpoPA, in addition to other objectives, also aims to protect the health of the population as such and thus also popular sport, which means that the entire sporting population is the addressee of Art. 22 SpoPA.[28]

The discussion of the legal interest protected in criminal proceedings is of practical importance with regard to issues of concurrence and sentencing, in which it is certainly relevant whether someone is declared guilty only on the basis of a violation of the SpoPA or also, for example, on the basis of a violation of the TPA. But it is also important with regard to the scope of application (cf. section IV.C below) and the balance of interest to determine wether the unlawfully private evidence ist usable or not (cf. section VI.C).

C. Scope of application

The criminal provision of Art. 22 SpoPA is systematically assigned to supplementary criminal law, so that the General Part of the SCC applies unless the SpoPA itself provides for regulations (cf. Art. 333 para. 1 SCC). This results in the following scope of application of Art. 22 SpoPA.

From a temporal perspective – in accordance with the principle of legality – the SpoPA is applicable from the time of its entry into force, i.e. to factual circumstances from 1 October 2012. Territorially, it is limited to acts committed in Switzerland in accordance with the principle of territoriality (cf. Art. 3 para. 1 SCC),[29] whereas the private law anti-doping rules of the sport federations for their athletes subject to them do not stop at the respective national border and apply to them globally.[30] In

[28] Federal Supreme Court decision 6B_734/2020 of 7 September 2020, E. 4.2.2.

[29] According to Art. 8 SCC, a criminal act is deemed to have been committed where the offender carries it out or remains inactive in breach of duty, as well as where the success has occurred.

[30] In practice, such subjection to the anti-doping rules takes place contractually (in particular by means of a license, daily licenses for a specific sporting competition, declaration of subjection) or under club law through membership in a club or association. See Steiner Marco, La soumission des athlètes aux sanctions sportives – Étude d'une problématique négligée par le monde uridico-sportif, Lausanne 2010.

personal terms, it applies to persons of legal age (majority)[31] who are not subject to military criminal law (cf. Art. 9 SCC). Finally, it is of great importance that the scope of application is now no longer limited to "regulated competitive sport", in contrast to the previous applicable legal provision in the Sport and Gymnastics Act. Since 1 October 2012, the legislator has made doping in sport in general punishable, so that the entire sporting population, i.e. including sporting activities outside competitions, is covered by this criminal provision.[32]

D. Interim conclusion

Whereas the private-law sport rules of the sport organizations sanction both third-party and self-doping, criminal law (currently) criminalizes only third-party doping, i.e. the athlete's environment. The state prosecutes doping offenses committed on Swiss territory, whereas territoriality is irrelevant for offenses against private anti-doping rules, which can be committed worldwide.

V. The Prosecution of Doping Offenses in Practice

A. Opening of a criminal investigation in general

According to Art. 23 para. 1 SpoPA, criminal prosecution is a cantonal matter, i.e. the cantonal public prosecutors' offices. In procedural terms, the Swiss Criminal Procedure Code (CrimPC), which entered into force on 1 January 2011, is applicable.[33]

The criminal provisions of the SpoPA are *Offizialdelikte* (ex officio crimes) which – in contrast to *Antragsdelikte* (crimes for which someone first has to file a criminal complaint) – are to be prosecuted ex officio as soon as the prosecution authorities become aware of criminal offenses or having grounds for suspicion pointing to

31 According to Art. 14 Swiss Civil Code a person that has reached the age of 18 is of legal age.

32 See also Federal Supreme Court decision BGE 145 IV 329, E. 2.4.2 and the review of the decision by Kaiser Martin/Schndydrig Hanjo, Tatort Fitnessstudio – zum Geltungsbereich des Begriffs "Sport" gemäss Strafbestimmungen des Sportförderungsgesetzes im Zusammenhang mit Massnahmen gegen Doping, iusNet StrafR-StrafPR of 16 December 2020.

33 Previously, formal criminal law was left to the cantons, so that 26 different criminal procedure codes existed.

criminal offenses (so-called compulsory prosecution pursuant to Art. 7 CrimPC). Thus, the prerequisite for initiating and conducting criminal proceedings are grounds for suspicion with regard to a criminal offence that has been committed. It follows that the initiation of criminal proceedings without the existence of grounds to suspect that a criminal offence has been committed is inadmissible, otherwise there is an inadmissible "fishing expedition".[34]

According to Art. 309 CrimPC, the public prosecutor shall open an investigation if:

a. there is reasonable suspicion based on the information and reports of the police, from a criminal complaint or its own findings;
b. it orders compulsory measures;[35]
c. it has been informed by the police according to Art. 307 para. 1 CrimPC.[36]

If suspicion is not evident from the police reports or criminal charges, the prosecutor may (re)refer them to the police to conduct additional investigations without opening an actual criminal investigation (para. 2).

If the prosecutor immediately issues a non-prosecution order or a penalty order, he waives the opening of an investigation (para. 3).

Proceedings, once opened, must then be concluded in the forms provided by law (cf. Art. 2 para. 2 CrimPC). For the prosecutor, this means that he either orders the case not to be heard, to be discontinued, he brings an indictment, or issues a penalty order. In the case of an indictment, the court then has the duty to either discontinue the proceedings, or issue an acquittal or guilty verdict.

---

[34] Cf. Federal Council Dispatch on the CrimPC of 21 December 2005, BBl 2006 1085, 1237 and 1255, where it is more correct to speak of "investigation of suspicions" (Verdachtsausforschung), and Federal Supreme Court decision BGE 137 I 218, E. 2.3.2 with further references.

[35] Compulsory measures are governed by Art. 196 ff. CrimPC and always require suspicion (of a crime). Depending on the degree of suspicion, the legislator then distinguishes between suspicion of a crime (Tatverdacht), reasonable suspicion (hinreichender Tatverdacht) and strong suspicion (dringender Tatverdacht). These degrees of suspicion play a role in the ordering of the various compulsory measures. Thus, the most drastic of all compulsory measures, the ordering of pre-trial detention, requires an urgent suspicion (of a felony or misdemeanor).

[36] These are so-called reportable events. This is particularly the case with homicides, sexual offenses, robbery, intentional serious assault, serious traffic, work, leisure and sport accidents.

B. Suspicion (of a crime)

The decisive criterion for the prosecutor to open a criminal investigation is therefore the existence of a suspicion. Although the suspicion is essential, a legal definition is missing. According to the Federal Supreme Court, the opening of a criminal investigation requires substantial and concrete factual indications of a criminal offence. Mere rumors or assumptions are not sufficient. The initial suspicion should have a plausible factual basis from which the concrete possibility of the commission of a criminal offence arises.[37] Particularly in the case of doubtful suspicion, the prosecutor is entitled to a certain margin of discretion. In case of doubt, however, a criminal investigation must be opened in accordance with the principle of "in dubio pro duriore", according to which charges are to be brought in case of doubt. This principle applies here just as it does in the context of the conclusion of the preliminary proceedings.[38]

In the area of doping, the suspicion of a violation of the SpoPA regularly arises on the basis of police findings, whether on the occasion of personal or traffic checks. Likewise, there are often so-called "chance findings", in particular on the occasion of house searches, which are connected with another criminal investigation. These chance findings are explicitly regulated in Art. 243 CrimPC and are to be distinguished from "fishing expeditions". According to the Federal Supreme Court, chance findings are "evidence, traces, objects or assets discovered by chance during the execution of compulsory measures in general and during searches and investigations in particular, which have no direct connection with the criminal offense to be investigated and neither substantiate nor refute the original suspicion, but which point to a further criminal offense."[39] Such chance findings are in principle usable.

Likewise, a suspicion arises when an individual makes a report or criminal complaint. According to Art. 301 CrimPC, every person is entitled to report criminal offences to a criminal prosecution authority (in writing or verbally). It must always be ensured that pure conjecture and suspicion (Verdächtigungen) are not sufficient

---

37 Federal Supreme Court decision 6B_455/2015 of 26 October 2015 E. 4.1 with further references.

38 Federal Supreme Court decision 6B_455/2015 of 26 October 2015 E. 4.1 with further references. Other opinion by Ackermann, 323. In view of the presumption of innocence, no criminal proceedings may be opened, and certainly no compulsory measures may be ordered if there are doubts about the conclusiveness of a suspicion.

39 See Federal Supreme Court decision BGE 139 IV 128, E. 2.1.

to establish suspicion (of a crime). Rather, concrete facts are required that point to criminal conduct.

In the area of prosecuting doping offenses, the reports by the customs authorities[40] and Swiss Sport Integrity are of great importance. Pursuant to Art. 20 para. 2 SpoPA, the customs administration shall report findings that give rise to a suspicion of violations of the SpoPA to the prosecution authorities. This may be the case, in particular, if large quantities of doping substances, paraphernalia, or raw materials for the production of such substances are found. Pursuant to Art. 23 para. 2 SpoPA, Swiss Sports Integrity is obliged to inform the competent prosecution authorities and to forward all documents as soon as a doping substance or method covered by the SpoPA is identified in one of its doping controls. This obligation exists even though prima facie there is unpunished self-doping, which may seem paradoxical. However, in agreement with Contat/Steiner,[41] this can be seen as a paradigm shift with the introduction of the SpoPA. Whereas under the previous legislation it was assumed that the athlete was doping on his own, there is now a presumption that the athlete is doping with the help of a third party.

Due to its great practical relevance, the following section will take a closer look at the interaction between Swiss Sport Integrity and the law enforcement authorities.

VI. Interaction between Swiss Sport Integrity and the Prosecution Authorities

A. Preliminary remarks

With the introduction of the revised SpoPA on 1 October 2012, the legislator, convinced that doping can only be tackled by all partners working together, created the legal basis for the exchange of data and information between the various bodies involved in the fight against doping to increase the effectiveness of the fight against doping.[42] Since then, there has been an explicit legal basis for the exchange of information, in particular between Swiss Sport Integrity and the prosecution authorities.

---

40 As of 1 January 2022, the Federal Customs Administration (FCA) has been renamed the "Federal Office for Customs and Border Security" (FOCBS).

41 Contat/Steiner, 370.

42 See BBl 2009 8189, 8221 in fine and 8222.

B. Notification of a positive doping sample by Swiss Sport Integrity

Due to legal obligations, Swiss Sport Integrity shall report to the prosecution authorities any doping control that has turned out positive for a doping substance covered by the SpoPA. In practice, this then raises the question of whether this is sufficient to justify an initial suspicion for the purpose of opening criminal proceedings, nota bene against a third party (since self-doping is not a criminal offence). At first glance, this question is to be answered with a "no". However, it should be recalled that with the revised SpoPA, the legislator established the presumption that the doping person is doping with the assistance of a third party.[43] With the forensic evidence of a positive doping sample (so-called "Adverse Analytical Finding" [AAF] by the WADA), there are therefore concrete indications that a person may have committed a criminal offense, which means that there is an initial suspicion.[44] Because this is an ex officio crime, the prosecution authorities are obliged to carry out investigations on the basis of the compulsory prosecution. In our opinion, this includes at least questioning the person who tested positive.[45] If there are no indications of the involvement of third parties, resulting in unpunished self-doping, a no-proceedings order or abandoning proceeding order can be issued. The often-applied practice by the prosecutors to not take any proceedings and globally referring that self-doping is not a criminal offence, without carrying out any investigative measures, therefore proves to be unlawful. Nevertheless, Swiss Sport Integrity has a right of appeal against such a no-proceedings order according to Art. 23 para. 3 lit. a SpoPA. However, even such an examination hearing of the person who tested positive is not a universal remedy, since due to his own impunity, he has little incentive, especially in an organized sport milieu, to incriminate his own environment and expose themself to a criminal investigation. Concerning this matter, the introduction of a leniency program could create the necessary incentives should self-doping one day become a criminal offense.[46] The statement by the person testing positive stating that they had engaged in self-dop-

43 Cf. section V.B. above.

44 According to the opinion expressed herein, it is irrelevant that, according to the anti-doping rules under private law, there is (only) a positive A sample and that the athlete can request the analysis of the B sample. At this stage of the proceedings, the only question is whether there are indications of criminal conduct and not whether there is evidence of a specific anti-doping rule violation within the meaning of the rules of the sport federations (cf. Art. 2.1 Doping Statute).

45 This person should be regularly questioned as a person providing information in accordance with Art. 178 or 179 CrimPC.

46 The Doping Statute and German anti-doping law provides for such a leniency program.

ing and had undertaken the necessary procurement activities for this purpose themself would then – although this would regularly be a self-serving assertion – regularly lead to the criminal investigation being discontinued by this point at the latest. Thus, the legislator's well-intentioned obligation of Swiss Sport Integrity to inform the prosecution authorities ultimately leads to nothing. The only remedy would be the abolition of unpunished self-doping, because then there would be a suspicion from the beginning, and effective compulsory measures could be taken against the person who tested positive as the accused person in the criminal proceedings. Currently, the person who has tested positive is not an accused person, which is why compulsory measures can only be ordered against them with utmost restraint (Art. 197 para. 2 CrimPC).

C. Admissibility of evidence collected by private individuals in criminal proceedings

1. Preliminary remarks

Since Swiss Sport Integrity is a foundation under private law within the meaning of Art. 80 ff. Swiss Civil Code, the question arises as to whether, and if so, under what conditions, the prosecution authorities may use their evidence for their criminal proceedings. This question arises all the more in view of the fact that self-doping is likely to become a criminal offense in the future.[47]

According to Art. 6 CrimPC, it is the duty of the criminal justice authorities to investigate ex officio all the circumstances relevant to the assessment of the criminal offense and the accused person. In order to establish the truth, they use all legally admissible evidence that is relevant in accordance with the latest scientific findings and experience (Art. 139 CrimPC). Nevertheless, there is no fundamental monopoly of evidence by the state in Switzerland, which in other words means that private individuals may also gather evidence and make it available to the prosecution authorities.[48] Although the prohibitions on the use of evidence in Art. 141 CrimPC are directed exclusively at the prosecution authorities, it is fundamentally unacceptable for a state to make use of private individuals in order to circumvent the rules of evidence or prohibitions that apply to it. Thus, evidence gathered by private individuals that is included in the criminal proceedings inevitably becomes a question of criminal procedural law. However, the legislator has explicitly

47 Cf. section III. above.

48 See Federal Supreme Court decision 6B_786/2015 of 8 February 2016, E. 1.2.

refrained from regulating the handling of evidence obtained by private individuals in the Criminal Procedure Code.[49] In doing so, it has ultimately left it to practice and case law to decide to what extent the prohibitions on the use of evidence provided for in the Criminal Procedure Code for the state authorities also apply to private individuals. According to Federal Supreme Court case law, evidence obtained contrary to (criminal) law by private individuals may only be used if (i) it could have been obtained lawfully by the prosecution authorities and, cumulatively, (ii) the interests involved are balanced against each other in favor of its use.[50] Conversely, this also means that lawfully obtained evidence by private individuals can be used without restriction in criminal proceedings.[51] In answering the question of whether the evidence could have been obtained lawfully by the prosecution authorities, it is essential to know whether the authorities could have obtained the disputed evidence if they had been aware of the suspicion.[52] If private individuals use methods such as means of coercion, the use of force, threats, promises, deception, or means that impair the ability to think or freedom of will, these are unusable because they are prohibited from the prosecution authorities under Art. 140 CrimPC and therefore cannot be lawfully obtained by them. When balancing the interests, the same standard must be applied as in the case of state-collected evidence. Use of evidence is thus only permissible if it is indispensable for the investigation of a serious criminal offense.[53] It must be assessed on a case-by-case basis what constitutes a serious criminal offense. In this context, it is not the abstract threatened sentence that is decisive, but the seriousness of the specific offense. Criteria such as the protected legal interest, the extent to which it is endangered or violated, the modus operandi and criminal energy of the offender, or the motive for the crime can be taken into account.[54] It should be noted that if evidence obtained by a private individual is unusable, the findings may not be used as a basis for further investigation due to the remote effect of the prohibitions on the use of evidence as stipulated in Art. 141 para. 4 CrimPC (Fruit of the Poisonous Tree' Doctrine).[55]

---

49 BSK StPO-Gless, Art. 141, N 40a; Praxiskommentar StPO-Schmid, Art. 141, N 3.

50 Federal Supreme Court decision 6B_786/2015 of 8 February 2016, E. 1.2 with further references.

51 See also BSK StPO-Gless, Art. 141, N 40c.

52 Federal Supreme Court decision 6B_1241/2016 of 17 July 2017, E. 1.2.2.

53 Federal Supreme Court decision 6B_1468/2019 of 1 September 2020, E 1.3.1. with further references.

54 Federal Supreme Court decision 6B_1468/2019 of 1 September 2020, E 1.4.2.

55 See also BSK StPO-Gless, Art. 141, N 43 with further references.

2. Criminal procedural use of Swiss Sport Integrity's doping samples

a. De lege lata

In order to fulfill its core mission of tackling doping within the sport federations and organizations affiliated with Swiss Olympic, Swiss Sport Integrity conducts doping controls on athletes. In order for these doping controls to be carried out and for disciplinary sanctions to be imposed, the athletes must be subject to these private law anti-doping rules. As already explained above, this subjection to the rules takes place under contract or association law.[56] Swiss Sport Integrity carries out this activity as a purely private entity and not, for example, as an extended arm of the criminal prosecution authorities. A doping control carried out within this framework in accordance with the rules,[57] and therefore legally collected, can be used without further ado in state criminal proceedings (against a third party), especially since the European Court of Human Rights (ECHR) has declared the current doping control system to be legal.[58] Should a doping control not have been carried out entirely in accordance with the rules, it should still be possible to use it in criminal proceedings. Art. 251 CrimPC gives the prosecution authorities the possibility of conducting examinations of persons, so they can lawfully obtain necessary blood and urine samples. The subsequent balancing of interests in the case of a qualified criminal offence pursuant to Art. 22 para. 2 SpoPA will without further ado be in favor of the usability of unlawfully collected evidence. In the case of the basic offense according to Art. 22 para. 1 SpoPA, an individual case assessment according to the criteria of the Federal Supreme Court would be required due to the many variants of the offense.

b. De lege ferenda

However, the question becomes particularly critical when the tested athlete themself becomes liable to prosecution (self-doping). The athlete who knowingly doped is faced with a choice after being called up for doping control by the sport organizations: Refusing the doping control under threat of a doping ban (period of ineligibility) of several years but possibly without criminal proceedings, or risking taking

---

56 See footnote 31 above.

57 The relevant rules are the Doping Statute, in particular Art. 5 thereof, as well as the Swiss Sport Integrity Implementation Regulations on Testing and Investigations, available on Swiss Sport Integrity's website (www.sportintegrity.ch). The authors will further use the German abbreviation ABDE.

58 See European Court of Human Rights decision no. 48151/11 and 77769/13 of 18 January 2018, Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France.

the doping control with the risk of both a doping ban and a criminal sanction for self-doping. In this context, the question therefore specifically arises as to whether the doping control and the accompanying analysis as a result of the privilege against self-incrimination in criminal proceedings precludes use in criminal proceedings.

According to Art. 113 para. 1 CrimPC, the accused person does not have to incriminate themself. In particular, they have the right to refuse to testify and cooperate in and with the criminal proceedings. The constitutionally and conventionally protected privilege against self-incrimination ("nemo tenetur se ipsum accusare") protects the accused person from not having to actively contribute to their own conviction in the criminal proceedings. This means that the criminal authorities may not resort to evidence obtained through pressure or coercion, thereby disregarding the will of the accused person. On the other hand, the accused person has an obligation to tolerate the compulsory measures provided for by law (Art. 113 para. 2 and Art. 200 CrimPC). Doctrine and case law on the scope of the privilege against self-incrimination state that this right primarily encompasses the right to remain silent.[59] Accordingly, the ECHR has also recognized that compulsory measures such as breath, blood, urine, or body tissue samples are permissible, since they could be obtained regardless of the will of the accused.[60] The scope of application does not include the collection of evidence that is already available before criminal procedural compulsory measures are exercised.[61]

The doping control, the subject of which is a urine and/or blood sample, is "material" obtained independently of the will and already existed before the execution of the compulsory measure, so that the nemo tenetur principle does not even apply.[62] This means that urine and blood samples taken by Swiss Sport Integrity can be used in any subsequent criminal proceedings.

---

59 Federal Supreme Court decision BGE 142 IV 207, E. 8.2; Donatsch/Scharzenegger/Wohlers, 27; SK StPO-Lieber, Art. 1, N 3.

60 European Court of Human Rights decision no. 19187/91 of 17 December 1996, Saunders v. United Kingdom, para. 69; Federal Supreme Court decision BGE 131 IV 36, E. 3.1.

61 Federal Supreme Court decisions BGE 142 IV 207, E. 8.3.2 with further references; BGE 138 IV 47, E. 2.6.1.

62 See Jansen, 85; SK StPO-Lieber, Art. 113, N 43a and 47.

3. Criminal procedural use of hearing protocols

As part of the disciplinary proceedings, the athlete is informed at an early stage of the allegation of a potential anti-doping rule violation and is granted the right to be heard (in writing or by personal hearing).[63] The accused athlete is also questioned in person by the disciplinary judges during an oral hearing in the ordinary proceedings before the Disciplinary Chamber of Swiss Sport (DC).[64] Thus, especially in view of a possible introduction of criminal liability for self-doping, the question arises whether these private hearing protocols may find their way into the state criminal proceedings. This question arises because two different procedural codes with different principles and procedural guarantees collide. These are, on the one hand, the Criminal Procedure Code and, on the other hand, the civil procedural rules for disciplinary proceedings by sport organizations.[65] In disciplinary proceedings, the accused athlete has a duty to cooperate in establishing the facts of the case. In case of violation, they are threatened with disadvantages. In contrast, the accused person in criminal proceedings has the right to refuse to testify and to cooperate in the proceedings (so-called privilege against self-incrimination or nemo tenetur principle). Accordingly, no one is required to incriminate themself. Hearings without reference to this right lead to the (absolute) inadmissibility of the accused person's statements (Art. 158 para. 2 CrimPC).

The private law anti-doping rules are based strongly on the strict liability of an athlete who has tested positive. In the classic doping offense of a positive doping sample (the so-called "presence of a prohibited substance" according to Art. 2.1 Doping Statute), this positive result is already sufficient for Swiss Sport Integrity to prove a doping offense, regardless of whether the athlete is at fault or not.[66] It is now up to

---

63 Cf. Art. 7.2 and 8 Doping Statute and Art. 8.1 of the Swiss Sport Integrity Implementation Regulations on Results Management, available on Swiss Sport Integrity's website (www.sportintegrity.ch). The authors will further use the German abbreviation ABRM.

64 Cf. Art. 7 para. 2 of the Regulations concerning the proceedings before the Disciplinary Chamber of Swiss Sport.

65 The Regulations concerning the proceedings before the Disciplinary Chamber of Swiss Sport shall apply primarily and, by reference, the Swiss Civil Procedure Code (CPC) shall apply subsidiarily and mutatis mutandis (Art. 27 Regulations concerning the proceedings before the Disciplinary Chamber of Swiss Sport).

66 A positive doping test during a competition automatically leads to the disqualification of the result achieved in the competition in question, with all the consequences arising therefrom, including the forfeiture of points, medals and prizes (cf. Art. 9.1 Doping Statute). The question of fault or intent is exclusively decisive with regard to the determination of the length of the doping ban.

the athlete who has tested positive to prove their innocence, which in effect leads to a reversal of the burden of proof to the athlete's disadvantage, forcing them to cooperate in the proceedings, otherwise they regularly face a four year doping ban. In view of the lack of possibility for sport organizations to apply compulsory measures, this reversal of the burden of proof seems understandable. First of all, it should be noted that the privilege against self-incrimination does not apply in disciplinary proceedings conducted under private law.[67] The introduction of a right to refuse to testify and to cooperate in analogous application of criminal procedural law in civil law disciplinary proceedings, so that such a hearing would be usable in subsequent criminal proceedings, is not compatible with the design of disciplinary proceedings and is therefore not an option. For this reason, it is incumbent on the criminal prosecution authorities to take this personal evidence again in accordance with the procedural rules of the criminal proceedings, without being allowed to fall back on the hearing from the disciplinary proceedings.

The reverse case, whereby Swiss Sport Integrity uses interrogation protocols of the criminal prosecution authorities for the disciplinary proceedings, is unproblematic. On the one hand, criminal proceedings grant the accused more extensive rights than disciplinary proceedings through the right to refuse to testify. On the other hand, the rules of the disciplinary proceedings allow it. According to Art. 3.2 Doping Statute, anti-doping rule violations can be proven by Swiss Sport Integrity with any reliable evidence. This includes, in particular, the records of interrogations by law enforcement authorities obtained on the basis of Art. 78 para. 1 lit. f SpoFöV. In this context, the increased evidentiary value of facts established by state authorities must also be pointed out. Specifically, the facts established in a final penalty order issued by a prosecutor or the judgment of a (criminal) court are binding on the DC, unless there is a violation of Swiss ordre public (cf. Art. 3.2.4 Doping Statute).

4. Criminal procedural use of observations by Swiss Sport Integrity

As already explained, Swiss Sport Integrity is a foundation under private law and acts purely as a private (legal) entity in its core area of tackling doping. If, in the course of its investigative activities, it wishes to observe athletes or coaches, for example, it is not bound by fundamental rights – unlike public administrative units or institutions entrusted with public duties – which is why it does not require a legal basis for this.[68] Observations in public spaces conducted by Swiss Sport Integ-

[67] SK StPO-Lieber, Art. 113, N 3.

[68] See Federal Supreme Court decision 6B_1241/2016 of 17 July 2017, E. 1.2.1.

rity are unproblematic because they do not fall within the scope of protection of Art. 179quater SCC (breach of secrecy or privacy through the use of an image-carrying device). An infringement and therefore a criminal offense is only committed by someone who observes a fact from the secret sphere of another or a fact from the private sphere of another, which is not readily accessible to everyone without the latter's consent, using a recording device or the records of an image-carrying device. This covers facts relating to the living conditions of a person, the perception of which is only possible for a limited group of people. Accordingly, the protected private sphere basically includes all events that take place in closed rooms and locations that are shielded from the view of outsiders, such as events that take place in a house, in an apartment or in an enclosed, private garden. By contrast, that which takes place in public and can be perceived by anyone, is not part of the protected area.[69]

If Swiss Sport Integrity makes observations (photos, video recordings), e.g. of athletes or their supporting personnel (coach, doctor, physiotherapist, etc.) while they are in public, these can, due to their legality, make their way into state criminal proceedings without further ado.

In contrast, the situation is different in the case of observations obtained by private individuals in violation of criminal law, in particular observations from the private sphere. In addition to the fact that the authorship commits a criminal offense, there is also no room for use in criminal proceedings. According to Art. 179quater para. 2 SCC, the legislator makes the downstream analysis of a prior criminal recording on an image-carrying device punishable, which means that even a prosecutor – subject to the consent of the person concerned – can potentially make themself liable to prosecution. Neither a weighty interest of the state in the use of evidence nor the duty of the criminal authorities to clarify the facts are suitable to legalize an action of the prosecutor in charge of the case or the judge passing sentence. In this constellation, a prohibition of use in criminal proceedings follows directly from Art. 179quater SCC (and not from Art. 141 para. 2 CrimPC), which means that there is no room for hypothesizing whether the prosecution authorities could have obtained the evidence legally, nor for balancing the interests in favor of serious crimes.[70]

---

69 Federal Supreme Court decision 8C_272/2011 of 11 November 2011, E. 6.1 with further references.

70 See Godenzi, 1243 ff.

D. Opportunities and risks of legal interaction between Swiss Sport Integrity and prosecution authorities

1. Positive effects

It is very advantageous to Swiss Sport Integrity that it receives information from the prosecution authorities and courts that it would not otherwise have access to.[71] This is particularly due to the fact that the prosecution authorities – unlike Swiss Sport Integrity as a private institution – can order compulsory measures. In the area of doping, the following compulsory measures are particularly worthy of consideration:

- House search;
- Search of cell phones;
- Physical examination;
- Seizure (of e.g. bank statements or other documents);
- Retrospective Participant Identification;
- Undercover enforcement officer;
- Telephone surveillance for qualified violations of the SpoPA;
- Undercover investigator for qualified violations of the SpoPA.

2. Negative effects

The other side of the story is that state intervention regularly leads to delays in the private law disciplinary proceedings, which is often incompatible with the purely sporting interest in resolving disputes quickly. Particularly in the case of a notification of a positive doping test, Swiss Sport Integrity leaves procedural jurisdiction to the prosecution authorities so as not to interfere with the criminal proceedings. During this time, the athlete is also not yet informed of the positive analysis result. In practice, it turns out that the feedback from the prosecution authorities as to whether the disciplinary proceedings can be continued or whether they should stay on hold a little longer has in some cases been delayed for several weeks without any prosecution measures being taken. In principle, such a situation is not tenable in sport law proceedings, since according to the rules of sport law, the athlete must

[71] In 2021, Swiss Sport Integrity (then still Antidoping Switzerland) received 54 notifications of criminal proceedings from various prosecutors, which corresponds to the long-term average.

be notified of the AAF (positive result) "without delay",[72] anti-doping rule violations must be prosecuted promptly and, in principle, must be concluded within six months with a first-instance decision.[73] A further problem exists in connection with the ordering of provisional suspensions, which must be carried out immediately if doping substances covered by the SpoPA are detected. If, after being notified by Swiss Sport Integrity of a positive doping sample, the prosecution authority does not open an investigation immediately, there is a risk that this athlete will unknowingly take part in further competitions and falsify them, with the unattractive consequence that any results obtained will have to be retroactively annulled and the ranking corrected, which can have major repercussions, especially at major events. For this reason, specialized prosecutors would be much needed, especially in the case of the introduction of punishable self-doping. Based on existing expertise, this would enable rapid and efficient case management, which is in the interest of the sport in particular, but also of law enforcement. In this regard, existing structures of specialized departments of cantonal public prosecutors' offices, such as in the area of narcotics, could already be used.

VII. Conclusion

Doping attacks fundamental sporting values such as health, fairness, willingness to perform, integrity, and equality of opportunity. In the authors' personal opinion, the legislator's previous assumption that sport would be able to get to grips with the doping problem itself can no longer be accepted. Sport, which is organized under private law here in Switzerland, does not have the means to keep up with highly professional players operating across national borders. The "Aderlass" case[74] in neighboring countries has impressively shown that state intervention is

---

[72] See Art. 5.1.5 ABRM. This rule specifically states that "if the review of the AAF does not reveal a valid Therapeutic Use Exemption or entitlement for one, a departure from the ABDE or WADA's International Standard for Laboratories that caused the result, or an ingestion of the relevant prohibited substance through a permitted route of administration, Swiss Sport Integrity shall promptly notify the athlete of the following: a) the AAF; […]" (translation from German).

[73] See Art. 4.2 ABRM (timeliness).

[74] "Operation Aderlass" is an investigation in Austria and Germany into the blood doping network of Germany based physician Mark Schmidt. He had more than 20 clients from different sports that he provided with blood doping. A lot of the athletes confessed and were then subsequently suspended. Dr. Schmidt was sentenced to four years in prison by a court in Munich.

needed today to break up well-organized doping networks. Only state prosecution authorities have the necessary legal means of intervention for this purpose, which is why, in the opinion of the authors, self-doping should also be introduced as a criminal offense in Switzerland. The (doping) athlete is often both the last link in this system, as well as the origin of the discovery of an entire network. A promising and efficient prosecution is hardly feasible without making these athletes the subjects of criminal proceedings. Finally, it is not clear why the consumption of "hard" doping substances should be judged differently from that of narcotics, especially since these are just as harmful to health and equally socially destructive as narcotics. It is now up to the DDPS and then parliament to take the next step, which the Germans already took a few years ago. The legislator in particular will have to decide on the scope of application.

Bibliography

Ackermann Jürg-Beat, Tatverdacht und Cicero, – in dubio contra suspicionem maleficii, in: M.A. Niggli, J. Hurtado Pozo, N. Queloz (eds.), Festschrift für Franz Riklin, Zurich 2007.

Bericht des Bundesrates in Erfüllung des Postulats 19.4366 Dobler vom 27. September 2019, Strafbarkeit des Selbstdopings im Sport vom 10. Dezember 2021, https://www.newsd.admin.ch/newsd/message/attachments/69523.pdf (last visited 18.10.2022) (cit. Bericht des Bundesrates, Selbstdoping).

Contat Laurent/Pamberg Christoph/Pfister Stefan/Steiner Marco, Dopingbekämpfung durch Staat und Private in der Schweiz, Causa Sport 2016, 159–179.

Contat Laurent/Steiner Marco, Erfolgreiche Dopingbekämpfung mittels Sportförderungsgesetz? – Versuch einer Bilanz nach acht Jahren, Causa Sport 2020, 358–372.

Donatsch Andreas/Lieber Viktor/Summers Sarah/Wohlers Wolfgang (eds.), Kommentar zur Schweizerischen Strafprozessordnung, 3rd edition, Zurich 2020 (cit. SK StPO-Author).

Donatsch Andreas/Schwarzenegger Christian/Wohlers Wolfgang, Strafprozessrecht, 2nd edition, Zurich/Basel/Genève 2014.

Godenzi Gunhild, Strafbare Beweisverwertung?, AJP 2012, 1243–1254.

Jansen Scarlett, Strafprozessuale Beweisverwertung von Dopingproben, SpuRt 2/2022, 80–86.

Jörger Werner, Die Strafbarkeit von Doping nach schweizerischem Recht: Postulate de lege ferenda, Jusletter of 20. 2. 2006.

Jositsch Daniel/Niklaus Schmid (eds.), Praxiskommentar zur Schweizerischen Strafprozessordnung, 3rd edition, Zurich/St. Gallen 2017 (cit. Praxiskommentar StPO-Author).

Niggli Marcel-Alexander/Heer Marianne/Wiprächtiger Hans (eds.), Schweizerische Strafprozessrecht/Jugendstrafprozessordnung, Basler Kommentar, 2nd edition, Basel 2014 (cit. BSK StPO-Author).

Rehberg Jörg/Flachsmann Stefan, Strafbarkeit von "Doping" nach geltendem schweizerischen Strafrecht, Expertise im Auftrag des Bundesamtes für Sport (BASPO), Zürich 1999.

Anti-Doping and Compulsory Investigation in Japan

Yoshihisa Hayakawa*

One of the significant phenomena in sport law is the drastic introduction of intelligence and investigation as a tool for detecting doping. In other words, it is nowadays sometimes quite difficult or nearly impossible to detect doping if testing is the only tool in the present sport situation, where various types of advanced doping methods have been invented one after another and are actually widely used among athletes. In Japan, however, there was and still is a strong hesitation to introduce compulsory investigation in the anti-doping activities.

This paper aims to analyze elements to be considered for the introduction of compulsory investigation power in the anti-doping activities. For this purpose, this paper explains the present legislation for the anti-doping activities in Japan and the discussions before the law-making activities. Then, this paper presents and analyzes two different possible approaches for introducing compulsory investigation in the anti-doping activities and examines reasons for the final feature of the anti-doping legislation.

Table of Contents

I. Introduction

One of the significant phenomena in sport law is the dramatic introduction of intelligence and investigation as tools for detecting doping. In other words, it can nowadays be quite difficult or even impossible to detect doping if testing is the only tool for detection, especially since various types of advanced doping methods

* Professor of Law at Rikkyo University.

have been invented one after the other. These advanced doping methods are unfortunately widely used by athletes.

As a result, the World Anti-Doping Agency (WADA) has developed its Intelligence and Investigation Department in order to protect whistleblowers, to conduct investigations, and to cooperate with law enforcement agencies.[1] The Japan Anti-Doping Agency (JADA) and the Japan Sport Council (JSC)have followed suit.[2] There is a serious limit, however, for the effective use of intelligence and investigation in the anti-doping activities in Japan. Why? What is the limit in Japan?

If concrete information with sufficient evidence of an athlete's act of doping is provided by a whistleblower, the anti-doping agency may continue to prosecute doping by itself based on the information and evidence provided. On the other hand, if the information is too abstract or accompanied by no or insufficient evidence, the anti-doping agency must gather additional information and/or evidence. For instance, in the case of a suspicious athlete walking to an apartment close to the stadium with his bag, there would be credible grounds for suspicion, that there is a prohibited substance or method for doping in his bag. If the athlete rejects a request to open the bag, however, the anti-doping agency cannot do anything further, unless compulsory investigation power has been granted.

Unfortunately, there was and still is no legal basis in Japan which grants compulsory investigation power to the JADA, JSC, or other related entities. Anti-doping activities based on intelligence and investigation have to be limited due to the lack of a legal basis in Japan.

On the other hand, when the XXXII Tokyo Olympic Games in 2020 were scheduled to take place, a tremendous number of athletes would have gathered from all over the world. There was a possibility that a certain percentage of the athletes would be suspect from the viewpoint of the anti-doping policies. Without a legal basis, how could Japan guarantee the integrity of results in the Olympic Games from the viewpoint of the anti-doping policies? There were serious discussions for this specific problem and other related issues in Japan.

This paper aims to describe and examine the discussions and law-making activities in Japan, as well as attempting to analyze elements worth considering for the introduction of compulsory investigation power concerning anti-doping activities. For

1 https://www.wada-ama.org/en/what-we-do/intelligence-investigations (last visited 17.10.2022).

2 https://www.playtruejapan.org/activity/intelligence.html (last visited 17.10.2022).

this purpose, this paper explains the present legislation for anti-doping activities in Japan (II) and the discussions prior to law-making activities (III). Then, this paper presents and analyzes two possible approaches for introducing compulsory investigation in the anti-doping activities (IV) and examines reasons for the final feature of the anti-doping legislation (V).

II. Act on the Promotion of Anti-Doping Activities in Sport

In 2018, two years before the Olympic Games in Tokyo were scheduled to take place, the Act on the Promotion of Anti-Doping Activities in Sport was newly passed as the first national statute exclusively concerning anti-doping activities in Japan.[3]

As described in Article 1, this Act aims to comprehensively promote measures related to anti-doping activities, thereby contributing to the healthy development of the minds and bodies of persons who play sport, as well as the development of sport. For this purpose, the Act prescribes basic principles related to the promotion of anti-doping activities (Articles 3 and 4), clarifies the responsibilities of the national government (Article 5), establishes basic policies (Article 11), and prescribes other necessary matters (Articles 12 to 16).

In Article 4, the Act clearly provides that sport athletes participating in international competitive events must not conduct doping in sport for their own benefit. The Act also clearly states that such sport athletes and persons who provide support for such sport athletes must neither conduct nor assist doping in sport for other such sport athletes with a wrongful purpose.

In relation to the responsibilities of the national government, Article 5 clearly provides that the national government is responsible for comprehensively formulating and implementing measures related to the promotion of anti-doping activities. The provision is quite important not only because of the content of the provision itself, but also for the securement of a national budget substantial enough to implement the various anti-doping measures for the Tokyo 2020 Summer Olympics. The same applies for Article 10, which provides that the government must take legislative, financial, and other measures necessary to implement policies for promotion of anti-doping activities.

[3] Act No. 58 of June 20, 2018. For the English translation of the Act, see https://www.japaneselawtranslation.go.jp/en/laws/view/3908/tb#je_toc (last visited 17.10.2022).

Another important set of provisions are Articles 6, 8, and 15. In Article 6, the JSC and JADA are legally mentioned as core institutions in the anti-doping activities. In Articles 6 and 8, the JSC, JADA, and the national government are required to collaborate and coordinate with one another in order to realize the basic principles. As described in Article 15, the national government is especially required to take the necessary measures for sharing information related to doping in sport among national administrative organs such as the JSC, JADA, and international organizations related to the prevention of doping in sport, so that international competitive events in Japan can take place smoothly. By the power of Article 16, information obtained by the Immigration Services Agency of Japan, the Japan Customs and the National Police Agency of Japan can be shared with each other and with the JSC and JADA.

By the power of the Act, information acquired by the national administrative organs can be used for the intelligence and investigation activities of JSC and JADA. However, the information is usually accidentally obtained by the national administrative organs. In the hypothetical case mentioned above, even when the JSC and/or JADA seriously need information about the contents of the suspicious athlete's bag, the Act cannot be used to compel the athlete to reveal the contents of his bag. In other words, a provision for giving the power of compulsory investigation for the anti-doping activities was never prepared in the newly established Act. But why?

III. Discussions Before the Law-Making Activities

The power of compulsory investigation is mainly given to Judicial Police Officers under the control of Judges of National Courts. Judicial Police Officers work for criminal cases, each of which is exactly defined and criminally prohibited and punished by the Penal Code of Japan. As a logical consequence, compulsory investigation for the anti-doping activities can be enforced by the Judicial Police Officers' power of compulsory investigation if the doping act is criminally prohibited and punishable. In this respect, discussions on the relationship between anti-doping activities and criminal law are practically useful. Actual discussions on this topic occurred, however, in a different context in Japan before the law-making activities for the Act.

Basic legal schemes for regulating the doping acts of athletes are contractual ones. Almost all athletes belong to national sport federations (NFs) and/or international sport federations (IFs). NF membership contracts require the athletes to agree to

obey their national anti-doping rules, whilst IF membership contracts similarly require the athletes to agree to obey the anti-doping rules of IFs. The national anti-doping rules and the anti-doping rules of IFs are completely harmonized by the significant influence of the World Anti-Doping Code (WADC).[4] Additionally, athletes have to sign a contractual entry sheet when they participate in a sport competition. The contractual entry sheet includes a provision requiring the athletes to agree to obey their national anti-doping rules, as well as the anti-doping rules of IFs. If one of the athletes conducts a doping act, it results in a violation of the anti-doping rules and, as a consequence, one or more sanctions will be imposed based on the anti-doping rules. In other words, the sanctions are contractually imposed.

The discussions on the relationship between anti-doping activities and criminal law before the time of the law-making activities of the Act focused directly on a fundamental problem: Should doping acts by athletes and/or persons who provide support be regulated by criminal law, in addition to the above-mentioned contractual schemes?

In December 2015, the Japan Sports Agency established a task force team for establishing and enhancing the system for anti-doping activities.[5] The task force team examined a series of related problems, including the relationship between anti-doping activities and criminal law, and issued its report in November 2016.[6] In the report, the task force team concluded that, since the number of doping acts found in Japan was relatively small, criminalization of doping cases was not seriously needed in Japan. The report also added several reasons for the conclusion: It was difficult to clearly define a target athlete and/or person who provided support in criminal law; it was difficult to capture a foreign athlete who had infringed the criminal measures for his or her doping act and had already escaped from Japan; criminal measures should be a last resort.

We can however rebut the reasonings for the conclusion in the report. First, even if the number of doping cases found in Japan was relatively small, more effective measures for anti-doping activities were needed for large-scale international sport competitions held in Japan, where many foreign athletes were expected to join. Second, it was technically possible to clearly define a target athlete and/or person

4 https://www.wada-ama.org/en/what-we-do/world-anti-doping-code (last visited 17.10.2022).

5 https://www.mext.go.jp/sports/b_menu/sports/mcatetop10/list/detail/1375009.htm (last visited 17.10.2022).

6 https://www.mext.go.jp/sports/content/1375009_3_2_1.pdf (last visited 17.10.2022).

who provided support in criminal law, if we could have carefully examined and designed a definition of the target.

The most important unrecognized element in the report is the ultimate reason for the introduction of criminal measures in the present situation of sport: Various types of advanced doping methods have been invented one after another, which were and still are widely used by athletes. As a countermeasure against this situation, the power of compulsory investigation was and still is seriously needed for the anti-doping activities. Criminalization of doping cases was one of the approaches for introducing the power to investigate in the anti-doping activities.

From this viewpoint, criminalization of doping cases had a significant meaning for the use of Judicial Police Officers' power of compulsory investigation against suspicious athletes and/or persons who provide support, even if they were foreigners. By the Judicial Police Officers' power, hidden information could have been acquired from the suspects at the time of the international sport competitions held in Japan. The information acquired by the Judicial Police Officers could have been used not only for the Judicial Police Officers themselves, but also for the JSC and/or JADA, using the information sharing system mentioned above, for their anti-doping intelligence and investigation activities.

In general, criminal measures should be a last resort. If there were serious needs and there was no other practical way for satisfying the needs, however, we should not have hesitated to introduce the Judicial Police Officers' power of compulsory investigation in the anti-doping activities by criminalization of doping cases. It is a very clear situation where the last resort should have worked.

But was there no other practical way for introducing the power of compulsory investigation in the anti-doping activities?

IV. Two Different Approaches for the Compulsory Investigation

Logically speaking, there are two different approaches for the use of the power of compulsory investigation in the anti-doping activities: (1) criminalization of doping cases and (2) special legal measures directly giving the power of compulsory investigation to anti-doping agencies.

Criminalization of doping cases is, as explained above, an approach to use pre-existing Judicial Police Officers' power of compulsory investigation for the anti-

doping activities. If a doping act satisfies the requirements of a pre-existing criminal provision, for instance crime of injury or crime of fraud, it is unnecessary to introduce new criminal measures for this purpose. We can easily imagine many doping cases, however, where none of pre-existing criminal provisions in the Penal Code of Japan are applicable. The power of compulsory investigation is sometimes needed for the cases to obtain hidden information and/or evidence for the anti-doping intelligence and investigation activities of the JSC and/or JADA. Unfortunately, it is not sufficient to use pre-existing crimes listed in the Penal Code of Japan for this purpose.

Another element to be considered in this approach is that, due to the strict requirements of Article 31 of the Constitution of Japan, it is strictly prohibited to broadly interpret pre-existing criminal provisions in the Penal Code of Japan. Under the constitutional requirement, pre-exiting criminal provisions cannot be flexibly applied to the doping cases by such broad interpretation, which were not originally targeted by those criminal provisions.

Considering the points mentioned above in criminal law, another practical approach should be explored for introducing the power of compulsory investigation in the anti-doping activities: Establishing special legal measures by directly giving the power of compulsory investigation to anti-doping agencies.

Such special measures actually exist in different areas in Japan. For instance, the power of compulsory investigation is given to the National Tax Agency, according to the Article 142 of the National Tax Collection Act of Japan.[7] The same power is also given to the Child Guidance Center, according to the Article 9-3 of the Child Welfare Act of Japan.[8] In other words, apart from Judicial Police Officers' power of compulsory investigation, the same power is specially given, if necessary, to a specialized agency by special measures. Similarly, if necessary for the effective anti-doping activities of intelligence and investigation, special measures should be prepared for giving the power of compulsory investigation to an agency responsible for the anti-doping activities.

7 https://www.japaneselawtranslation.go.jp/ja/laws/view/3874 (last visited 17.10.2022).
8 https://www.japaneselawtranslation.go.jp/ja/laws/view/2221 (last visited 17.10.2022).

V. Reasons for the Final Features of the Anti-Doping Legislation

Immediately after the submission of the report by the task force team for establishing and enhancing the system for anti-doping activities in November 2016, the All-Party Parliamentary Group for Sport started its law-making activities for preparing the bill for the Act on the Promotion of Anti-Doping Activities in Sport with the support of the Japan Sport Agency.[9] After a series of meetings and discussions in April 2017, the Group completed the bill, which lacked a provision for giving any power of compulsory investigation for the anti-doping activities.[10] As mentioned above, the Act was established without any provision for compulsory investigation in 2018. What were those reasons?

As examined above, one of the possible approaches for the use of the power of compulsory investigation in the anti-doping activities, is the use of the pre-existing Judicial Police Officers' power of compulsory investigation. As also examined above, the pre-existing crimes listed in the Penal Code of Japan for this purpose cannot cover all the possible doping cases. The pre-exiting criminal provisions cannot be flexibly applied to the doping cases by broad interpretation, due to the constitutional requirements. Therefore, criminalization of doping cases by the newly established law was necessary for the realization of this approach.

Even if the main purpose of the criminalization of doping cases was the use of the pre-existing Judicial Police Officers' power of compulsory investigation, there was a strong philosophical or emotional hesitation to additionally prepare criminal provisions for doping cases in Japan.

Moreover, there was another concern that athletes' human rights could be arbitrarily infringed on by the Judicial Police Officers. For instance, the main demand of compulsory investigation in the anti-doping activities is the power of search and seizure. After that, the information acquired by the search and seizure would be shared with the JSC and JADA and used in the above-mentioned contractual scheme. There was a concern in this approach, however, that the power of arrest and detention might be arbitrarily used by the Judicial Police Officers.

9 http://jsla.gr.jp/J/24kai_report.htm (last visited 17.10.2022).

10 https://www.nikkei.com/article/DGXLASDG27H3F_X20C17A4000000/ (last visited 17.10.2022).

Considering the hesitation due to these concerns and the limited time period until the scheduled Tokyo 2020 Summer Olympics, the criminalization approach was given up in the law-making activities.

In relation to the other approach, it was logically possible to introduce special provisions of giving the power of compulsory investigation, especially the power of search and seizure, to only a special agency in the bill. There was another problem, however, in this approach: Under the bill, the agencies responsible for the intelligence and investigation in the anti-doping activities were planned to be the JSC and JADA. The JSC is an independent administrative institution, and the JADA is a public interest incorporated foundation. They are not organs of the government of Japan. On the other hand, the National Tax Agency and Child Guidance Center, to which the power of search and seizure is given by the special measures for the collection of tax or for the avoidance of child abuse, are organs of the government of Japan. In other words, there was no prior example of the power of compulsory investigation being given to a non-governmental organization in the entire history of Japanese legislation at the time.

Considering these elements, which had to be resolved academically and practically, and the limited time period until the scheduled Tokyo 2020 Summer Olympics, this approach was also given up in the law-making activities.

VI. Final Remarks

Due to the COVID-19 pandemic, the Tokyo 2020 Summer Olympics were postponed and actually held in the summer of 2021. Now the games have gone and only the anti-doping legislation without the power of compulsory investigation remains.

Just after the Tokyo 2020 Summer Olympics, the Beijing 2022 Winter Olympics were held. During those Winter Olympics, a 15-year-old Russian figure skater who had won first place in free skating in the women's single skating team event, was notified that she had been provisionally suspended because of the presence of prohibited substances in her urine sample. Why was the prohibited substance found in her sample? It is quite difficult to find out the true facts, including the involvement of her coach and her team's doctor, without the power of compulsory investigation.

Nowadays, the power of compulsory investigation in the anti-doping activities is one of the necessary conditions to become the host country of a largescale international sport competition, in order to guarantee the integrity of the results in the

sport competition. In other words, Japan has to immediately establish the power in the anti-doping activities, in order to host large-scale international sport events in the future, including the Winter Olympics scheduled in 2030. How can we realize it now? It is a serious and important task for the successful future of Japan in the sport field.

Doping at Mega-Sporting Events from the Japanese Perspective

Shoichi Sugiyama*

In summer 2021, Japan hosted the Tokyo 2020 Olympic and Paralympic Games ("Tokyo Games"). During the preparation for this mega-sporting event, the criminalization of anti-doping violations was discussed in Japan. Although the criminalization was not implemented, new legislation on anti-doping was enacted in 2018, which increased the legitimacy of sharing information, including personal data, between administrative organs and domestic and international anti-doping organizations. Finally, as a part of the preparations for the Tokyo Games, the memorandum of cooperation was concluded between the relevant parties, including domestic and international anti-doping organizations. Based on this memorandum, the anti-doping scheme for the Tokyo Games to share intelligence on anti-doing was implemented.

At the Tokyo Olympic Games, only six anti-doping rule violations have been asserted so far, of which some are partially still pending. Furthermore, there were no cases asserted in a non-analytical manner. Since anti-doping rule violations may be discovered in re-testing of the samples in the previous Games, whether or not the Japanese scheme for sharing information installed just before the Tokyo Games was effective should be evaluated at a later stage. As it is expected that mega-sporting events will be held in Japan in the future, it is important to continue reviewing the preparation and its consequences for the Tokyo Games, keeping an eye on doping cases which may be revealed at a later date.

Table of Contents

* Shoichi Sugiyama is a JD (University of Tokyo), Attorney at Law in Japan and a lecturer in Sports Law at the Keio University LL.M, Chuo University LL.B, Tsukuba University and Nihon University.

I. Introduction

In summer 2021, Japan hosted the Tokyo 2020 Olympic and Paralympic Games ("Tokyo Games"). During the preparation for this mega-sporting event, the criminalization of anti-doping violations had been discussed in Japan. Although the criminalization was not implemented in Japan, new legislation on anti-doping was passed in 2018.[1]

As it is expected that mega-sporting events will be held in Japan in the future, it is important to evaluate the consequences of the preparations for the Tokyo Games. Therefore, this paper examines the process of the preparations and the consequences of anti-doping in the Tokyo Games at this stage.

II. Preparation for the Tokyo Games

A. Discussions on whether or not to criminalize

Ever since the decision to hold the Tokyo Games was made in 2013, how to establish an effective scheme on anti-doping had been one of the primary agendas that needed to be settled.[2] In Japan, anti-doping rule violations were not criminalized at that time. Therefore, compulsory measures under the Code of Criminal Procedure by Japanese police or prosecution authorities could not be taken, even when suspicions of anti-doping rule violations were recognized during the subsequent events.

In December 2015, the Japan Sports Agency ("JSA") of the Ministry of Education, Culture, Sports, Science and Technology, the administrative organs established for the purpose of promoting sports and sports-related policies, convened the "Task Force for the Establishment and Strengthening of Anti-Doping Systems" ("Task

1 Also see Sugiyama/Hangartner, 243 ff.
2 Imaizumi, 31.

Force").[3] The Task Force had discussed the development of anti-doping systems in Japan, including the criminalization of anti-doping rule violations. However, the final report of the Task Force concluded that criminalization of anti-doping rule violations was not necessary at the current stage, considering the situation in Japan.[4] The report pointed out that there was little need to impose sanctions in addition to the pre-existing sporting sanctions by sport organizations against anti-doping rule violations. The report also noted that it would be difficult to distinguish high-performance athletes who had to be punished from other athletes. The report additionally pointed out that if anti-doping rule violators were foreign nationals, it could not be guaranteed that the crackdowns and enforcement would be effectively executed, if the perpetrators left for other countries.[5]

As described above, although the criminalization of anti-doping rule violations was discussed in the agenda, Japan did not choose the path of the criminalization.

B. Discussions on whether to share intelligence

Subsequently, in Japan, whether domestic and international anti-doping organizations could share information on anti-doping, without using the compulsory measures by Japanese police or prosecution authorities, became a question in need of a solution. Since information generally used in non-analytical investigations by anti-doping organizations includes personal data, the issue was whether the sharing of such information among anti-doping organizations was legal under the legislations related to personal data in Japan.

Accordingly, the "Project Team for Establishing an Intelligence Scheme on Anti-Doping" was established in the Japan Sport Council ("JSC"), the central organization aimed at enhancing integrity of sport in Japan, including the areas of fighting against doping.[6] The Project Team concluded that it can be lawful under the legislations related to personal data in Japan for administrative agencies, the JSC, and the Japan Anti-Doping Agency ("JADA") to share intelligence, including personal data, in the doping controls, even without consent from the affected individuals.[7]

3 Task Force, 20 ff.
4 Task Force, 20 ff.
5 Task Force, 20 ff.
6 JSC, Intelligence Scheme, 5.
7 JSC, Intelligence Scheme, 5.

C. New legislation on anti-doping

In line with these discussions, the Act on the Promotion of Anti-Doping Activities in Sport ("PADAS") was passed in 2018.[8]

The PADAS makes it illegal for subject athletes who participate in the international events such as the Olympic Games and the Paralympic Games[9] to conduct anti-doping rule violations.[10] The PADAS also makes it illegal for coaches or trainers of these athletes to conduct or assist doping in sport.[11] However, no penalty is specified in the PADAS. Thus, PADAS is not regarded as a kind of criminal code.

The PADAS also stipulates that the Japanese government shall take necessary measures for sharing information related to doping among national administrative organs, the JSC, the JADA, international organizations such as the International Olympic Committee, and the International Testing Agency.[12] The objectives of this article are to smoothly execute information exchange in mega-sporting events for the prevention of anti-doping rule violations. Furthermore, the PADAS has a supplementary provision, which states that the government shall review the measures for the prevention of anti-doping rule violations, including the manner of involvement of the national government, and take necessary measures based on the results of the review.[13]

As a result of the enactment of the PADAS, anti-doping rule violations by subject athletes have become illegal in Japan, even if such violations do not lead to a criminal penalty. The PADAS also obligates the Japanese government to take the necessary measures for sharing information. Therefore, it can be said that the PADAS increases the legitimacy of sharing information, including personal data, between administrative organs and other relevant entities such as the JSC, JADA, and the Organizing Committee of the Tokyo Games.

---

8 Act on the Promotion of Anti-Doping Activities in Sport, Japanese Law Translation, https://www.japaneselawtranslation.go.jp/en/laws/view/3908 (last visited 24.09.2022).

9 Subject athletes in PADAS are athletes who participate or intend to participate in any international competitive events such as the Olympic Games, the Paralympic Games, and national-scale sport events (Article 2.1 of the PADAS).

10 Article 4.1 of the PADAS.

11 Article 4.2 of the PADAS.

12 Article 15.1 of the PADAS.

13 Paragraph 2 of the Supplementary Provisions of the PADAS.

D. Establishment of a cooperative system based on the Anti-Doping Promotion Law

Finally, as a part of preparation for the Tokyo Games, the Memorandum of Cooperation ("MoC") was concluded in May 2021 between the International Testing Agency("ITA"), JSA, JADA, JSC, and the Organizing Committee of the Tokyo Games. The purpose of this memorandum was to facilitate the sharing of information related to potential anti-doping violations.[14]

Based on this memorandum, the ITA has received the support of the JSA, JSC, JADA, and the Organizing Committee of the Tokyo Games, with respect to intelligence and anti-doping activities in connection with the Tokyo Olympic Games. Consequently, the anti-doping scheme for the Tokyo Games was implemented under this MoC.

III. The Outcome of the Tokyo Games

A. Analytical violations

From two months prior to the start of the Tokyo Games until August 8, 2020 (the closing ceremony), the IOC entrusted the ITA with the result-management authority. During this period, the ITA collected a total of 6200 samples from 4255 athletes.[15,16]

At the Tokyo Olympic Games, the ITA asserted six anti-doping rule violations based on the results from such samples before the Anti-Doping Division ("ADD")[17,18] of the Court of Arbitration for Sport, which was temporarily installed

[14] ITA, The ITA officializes cooperation on information exchange linked to doping with Japanese authorities for Tokyo 2020, 25 May 2021, https://ita.sport/news/the-ita-officialises-cooperation-on-information-exchange-linked-to-doping-with-japanese-authorities-for-tokyo-2020/ (last visited 24.09.2022).

[15] ITA, Olympic Games Tokyo 2020, 13 September 2021, https://ita.sport/event/olympic-games-tokyo-2020/ (last visited 24.09.2022).

[16] Among the samples, 34.6% were collected out-of-competition, and 65.4% were collected in-competition.

[17] From the 2018 Rio de Janeiro Olympic Games, the ADD became the first instance to decide on the suspicion of violations of the IOC Anti-Doping Rule during the Games.

[18] Independent observers criticized the inadequacy of the anti-doping expertise of the arbitrators at the ADD, Report of the Independent Observers, Tokyo, 36.

in the host city Tokyo.[19] One of the cases is a violation of the athlete on the British 400m relay team who won the silver medal.[20] After the Tokyo Games, the violation was confirmed, and the result of the team became invalidated.[21] As some case were still pending, the number of violations in the Tokyo Olympic Games has not been determined until now.

Figure 1: Assessed ADRV at the Tokyo Games

	Nationality of Athlete	ADRV	Substance	Date of the ADRV	OOC/IC
1	Ukraine	2.1	recombinant erythropoietin	23.07.2021	OOC
2	Kenya	2.1	methasterone	28.07.2021	OOC
3	Georgia	2.1	dehydrochloromethyl-testostrone, metandienone, tamoxifen	31.07.2021	OOC
4	Bahrain	2.1	homologous blood transfusion	02.08.2021	OOC
5	Great Britain	2.1	SARMS enobosarm (Ostarine) and SARMS S-23	06.08.2021	IC
6	Bahrain	2.1	homologous blood transfusion	08.08.2021	IC

In addition to the cases brought before the ADD, one case was registered before the ad-hoc Division ("AHD") of the Court of Arbitration for Sport. The legal issue of the case was whether or not a provisional suspension was to be lifted (CAS OG 20/06 & CAS OG 20/08). The panel of the AHD finally concluded the provisional suspension should be imposed.[22]

19 ITA, Anti-Doping Rule Violations, Olympic Games Tokyo 2020, https://ita.sport/sanction/olympic-games-tokyo-2020 (last visited 24.09.2022).

20 Media release of ITA on 12 August 2021, https://ita.sport/news/the-ita-asserts-an-apparent-adrv-against-british-track-and-field-athlete-ujah-chijindu/ (last visited 24.09.2022).

21 Media release of CAS on 18 February 2022, https://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Media_Release_ADD33.pdf (last visited 24.09.2022).

22 CAS OG 20/06 World Athletics v. Alex Wilson, Swiss Anti-Doping & Swiss Olympic CAS OG 20/08 WADA v. Alex Wilson, Swiss Anti-Doping & Swiss Olympic, 27 July 2021, https://www.tas-cas.org/fileadmin/user_upload/Award_CAS_OG_20-06-08__FINAL__.pdf (last visited 24.09.2022).

B. Non-analytical violations

In accordance with the figure published by the ITA, all six asserted cases are violations of Article 2.1 of the IOC Anti-Doping Rules and all were detected by testing.[23] Therefore, there are so far no cases in the Olympic Games where non-analytical approaches, including information sharing, were utilized.

IV. Evaluation and Conclusion

Although the need for the criminalization of anti-doping rule violations was once discussed in the face of the mega-sporting event, Japan did not choose the criminalization of anti-doping rule violation, instead building the scheme for information sharing and strengthening its legitimacy by enacting the new legislation PADAS.

Compared to the test figures in the 2016 Rio de Janeiro ("Rio") Olympic Games, the number of testing conducted in the Tokyo Olympic Games (6200 from 4255) is higher than that of the Rio Olympic Games (4882 from 3237 athletes).[24] Although the numbers alone cannot be a sufficient barometer to compare the two events, it can be said that the testing on doping in the Tokyo Games was more effectively conducted than the most recent Games. In addition, with regard to confirmed violations, the number of violations in the Tokyo Olympic Games (the current potentially asserted number is 6) is lower than that of the Rio Games (10 samples were confirmed as of October 5, 2016).[25] The number of confirmed violations in the Tokyo Games is expected to be less than in the most recent Games.

In addition, there were no cases asserted in a non-analytical manner during the period of the Tokyo Games. This may have been a consequence of the border restrictions caused by the Covid-19 infection, which made it difficult for foreign citizens other than athletes and officials etc. to enter Japan around the time of the Tokyo Games. However, the absence of non-analytical violations (such us tempering, administration etc.) so far does not ensure no non-analytical violations were conducted during the period of the Tokyo Games, since anti-doping rule violations may be discovered by re-testing the samples of the previous Games. Therefore, whether or not the Japanese scheme for sharing information on anti-doing

---

23 ITA, Anti-Doping Rule Violations, Olympic Games Tokyo 2020, https://ita.sport/sanction/olympic-games-tokyo-2020 (last visited 24.09.2022).

24 Report of the Independent Observers, Rio de Janeiro 34.

25 Report of the Independent Observers, Rio de Janeiro 54 f.

installed just before the Tokyo Games was effective, should be evaluated at a later stage.

Since there is a possibility that mega-sporting events will be held again in Japan in the future, it is important to continue reviewing the preparation and its consequences on the Tokyo Games, keep an eye on doping cases which may be revealed at a later date, and make use of the result of said evaluation and review for the establishment of future anti-doping systems in Japan.

Bibliography

Imaizumi Jugo, The draft of the act on anti-doping in Japan, Report of the 14th symposium of the Japan Sports Arbitration Agency, https://www.jsaa.jp/sympo/sympo14report.pdf (last visited 24.09.2022).

JSC, The Report on Project Team for Establishing an Intelligence Scheme on Anti-Doping, https://www.jpnsport.go.jp/corp/Portals/0/corp/keisen/ADG/houkokusyo.pdf (last visited 06.07.2021) (cit. JSC, Intelligence Scheme).

Report of the Independent Observers, Games of the XXXI Olympiad, Rio de Janeiro 2016, https://www.wada-ama.org/sites/default/files/rio2016_io_team_report_26102016.pdf (last visited 24.09.2022) (cit. Report of the Independent Observers, Rio de Janeiro).

Report of the Independent Observers, Games of the XXXII Olympiad, Tokyo 2020, https://www.wada-ama.org/sites/default/files/2022-01/IO%20Report_2020%20Tokyo%20Olympic%20Games_Final.pdf (last visited 24.09.2022) (cit. Report of the Independent Observers, Tokyo).

Sugiyama Shoichi/Hangartner Sena, Ahead of the Tokyo 2020 Olympic Games – The Fight against Doping in Japan and in Switzerland at a Glance, Causa Sport 2019, 243–253.

Task Force for Establishing and Strengthening the Anti-Doping Structure, Establishing and Strengthening the Anti-Doping Structure, Toward the Realization of Clean Sports without Doping, https://www.mext.go.jp/sports/content/1375009_3_2_1.pdf (last visited 24.09.2022) (cit. Task Force).

The criminal liability of health care professionals treating anabolic steroid users under the SpoPA*

A medical and legal analysis

Dominique Diethelm/Gian Ege/Malte C. Claussen**

In 2011, the new Sport Promotion Act (SpoPA) with its criminal provision in Art. 22 SpoPA was issued. Compared to its predecessor, the criminal provision does not reduce the scope of applicability to regulated sports competition and therefore criminalization was expanded into amateur sport. While convincing in some regards, this expansion of the state anti-doping measures leads to risks and difficulties for healthcare professionals (HCPs). This paper specifically assesses the risks of criminal liability of HCPs treating users of image and performance enhancing drugs (IPEDs).

HCPs, according to their professional duties, follow scientific medical standards to determine the optimal treatment for their patients. For many showing side effects of IPED use, medical guidelines recommend medication which can be found on the Swiss anti-doping list. Art. 22 SpoPA creates a conflict with medical guidelines by criminalizing the prescription and administration of substances on the anti-

* This article is published identically in this collective volume and in Sports Psychiatry 2022, 1–10 (ISSN 2674-0052) published in winter 2022 to reach both a legal and medical readership. The paper was originally published in cooperation with Dr. med. Samuel Iff. He withdrew his authorship due to personal reasons.
Dominique Diethelm and Gian Ege contributed the legal part of the text, Samuel Iff and Malte Claussen contributed the medical part of the text. The authors kept to their areas of expertise and did not interfere with the other parts of the text. The final published version was approved by all authors.

** **MLaw Dominique Diethelm**, **LL.M.**, PhD Candidate and Research Assistant, University of Zurich; **Prof. Dr. iur. Gian Ege**, Assistant Professor for criminal law and criminal procedure, University of Zurich; **KD Dr. med. Malte Christian Claussen**, Chief Physician, Clinic for Depression and Anxiety, PZM Psychiatry Center Muensingen AG, Muensingen, Switzerland, Junior Research Group Leader, Department of Psychiatry, Psychotherapy, and Psychosomatics, Psychiatric University Hospital Zurich, University of Zurich, Zurich, Switzerland.

doping list. In these situations, HCPs in practice often fear criminal liability, and with good reason. The applicability of Art. 22 SpoPA was expanded to amateur sport without considering all consequences and without amending relevant provisions accordingly. This resulted in multiple structural discrepancies which cause significant harm instead of protecting public health, since HCPs are deterred from treating patients.

The dogmatic argumentation against criminal liability of HCPs poses difficulties. A structured analysis revealed that the only promising approach is the obligation of authorities to refrain from prosecution, according to Art. 52 of the Swiss Criminal Code. However, having to resort to a solution as general as the principle of opportunity to avoid liability that was clearly not intended, is more than problematic. The best solution seems to be a re-introduction of the limitation to regulated sports competition. This would do away with dogmatic issues regarding liability of HCPs and would not hinder prosecution of an unlawful prescription under the Therapeutic Products Act.

Table of Contents

I. Introduction

The use of image and performance enhancing drugs (IPEDs) is common among gym-goers and fitness athletes, and its usage is on the rise.[1] Among IPEDs, the anabolic-androgenic steroid (AAS) is the most commonly used drug.[2] Corresponding with the rise of IPED use, some AAS users seek professional advice in case of questions or side effects.[3] In practice, healthcare professionals (HCPs) follow the principle of harm reduction and adhere to medical guidelines regarding optimal treatment for a patient.[4] For the treatment of AAS users, the scientific medical standards frequently suggest prescription of substances prohibited under anti-doping regulations.[5] Could this lead to criminal liability according to Art. 22 of the Sports Promotion Act (SpoPA)[6], which criminalizes the prescription or administration of prohibited substances?

In regulated sports competition, adhering to anti-doping rules is crucial to ensure the fairness and integrity of sport. However, only very few individuals who visit the gym for fitness or bodybuilding regularly compete in any form of contest. They mostly use IPEDs to improve their looks and rarely their performance in the gym.[7] The HCP's harm reduction is therefore very unlikely to influence the fairness and integrity of (professional) sports competitions, yet it is important help for AAS users.

In this paper, we want to discuss the medical considerations behind a treatment for AAS users. Subsequently, we will provide a legal comment on the risks of criminal liability of HCPs according to Art. 22 SpoPA if they proceed to treat their patients as recommended by medical guidelines. The legal analysis is based on a case study to ensure relevance and comprehensibility.

---

1 Brennan/Wells/Van Hout, 1459 ff.; Sagoe et al., 383 ff.

2 Bonnecaze/O'Connor/Aloi, 1 ff.

3 Bates/Shepherd/McVeigh, 630 ff.; Bonnecaze/O'Connor/Burns, 2055 ff.

4 Vokinger, N 8 ff. for an overview of the relevant legal framework for HCP.

5 Prohibited substances according to Art. 19 Para. 3 SpoPA are listed in the appendix to the Ordinance to the Sports Promotion Act of 23 Mai 2012 (SpoPO), SR 415.01.

6 The Federal Act on the Promotion of Sport and Exercise of 17 June 2011 (Sport Promotion Act, SpoPA), SR 415.0.

7 Murray et al., 198 ff.

II. Medical Background

The use of AAS in any supraphysiological dose leads to an immediate shutdown through the negative feedback loop that controls the production of sexual hormones.[8] This drop in sexual hormones is called hypogonadism.[9] The exogenous AAS leads to a complete inhibition of the hypothalamus-piturary-gonadal axis (HPG) which controls the natural production of sexual hormones. There are sexual hormone sensitive cells in the hypothalamus which release a gonadotropine releasing hormone, that stimulates cells in the anterior pituary to produce luteinising hormone (LH) and follicle stimulating hormone (FSH). In the male body, the LH triggers the quantity of sperm production and the FSH enables sperm maturation in terms of quality. Both hormones are needed for normal sperm production and hence normal fertility. The lack of one or the other leads to oligo- or even azoospermia, a condition where the sperm count is below normal, potentially even a complete absence of sperm in the ejaculate. The exogenous use of AAS does not only lead to the diagnosis of hypogonadism and infertility but also brings other sequelae. According to studies, the most common side effects during AAS use are: Testicular shrinkage (27%–63%), acne (38%–55%), hypersexuality (51%), hypertension (43%), gynaecomastia (26%–34%), mood swings (42%), alopecia (23%) and polycythaemia (13%). There may also be persistent reductions in libido (38%), oligospermia and erectile dysfunction (20%–33%).[10] Most of these sequelae take months to years to return back to normal functioning. After prolonged use however, the return to normal functioning is uncommon.[11]

Some AAS users seek medical help to minimize the negative effects of AAS but can be reluctant to do so out of shame, fear of stigmatization, and prejudice, as well as a perceived lack of knowledge of HCPs.[12] Ongoing support, active harm reduction and management of side effects is likely to strengthen an AAS users' confidence in their HCP's advice regarding evidence-based treatments and to increase their motivation to stop using.

Cessation of AAS use can often reduce or even eliminate most of the sequelae, but AAS abstinence cannot always be achieved, as roughly 30% of users experience

8 El Osta et al., 2 ff.
9 Sharma/Jayasena/Dhillo, 29 ff.
10 Bonnecaze/O'Connor/Aloi, 1 ff.; Smit/de Ronde, 167 ff.
11 Kanayama et al., 823 ff.
12 Griffiths/Murray/Mond, 446 ff.; Laure/Binsinger/Lecerf, 335 ff.; Yu/Hildebrandt/Lanzieri, 49 ff.

symptoms of addiction.[13] A key element that maintains repeated use, with elements of addictive behavior, is the fear of losing the positive aspects, for example increased strength, muscularity, and energy. Equally important, however, is the fear of unpleasant effects associated with discontinuation, e.g. loss of libido.

Although abstinence of AAS use remains the main aim of the HCP and would likely resolve most negative health effects, this is not always possible. Some patients are not able to stop, do not want to stop, or fear the consequences of stopping. Therefore, the interaction between the AAS user and the HCP should primarily lead to an understanding of why AASs are being used, what the concerns are and why medical help is being sought. A non-judgmental, non-stigmatizing and supportive attitude is essential.[14] Open-ended questions can reveal the patient's motivations, such as fear of fertility loss, protection of health or avoidance of side effects. If these factors are recognized, there is an opportunity to build understanding, minimize harm and eventually move to abstinence and medical replacement therapy if required.

To provide effective harm reduction, most HCPs will rely on pre-existing evidence-based speciality guidelines. However, by following the guidelines for treatment of the conditions caused by AAS use, HCPs may be at risk of prosecution under anti-doping laws. For the treating HCP, the fear of criminalization undermines their authority as primary HCP and their ability to treat their patients. In addition, it erodes AAS users' trust in their HCP, making them more likely to disengage from care and seek advice and treatment from unreliable sources (e.g. the internet), putting them at further risk of additional complications. This represents a missed opportunity for harm reduction, motivational interviewing, and engagement in proven, evidence-based strategies for long-term cessation of AAS use.

AAS use is becoming increasingly prevalent. To minimize harm and to maximize users' engagement in services to reduce their use, it is essential that HCPs are not put at risk of criminalization when following guidelines in treating non-professional athletes.

Sales reporting of Interpharma in Switzerland in 2021 indicates over 80 000 packages of testosterone and over 90 000 packages of ovulatory stimulation hormones (like FSH and HCG) sold.[15] This indicates a high use of those substances either without awareness or in spite of their listing on the anti-doping list.

---

13 Pope et al., 203 ff.

14 Bonnecaze/O'Connor/Burns, 2055 ff.

15 Direct communication by Interpharma with data base IQVIA AG (2021), https://datacenter.interpharma.ch/medikamentenmarkt/medikamentenmarkt/ (last visited 19.09.2022).

III. Case Study

The patient has been using AAS for 2 years and he and his partner wish to conceive a child. The patient does not wish to stop his use of AAS. Knowing about the reduced fertility, he turns to the HCP to ask for treatment to improve his fertility. After his diagnosis of oligo- or azoospermia, the recommended treatment, according to guidelines of hypogonadism and oligospermia,[16] involves the use of SERM and/or HCG, both listed on the anti-doping list of the SpoPO and the WADA list.[17] Can the HCP proceed without risk of criminal liability?

A. The broad applicability of Art. 22 SpoPA

The case study describes a HCP acting with best intentions and according to scientific medical standards. The patient is a regular gym-goer, but by no means a professional athlete, since he does not participate in any regulated competitions. The medication the HCP is recommended to prescribe by current and recognized guidelines is however on the anti-doping list of the SpoPO. The case study aims at assessing the risk of criminal liability of the HCP in this situation under the SpoPA. Is it relevant that the patient is an AAS user? Does the patient or the HCP need to apply for a therapeutic use exemption (TUE)? Or is a prescription of the aforementioned medication unproblematic?

To answer these questions, an analysis of Art. 22 SpoPA is necessary. Art. 22 criminalizes the prescription or administration of prohibited doping substances or methods for doping purposes. Doping is defined in Art. 19 Para. 1 SpoPA as "*the abuse of substances and methods to increase physical performance in sport.*" The prohibited substances and methods are listed in the appendix to the SpoPO according to Art. 19 Para. 3 SpoPA. The analysis is focused on the HCP, as Art. 22 Para. 4 SpoPA exempts the users themselves from criminal liability. To best understand today's criminal provision, a historical analysis is necessary.

[16] Corona et al., 970 ff.; Rahnema et al., 1271 ff.

[17] WADA Anti-Doping List, https://www.wada-ama.org/en/prohibited-list, (last visited 19.09.2022).

1. The new SpoPA of 2011

The example case reveals an issue rooted in the structure of the SpoPA as it has been revised and issued in 2011. The preceding Federal Act on the promotion of Gymnastics and Sports (version of 2002) already contained a criminal provision, yet with a different scope. Its ordinance limited the criminal liability to "regulated sports competition".[18] With the new criminal provision in the SpoPA, the legislator intended to implement stricter criminal prosecution for doping violations.[19] This was not necessary to comply with the international standards and the parliamentarians did not further explain their intentions.[20] The parliamentary discussion reveals an urge to reinforce criminal protection against doping to ensure Switzerland's credibility in the fight against doping.[21] The target in mind seems to have been illicit black market trade of doping substances and illicit imports.[22] From a criminal law standpoint this statement is surprising, considering that illegal import, trade, administration and use of (most) doping substances is already criminalized under Art. 86 of the Therapeutic Products Act (TPA).[23]

Nevertheless, this reinforcement of criminal liability was achieved by abolishing the limitation to regulated sports competition in the revised legislation. The Federal Court as well as the prevailing doctrine confirm a broadened application of Art. 22 SpoPA outside of regulated sports competition.[24]

2. Risk of criminal liability of the HCP due to the broad definition of sport

Yet what does "sport" outside regulated sports competition mean? The new definition of "sport" is essential, since Art. 22 SpoPA criminalizes the prescription or

---

18 Art. 11*d* of the old SpoPA prohibited the prescription and administration of doping substances according to Art. 11*c*. The ordinance on doping substances and methods of the Federal Department of Defence, Civil Protection and Sport (DDPS) of the 31. October 2001, SR 415.052.1 (version 2008) specified the limitation to "regulated sports competition" and listed the prohibited substances in Art. 3 and methods in Art. 4.

19 Dispatch SpoPA, BBl 2009 8189, 8221.

20 International standard: UNESCO International Convention against doping in sports of 19 October 2005, SR 0.812.122.2 (see Dispatch SpoPA, BBl 2009 8189, 8220 f.).

21 Consultation of the National Council *(Nationalrat)*, 15.09.2010, AB 2010 N 1245; Consultation of the Council of States *(Ständerat)*, 08.12.2010, AB 2010 S 1173.

22 Consultation of the National Council *(Nationalrat)*, 15.09.2010, AB 2010 N 1248.

23 Federal Act on Medicinal Products and Medical Devices of 15 December 2000 (Therapeutic Products Act, TPA), SR 812.21.

24 BGE 145 IV 329, E. 2; Kaiser/Schnydrig, 2; Contat et al., 167; Contat/Steiner, 365.

administration of prohibited substances *"for doping purposes"*.[25] According to Art. 19 Para. 1 SpoPA, doping is *"the abuse of substances and methods to increase physical performance in sport."*

Since the renunciation of the limitation to regulated sports competition, everybody working out alone without any relation to competition or associations falls within the definition of "sport".[26] According to the Federal Court, "sport" is further sufficiently defined with the common use of the term.[27] The term "sport" as it is used commonly, is however not substantive enough to draw legally convincing lines between patients inside and outside sports. Does a person outside sports competition need to work out once a week? Or is once a year enough? And what is a workout? Would regularly running to catch a bus or short walks to the supermarket be enough? Any distinction along those lines would be nothing but arbitrary and ignorant to the specific circumstances of the individual in question. The only practical solution for a HCP is to assume that every patient does sports, even an AAS user who does not work out regularly alongside their AAS usage. Therefore, every prescription of medication with performance enhancing qualities automatically amounts to doping under Art. 19 Para. 1 SpoPA.

This broadening of the definition of "sport" is what poses the risk of criminal liability for HCPs. For the HCP in the case study, it is abundantly clear that his patient will continue to go to the gym and therefore participates in a form of sports. The prescription of SERM or HCG – which can both be found on the anti-doping list – therefore is, in principle, a violation of the SpoPA's criminal provision. The primary medical purpose pursued by the HCP cannot be relevant according to the wording of the SpoPA. Thereby, the legislature has implicitly introduced a prohibitive approach, essentially banning all use of the substances on the anti-doping list.

3. Structural discrepancies arguing against criminal liability

It must be said that this outcome seems just if the HCP prescribes substances to a professional athlete in a competitive environment. For the patient working out alone in the gym – or even at home – this result is however more than questionable.

---

25 In the (unbinding) English translation of Art. 22 SpoPA the clarification of the incriminated conduct "for doping purposes" – which is present in all binding languages – is missing.

26 Kaiser/Schnydrig, 2.

27 BGE 145 IV 329, E. 2.3.2.

Those doubts are corroborated by multiple structural discrepancies indicating that criminal prosecution of HCPs doing their jobs was not the legislature's intention.

Firstly, the individuals using the prohibited substances are not liable to prosecution according to Art. 22 Para. 4 SpoPA. In the parliamentary discussion it was even stated that many of the politicians present at the meeting could be "doped" according to the legislation, but their prosecution is not the criminal provision's intention.[28] This stems from a practical approach: Punishment of doped athletes is considered significantly more efficient when conducted through private means, which is why the state is trying to limit its resource expenditure.[29] If the SpoPA is however also applicable outside of sports competition, the patients themselves are not liable to private sanctions, because those are not applicable without a subjection under statutory law.[30] The current structure of the SpoPA therefore results in criminal liability through state provisions for a HCP, whereas the patient is not subjected to any legal consequences. Since the private use of doping substances was not intended to be sanctioned, their administration and prescription should not be criminalized either.

Furthermore, other legislation applicable in the context of anti-doping, such as the Narcotics Act (NarcA)[31] or the TPA, know explicit exceptions from criminal liability if the substances are used according to recognized rules of pharmaceutical and medical science.[32] The SpoPA does not seem to account for the inevitable everyday legitimate use of the prohibited substances. This would fall within the legislature's area of competency to change.

Moreover, for many presenting side effects of AAS, there is no reasonable alternative to the medication containing prohibited substances. While cessation of the usage would be an alternative, the refusal of the patient to stop using does not hinder his right to treatment, and it can a fortiori not stand in the way of a HCP's

---

28 Consultation of the National Council *(Nationalrat)*, 15.09.2010, AB 2010 N 1248.

29 Dispatch SpoPA, BBl 2009 8189, 8221: A conviction on probation or to a fine under the SpoPA has a negligible impact on the athlete's life compared to a ban from competition.

30 Subjection under private regulations is primarily achieved through membership in a sports association which commits their members to the Swiss Olympic Doping Statute or via contractual obligations (see Contat et al., 173 f.).

31 Federal Act on Narcotics and Psychotropic Substances of 3 October 1951 (Narcotics Act, NarcA), SR 812.121.

32 Art. 9 ff. NarcA and Art. 26 TPA read with Art. 86 TPA; see OFK BetmG-Fingerhut/Schlegel/Jucker, Art. 11 N 5 ff. regarding the definition of "recognised rules of medical science".

duty to provide adequate treatment.[33] Considering that around one third of AAS users experience symptoms of addiction, the government's harm-minimization approach is relevant. The goal is to accept (temporary) addiction and focus on minimizing harm to the individual and society.[34] Criminalizing the HCP treating these patients diametrically opposes the postulated mindset.

Overall, the severe structural issues within the SpoPA cause significant harm instead of protecting public health.[35] The result of criminal liability of a HCP in situations such as the case study cannot be right. Criminal liability was extended without clearly stated reason, and the direct consequences deriving from the legislation do not seem to be thought through. Despite the clear result, it is a challenge to dogmatically argue against the criminal liability of HCPs. The following section of the paper will analyze possible approaches.

B. Solutions to avoid criminal responsibility of a HCP

1. Objective and subjective elements of the crime

It would be most efficient and most encouraging for HCPs if the criminal liability could already be excluded in the elements of the crime. The objective elements of Art. 22 Para. 1 SpoPA require i) a prohibited substance or method according to the anti-doping list, ii) a conduct as listed in Para. 1, and iii) the conduct needs to be performed "for doping purposes". Subjectively, the provision requires intent.

The prohibited substance or method as well as the conduct under Para. 1 will not be further looked at, since they will be fulfilled in most situations assessed here. For the HCP in the example: SERM and HCG are both on the list of prohibited substances, and the relevant conduct is the prescription and administration.

a. No need for proof of enhanced physical performance

Art. 22 Para. 1 SpoPA does not require any proof of an actual performance enhancing effect of the substance on the athlete. Adding this condition – while promising

---

[33] See Art. 3 Federal Act on the General Part of Social Insurance Law (GPSA) of 6 October 2000, SR 830.1, which only requires any impairment of physical, mental, or psychological health and a respective need for medical examination or treatment. The cause of the sequelae is irrelevant for the entitlement to treatment (SK GPSA-Kieser, Art. 3 N 12).

[34] FOPH, National Strategy on Addiction, 21 f.

[35] Protected interest of public health stated in: Art. 1 Para. 1 SpoPA; Dispatch SpoPA, BBl 2009 8189, 8197.

at first sight – is not a feasible solution in practice. For multiple substances on the WADA list as well as the SpoPO list, there is no conclusive scientific evidence whether it enhances physical performance or not.[36] This would lead to significant issues regarding the applicable standard of proof. It would not be possible for the prosecution to prove the performance-enhancing effect or even more so for the HCP to prove the opposite – whereas the latter would also be a problematic shift in the burden of proof.

This zero-tolerance approach can be justified from a private measure's perspective, wanting to take no risks in ensuring fairness in sports. Since the SpoPA is however also applicable outside regulated sports competition, it can be questioned whether this approach is a valid foundation for penalties as grave as incarceration.

While WADA regulates thresholds for certain substances,[37] such limitations are nowhere to be found under the SpoPA.[38] Miniscule traces of substances given to an athlete via blood transfusions six months ago can still amount to a violation of the anti-doping rules.[39] For national criminal law, the abstract threshold for a violation should be increased and not simply copied from a private disciplinary system.

b. Intent

In practice, authorities argue against an intent for doping since the relevant conduct is completed for medical rather than doping purposes.[40] The Federal Council Dispatch to the SpoPA clarifies that Art. 22 requires intent for someone to be prosecuted, negligence is therefore insufficient.[41] What is sufficient on the other hand – and apparently not primarily considered in practice – is the contingent intent

---

36 Heuberger/Cohen, 525 ff.

37 WADA Technical Document TD2019DL.

38 See e.g. the legislation regarding narcotics and driving: Art. 34 of the ASTRA Ordinance to The Ordinance on Road Traffic Control (VSKV-ASTRA, SR 741.013.1) states clear thresholds for substances leading to incapacity to drive according to Art. 2 of The Ordinance on Traffic Rules (VRV). If a substance not on the list is detected, the impairment of the ability to drive needs to be proven (see Art. 16 of The Ordinance on Traffic Control (SKV, SR 741.013)), see Commentary SVG-Weissenberger, Art. 55 N 33 ff. with critique applicable to the SpoPA as well.

39 Kintz/Gheddar/Raul, 1785 ff.

40 That the prescription of a substance by a Swiss medical professional somehow changes its relevance or expected damage with regard to doping has been (indirectly) stated by the Federal Court in BGer of 23 December 2022, 2C_528/2022, E. 4.1 ff.

41 Dispatch SpoPA, BBl 2009 8189, 8240.

(Eventualvorsatz). Swiss criminal law states in Art. 12 Para. 2 Criminal Code (CC)[42], that a person already acts with intent, if they regard the realization of the act as being possible and accept this outcome. That is to say a HCP, knowing about the performance enhancing effect of a medication and prescribing it anyway because it helps the patient, acts with intent. They might not specifically want to dope the patient, yet they accept the effect of the treatment. There even are situations, in which the performance enhancing effect is part of the necessary treatment and therefore expressly desired, for example for the treatment of sarcopenia, cachexia or severe burns.[43] Since a HCP needs to be aware of the effects of prescribed medication and needs to assess the individual patient's situation before prescribing, there does not seem to be a scenario in which the HCP can plausibly argue for negligence.[44] Every informed prescription therefore automatically equals an intent for doping, due to the broad concept of sport under the SpoPA.[45] The only option to avoid liability on the level of intent is if direct intent *(Absicht)* is required. There is however no indication in either the provision, or in the Federal Council Dispatch, that contingent intent is excluded. Furthermore, since doping and treatment effects are often congruent, it is questionable whether direct intent could be convincingly negated in the majority of cases.

c. *Conclusion regarding the elements of the crime*

In conclusion, there is no convincing argumentation to reject criminal liability of a HCP on the level of the elements of the crime. With the broadening of the state anti-doping regulations to sports outside regulated competition, the legislature introduced a hidden prohibitive approach, in principle forbidding all use of substances or methods on the list. This conclusion is corroborated by the lack of thresholds for the prohibited substances.

2. Justification: Act permitted by law

Since the elements of the crime are fulfilled, the next logical step is to analyze whether the HCP's conduct can be justified.

---

42 Swiss Criminal Code of 21 December 1937, SR 311.0.

43 Falqueto et al., 161 ff.; Li et al., 717 ff.

44 See Art. 26 TPA; Art. 4.3 and 4.4 of appendix 5 to the FMH Code of Conduct.

45 Every *uninformed* prescription would lead to criminal liability under the TPA (Art. 86 Para. 1 lit. a in conjunction with Art. 26).

It has been frequently mentioned that the HCP in the case study follows scientific medical standards and therefore adheres to their professional duties.[46] Thus, the question arises, whether Art. 14 CC could be applicable. It states that "*any person who acts as required or permitted by the law, acts lawfully even if the act carries a penalty under this Code or another Act*." There is no unanimous Swiss doctrine as to the formal legislative requirements of the "law" within the meaning of Art. 14. Whether a formal act issued in the respective parliamentary procedure is necessary or if a more liberal approach is indicated can be left unanswered here.[47] The mere fact that a HCP is subjected to professional duties, is not sufficient to justify incriminating conduct.[48] This means the obligation to treat patients does not by itself overrule any other legal responsibility. Otherwise, a HCP would even be allowed to treat a patient against their will.[49] Rather, conduct prohibited by the SpoPA could only be justified, if the law specifically allowed it.[50] As already mentioned, the SpoPA does not know a direct exception for medical treatments. Moreover, the specific guidelines referred to by HCPs are first and foremost private regulations and therefore do not suffice under any premise of "law".[51] Consequently, an application of Art. 14 CC is not possible.

3. Culpability: Error as to unlawfulness *(Verbotsirrtum)*

The Swiss anti-doping legislation is divided into a multitude of sources, the distinction between private and state measures is not always clear-cut and the SpoPA as well as its ordinance contain significant contradictions. This could be a case of Art. 21 CC, stating that "*any person who is not and cannot be aware that, by carrying out an act, he is acting unlawfully, does not commit an offence. If the error was avoidable, the court shall reduce the sentence*."

---

46 Those are set out in Art. 40 of the Federal Act on University Medical Professions of 23 May 2006, SR 811.11 as well as Art. 16 of the Federal Act on Health Professions of 30 September 2022, SR 811.21; see Vokinger, N 8 ff. for a thorough legal analysis of the HCP's duties and obligations.

47 Arguing for a requirement of formal law: BSK CC-Niggli/Göhlich, Art. 14 N 10; postulating a more liberal approach: PK CC-Trechsel/Geth, Art. 14 N 2; AK CC-Mausbach/Straub, Art. 14 N 2.

48 BGE 129 IV 172, E. 2.4; AK CC-Mausbach/Straub, Art. 14 N 6; HK CC-Wohlers, Art. 14 N 4; PK CC-Trechsel/Geht, Art. 14 N 6; Stratenwerth, § 10 N 99.

49 AK CC-Mausbach/Straub, Art. 14 N 6.

50 HK CC-Wohlers, Art. 14 N 4.

51 See Vokinger, N 19 ff. for the legal classification of guidelines.

Can we expect a HCP to be aware of the fact that prescription of a prohibited substance to a person who is *not participating in regulated sports competition* is unlawful according to Art. 22 SpoPA? The main area of application of Art. 21 is indeed within the often scattered and not easily grasped ancillary criminal law.[52] According to the jurisprudence of the Federal Court, an error as to unlawfulness requires i) absence of knowledge of the unlawfulness of the behavior and ii) the error must have been unavoidable.[53] A defendant already has knowledge about unlawfulness if he has a vague idea that the conduct cannot be legally accepted[54] – knowledge of the specific provision is never necessary.[55]

For example, if a HCP is treating a patient with breast cancer and prescribing tamoxifen, it can be assumed that they are unaware of the potential criminal risk. And even if the HCPs were to conduct legal research, they would find no literature or jurisprudence to indicate the potential criminalization, which is why the error has to be considered unavoidable.[56]

Since a vague idea of unlawfulness is sufficient to exclude Art. 21 CC, it cannot be precisely ascertained whether a court would accept the excuse for a HCP treating a patient using AAS. The Federal Court's jurisdiction generally demonstrates a restrictive approach with very few acquittals based on Art. 21 CC.[57] Additionally, private medical provisions clearly oblige HCPs to be aware of doping risks and not to facilitate prohibited substances, even if said substance is only for private use.[58] While it is clear that AAS users medically, morally, and legally deserve treatment as much as a patient with breast cancer, the HCP will be more aware of the risks under the SpoPA compared to the general public. Whether an Art. 21 CC acquittal would

---

52 Geth, N 239; BSK CC-Niggli/Maeder, Art. 21 N 9.

53 For a good overview see BSK CC-Niggli/Maeder, Art. 21 N 12 ff.; for extensive references to jurisprudence: AK CC-Mausbach/Straub, Art. 21 N 3 ff.

54 AK CC-Mausbach/Straub, Art. 21 N 3 with extensive reference to jurisprudence; BSK CC-Niggli/Maeder, Art. 21 N 13; Geth, N 241.

55 BSK CC-Niggli/Maeder, Art. 21 N 15 with further references; Geth, N 241.

56 For a similar situation see the decision of the Regional Court Cologne, 07.05.2012, 151 NS 169/11: A HCP was tried for assault because of a *lege artis* circumcision of a small boy that he thought was justified. The court specifically stated that the error was unavoidable because if the HCP had conducted legal research (which he did not), it would not have led to conclusive results (8 f. of the decision); The publication of this single paper barely qualifies as doctrine and is not expected to be able to exclude an error as to unlawfulness.

57 See BGE 129 IV 238, E. 3.1; Killias et al., N 312.

58 Appendix 5 to the FMH Code of Conduct, Art. 4.4 f.; SAMW, Rechtliche Grundlagen, 100 ff.

be accepted is however of limited relevance because the whole line of reasoning has an obvious flaw: The error as to unlawfulness can only be attested to the first (few) HCPs being tried under Art. 22 SpoPA. As soon as there is clear jurisprudence on the matter, HCPs cannot claim lack of knowledge regarding the unlawfulness of their actions.[59] In consequence, Art. 21 CC is not a suitable long-term solution.

4. TUE and the principle of opportunity

The therapeutic use exemption (TUE) originates from the WADA system and allows for medically indicated use or administration of prohibited substances to not be considered an anti-doping rule violation. To further look at this mechanism is a final promising approach for arguing against criminal liability of a HCP.

TUE are mentioned in Art. 4.4 of the World Anti-Doping Code (WADC) and specified in Art. 4.2 of the WADA international standard on therapeutic use exemptions (ISTUE). The international standard sets out four conditions: i) a medical diagnosis supported by relevant clinical evidence is the trigger for the prescription of the substance, ii) on the balance of probabilities, the substance is not increasing physical performance beyond the athlete's normal health, iii) there are no reasonable permitted therapeutic alternatives and iv) the necessity for the use is not, fully or in part, a direct consequence of prior use of a prohibited substance.

As promising as the approach is, TUE originate from the system of private measures. It must therefore first be assessed whether TUE are applicable for a HCP under Swiss law.

a. TUE in Swiss national law

The 2005 UNESCO international convention against doping in sports obliges signing parties to implement measures which are consistent with the principles of the WADC (Art. 3 of the Convention). According to Art. 8 Para. 1, parties are obliged to restrict the availability of prohibited substances, "*unless the use is based upon a therapeutic use exemption*." Switzerland implemented the UNESCO convention with the SpoPA and the Federal Council Dispatch itself references the exception for legitimate medical use.[60] However, the term TUE is neither referenced in the Federal Council Dispatch, nor in the SpoPA or its ordinance, and the legislator never followed up on this general mention of an exception. In other words, the

[59] See Giger, 102.

[60] Dispatch SpoPA, BBl 2009 8189, 8220 f.

non-self-executing[61] UNESCO Convention clearly states the exception provided by the TUE and the parallel private system applies them, but national Swiss law does not reference it. What that means for TUE under the SpoPA has hardly been addressed by literature or jurisprudence.[62] SSI do however not issue TUEs outside regulated sports competition.

HCPs are seldomly subjected to private regulations.[63] Even if – within regulated sports competition – the athlete as well as the HCP are exculpated from all disciplinary measures, a private organization waiving sanctions can of course not have a direct impact on criminal provisions. Otherwise, private institutions could overrule the democratically legitimized criminal law. On the other hand, if the conduct is not considered doping under international doping regulations, it does not seem appropriate to criminalize it under Swiss law. However, without clear mention in Swiss national law, TUEs cannot directly exculpate a defendant from Art. 22 SpoPA.

b. The principle of opportunity according to Art. 52 CC

Although TUEs might not have a direct impact on Swiss criminal law, their requirements may be an indirect standard for refraining from criminal prosecution according to Art. 52 CC. Art. 52 is an expression of the principle of opportunity and states that "*the competent authority shall refrain from prosecuting the offender, bringing him to court or punishing him if the level of culpability and consequences of the offence are negligible*." The low level of culpability and the minor consequences of the offence both need to be fulfilled for Art. 52 to be applicable.[64] The level of culpability is determined according to principles stated in Art. 47 CC and the consequences of the offence are assessed not only by the offence itself, but also by considering all consequences caused by the defendant.[65] According to the Federal Court, the relevant criterium is whether the specific conduct in question is, in comparison to average violations of the provision, insignificant to the point where the need for punishment does not apply anymore.[66] If the conditions are met, the

---

61 The convention requires implementation and can therefore not be applied directly, see Kamber/Mullis, 7.

62 See BGer of 23 December 2022, 2C_528/2022, E. 4.3.2, where a reference to the first sentence of Art. 8 Para. 1 of the UNESCO convention is made to justify foregoing seizure and destruction of medically prescribed substances.

63 Clénin/Duruz, 197.

64 BSK CC-Riklin, Art. 52 N 19.

65 BGer of 27 September 2021, 6B_519/2020, E. 2.4 with further references.

66 BGE 146 IV 297, E. 2.3; BGer of 27 September 2021, 6B_519/2020, E. 2.4; BGer of 26 May 2021, 6B_1295/2020, E. 7; BGer of 5 March 2019, 6B_167/2018, E. 2.1.

authorities do not have discretion on the matter but are obliged to refrain from prosecution.[67]

Cases where the athlete obtained a TUE – whether in or outside regulated sports competition – seem to be clear-cut cases where authorities need to refrain from prosecuting HCP. The culpability and the consequences of the offence have to be considered non-existent, since the HCPs acted according to recent medical science, the integrity of sports and other financial interests are not endangered, and the treatment is in favor and not at the expense of the athlete's health.[68] The assumption therefore is, that if the athlete obtained a TUE, there is no remaining need for punishment for the HCP. It is crucial to emphasize that the *fulfilment of the requirements* of the TUE should be looked at. The issuing of the TUE by the SSI itself without legal foundation in the SpoPA cannot have a direct impact and is therefore also not necessary for an application of Art. 52 CC.

On the other hand, Art. 52 CC is also not bound by or limited to the conditions of a TUE. It can be argued that a prescription of a prohibited substance based on medical indication outside regulated sports competition by itself renders the level of culpability and the consequences of the offence negligible. This is the only argumentation in which the HCP prescribing HCG or SERM to an AAS user will not be held criminally liable. If the requirements of TUEs are strictly adhered to, the HCP in the case study would still run the risk of criminal prosecution because the necessity for treatment cannot be a direct consequence of previous use of prohibited substances.[69]

An assessment of the protected legal interests at stake supports an application of Art. 52 CC independent of TUEs. The Cantonal Court of Aargau has argued that outside regulated sports competition, the criminal provision of the SpoPA is consumed by the criminal provisions of the TPA because both aim at protecting public health.[70] The reason for this is that outside competition, the SpoPA's interest is reduced to the protection of an athlete's health since financial or fairness aspects are not equally relevant.[71]

---

67 For example: BGE 135 IV 130, E. 5.3.2.

68 For protected interests of the SpoPA see: Kaiser/Schnydrig, 2 f.; Contat/Steiner, 360; Contat et al., 169.

69 Art. 4.2 d) WADA international standard on therapeutic use exemptions (ISTUE).

70 Decision of the Cantonal Court Aargau of 21 November 2018, SST.2018.130, E. 4.3.

71 See Decision of the Cantonal Court Aargau of 21 November 2018, SST.2018.130, E. 4.3; Protected legal interests see Fn. 68.

This reasoning is convincing when assessing the case study: Prescribing a medically indicated and scientifically recommended medication cannot logically have significant negative consequences on the patient's health. An assessment of the same case study, with the same rights and interests involved, would further not result in criminal liability of the HCP under the TPA. Since the SpoPA outside regulated sports competition does not protect further interests than the TPA, this clearly demonstrates the lack of a necessity to punish.[72] Authorities seem to share this view, as there are no known convictions of HCPs prescribing substances prohibited under the SpoPA outside regulated sports competition.

With its binding nature once the requirements are fulfilled, Art. 52 CC would be a reliable and dogmatically convincing solution to avoid criminal prosecution of HCPs under the current SpoPA system.

C. Concluding remarks

The findings above can be summarized as follows: The SpoPA does not provide for a general exception of medically indicated treatments according to recognized standards of science. An exclusion of criminal liability on the level of the elements of the crime is not possible due to the clearly stated extension of the definition of "sport" under the new SpoPA. The professional duty of HCPs to treat their patients alone can furthermore not overrule the provisions of the SpoPA. An error as to unlawfulness is at best a temporary solution. The only promising approach is the obligation of authorities to refrain from prosecution in cases of minor culpability and consequences of an offence according to Art. 52 CC. This also appears to be the approach followed in practice, given the absence of convictions of HCPs.

Despite providing a convincing theoretical argument against the criminal liability of a HCP, the analysis revealed grave structural issues of the SpoPA. Having to construct justifications and other solutions to avoid criminal liability which clearly was unintended, is problematic in and of itself. It also has tangible consequences in practice: A HCP in the specific situation of our case study does not know with certainty whether Art. 52 CC will really be applicable to their case, or might even be unaware of this option to waiver the criminal prosecution. The fear of prosecution (understandably) leads to HCPs refusing essential treatment to AAS users, which causes unnecessary suffering in patients.[73] It is clear that AAS users deserve appro-

[72] Dissenting opinion: Contat/Steiner, 368.

[73] See above, II. Medical Background, 112 f.

priate and unrestricted treatment for their sequelae. The message sent by the SpoPA does however not provide for an environment in which HCPs can comfortably and safely provide such treatment.

To prevent unexpected assessments and to create certainty for the HCP, a possibility could be to apply for a TUE before the prescription and administration of the medication. While this would constitute a confirmation that the conduct is not considered doping from the Swiss doping agency, this approach is not feasible in practice. Too many doses of substances with both medical and doping qualities are sold in Switzerland every year, and this abundance of new TUE applications is expected to go beyond the SSI's resources.[74] Since TUEs are merely an indirect measurement and Art. 52 CC can be applied independently, it would constitute a grave misuse of the SSI's resources needed in the fight against doping *within* regulated sports competitions.

The overall findings clearly indicate the need for change within the SpoPA. An option would be to introduce a general exception for medical use, as known from the NarcA and the TPA. Whether this would be a suitable option for the SpoPA shall not be discussed at length here. While it is a swift and transparent solution, it would mean waiving criminal liability of a HCP prescribing prohibited substances to an Olympic athlete, as long as they can convincingly argue for any medical indication. The root of the contradictions and inconsistencies does however lay within the definition of "sport" that was extended without considering the consequences. To reintroduce this limitation would in no way hinder prosecution of a HCP prescribing anabolic steroids to a body builder without medical indication. The criminal liability would simply stem from Art. 86 TPA instead of the SpoPA.

While wanting to reinforce the Swiss fight against doping, the legislature created a confusing and incoherent criminal provision, that has not led to any more convictions than its predecessor. Doping poses the same difficulties to authorities, while suffering is unnecessarily amplified. This paper therefore is a medical and legal appeal for revising the criminal provision of the SpoPA and for further improving coordination between private and state anti-doping measures.

[74] SSI annual report 2021, 33: The SSI received only 73 TUE applications in 2021; According to Interpharma, there were already around 150 000 doses of testosterone and ovulatory stimulation hormones sold in Switzerland (see Fn. 15).

Bibliography

Bates Geoff/Shepherd Scott/McVeigh Jim, Harm reduction strategies for androgen users: providing appropriate support and improving engagement with healthcare, Current Opinion in Endocrinology, Diabetes and Obesity 2(6)/2021, 630–635.

Bonnecaze Alex K./O'Connor Thomas/Aloi Joseph A., Characteristics and attitudes of men using anabolic androgenic steroids (AAS): A survey of 2385 men, American Journal of Men's Health November-December 2020, 1–12.

Bonnecaze Alex K./O'Connor Thomas/Burns Cynthia A., Harm reduction in male patients actively using anabolic androgenic steroids (AAS) and performance-enhancing drugs (PEDs): A review, Journal of General Internal Medicine 36/2021, 2055–2064.

Brennan Rebekah/Wells John S. G./Van Hout Marie Claire, The injecting use of image and performance-enhancing drugs (IPED) in the general population: a systematic review, Health and Social Care in the Community 25(5)/2017, 1459–1531.

Clénin German/Duruz Julien, Revision der berufsethischen Regeln zum Doping, Schweizerische Ärztezeitung 100(7)/2019, 196–199.

Contat Laurent et al., Dopingbekämpfung durch Staat und Private in der Schweiz, Causa Sport 2/2016, 159–179.

Contat Laurent/Steiner Marco, Erfolgreiche Dopingbekämpfung mittels Sportförderungsgesetz? – Versuch einer Bilanz nach acht Jahren, Causa Sport 3/2020, 358–372.

Corona Giovanni et al., European Academy of Andrology (EAA) guidelines on investigation, treatment and monitoring of functional hypogonadism in males, Andrology 8/2020, 970–987.

El Osta Rabih et al., Anabolic steroids abuse and male infertility, Basic and Clinical Andrology 26(2)/2016.

Falqueto Hugo et al., Can conditions of skeletal muscle loss be improved by combining exercise with anabolic-androgenic steroids? A systematic review and meta-analysis of testosterone-based interventions, Reviews in Endocrine and Metabolic Disorders 22/2021, 161–178.

Fingerhut Thomas/Schlegel Stephan/Jucker Oliver, Orell Füssli Kommentar, BetmG Kommentar, Betäubungsmittelgesetz mit weiteren Erlassen, 3rd edition, Zurich 2016 (cit. OFK BetmG-Fingerhut/Schlegel/Jucker).

Geth Christoph, Strafrecht Allgemeiner Teil, 7th edition, Basel 2021.

Giger Beatrice, Zirkumzision – ein gesellschaftliches und strafrechtliches Tabu, forumpoenale 2/2012, 95–103.

Graf Damian K., Annotierter Kommentar StGB, Bern 2020 (cit. AK CC-author).

Griffiths Scott/Murray Stuart B./Mond Jonathan M., The stigma of anabolic steroid use, Journal of Drug Issues 46(4)/2016, 446–456.

Heuberger Jules A.A. C./Cohen Adam F., Review of WADA prohibited substances: Limited evidence for performance-enhancing effects, Sports Medicine 49/2019, 525–539.

Kaiser Martin/Schnydrig Hanjo, Tatort Fitnessstudio – zum Geltungsbereich des Begriffs "Sport" gemäss Strafbestimmungen des Sportförderungsgesetz im Zusammenhang mit Massnahmen gegen Doping, iusNet, 25.09.2019.

Kamber Matthias/Mullis Primus-E., The worldwide fight against doping: From the beginning to the World Anti-Doping Agency, Endocrinology and Metabolism Clinics of North America 39(1)/2010, 1–9.

Kanayama Gen et al., Prolonged hypogonadism in males following withdrawal from anabolic-androgenic steroids: an under-recognized problem, Addiction 110(5)/2015, 823–831.

Kieser Ueli, Schulthess Kommentar (SK), Kommentar zum Bundesgesetz über den allgemeinen Teil des Sozialversicherungsrechts ATSG, 4th edition, Zurich 2020 (cit. SK GPSA-Kieser).

Killias Martin et al., Grundriss des Allgemeinen Teils des Schweizerischen Strafgesetzbuchs, 2nd edition, Bern 2017.

Kintz Pascal/Gheddar Laurie/Raul Jean-Sébastien, Adverse analytical finding due to red blood cells transfusion: A rare case involving the diuretic dorzolamide, Drug Testing and Analysis 14(10)/2022, 1785–1790.

Laure P./Binsinger C./Lecerf T., General practitioners and doping in sport: attitudes and experience, British Journal of Sports Medicine 37/2003, 335–338.

Li Hui et al., The efficacy and safety of oxandrolone treatment for patients with severe burns: A systematic review and meta-analysis, Burns 42(4)/2016, 717–727.

Murray Stuart B. et al., Anabolic steroid use and body image psychopathology in men: Delineating between appearance- versus performance-driven motivations, Drug and Alcohol Dependence 165/2016, 198–202.

Niggli Marcel Alexander/Wiprächtiger Hans, Basler Kommentar, Strafrecht (StGB/JStG), Strafgesetzbuch, Jugendstrafgesetz (2. Bände), 4th edition, Basel 2019 (cit. BSK CC-author).

Pope Harrison G. et al., A diagnostic interview module for anabolic-androgenic steroid dependence: preliminary evidence of reliability and validity, Experimental and Clinical Psychopharmacology 18(3)/2010, 203–213.

Rahnema Cyrus D. et al., Anabolic steroid–induced hypogonadism: diagnosis and treatment, Fertility and Sterility 101(5)/2014, 1271–1279.

Sagoe Dominic et al., The global epidemiology of anabolic-androgenic steroid use: a meta-analysis and meta-regression analysis, Annals of Epidemiology 24(5)/2014, 383–398.

Sharma Aditi/Jayasena Channa N./Dhillo Waljit S., Regulation of the hypothalamic-pituitary-testicular axis: Pathophysiology of hypogonadism, Endocrinology and Metabolism Clinics of North America 51(1)/2022, 29–45.

Smit D. L./de Ronde W., Outpatient clinic for users of anabolic androgenic steroids: an overview, The Netherlands Journal of Medicine 76(4)/2018, 167–175.

Stratenwerth Günther, Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat, 4th edition, Bern 2011.

Trechsel Stefan/Pieth Mark, Praxiskommentar, Schweizerisches Strafgesetzbuch, 4th edition, Zurich/St. Gallen 2021 (cit. PK CC-author).

Vokinger Kerstin, Das Berufsrecht in der Arzt-Patienten-Beziehung – veranschaulicht an einem Fallbeispiel, hill 28/2012.

Weissenberger Philippe, Kommentar Strassenverkehrsgesetz und Ordnungsbussengesetz, Mit Änderungen nach Via Sicura, 2nd edition, Zurich/St. Gallen 2014 (cit. Commentary SVG-Weissenberger).

Wohlers Wolfgang/Godenzi Gunhild/Schlegel Stephan, Handkommentar, Schweizerisches Strafgesetzbuch, 4th edition, Bern 2020 (cit. HK CC-author).

Yu Jessica/Hildebrandt Thomas/Lanzieri Nicholas, Healthcare professionals' stigmatization of men with anabolic androgenic steroid use and eating disorders, Body Image 15/2015, 49–53.

Materials

Federal Council Dispatch on the Sports Promotion Act and the Federal Act on Federal Information Systems in the Field of Sport, 11. November 2009, BBl 2009 8189 ff. (cit. Dispatch SpoPA, BBl 2009 8189).

Federal Office of Public Health (FOPH), National Strategy on Addiction and Addiction plan 2017–2024 (full report only available in German), https://www.bag.admin.ch/bag/de/home/strategie-und-politik/nationale-gesundheitsstrategien/strategie-sucht.html (last visited 19.09.2022) (cit. FOPH, National Strategy on Addiction)

Foederatio Medicorum Helveticorum (FMH), Code of Conduct *(Standesordnung)*, version of 19. Mai 2022, https://www.fmh.ch/ueber-die-fmh/statuten-reglemente.cfm#i112408 (last visited 19.09.2022) (cit. FMH Code of Conduct).

SAMW, Rechtliche Grundlagen im medizinischen Alltag, Ein Leitfaden für die Praxis, 4th edition, Bern 2022 (cit. SAMW, Rechtliche Grundlagen).

SSI Annual Report 2021, 26 ff. (https://www.sportintegrity.ch/sites/default/files/annual_report_2021.pdf, last visited: 19.09.2022).

Swiss Olympic, Doping Statute, version 20221 of 26. November 2021, https://www.swissolympic.ch/dam/jcr:44063aa0-f23d-486f-8948-489429151037/20220223_Doping-Statut-2022_final_Webversion_DE.pdf (last visited 19.09.2022).

World Anti-Doping Agency (WADA), International Standard of Therapeutic Use Exemptions (ISTUE), version of January 2023, https://www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-therapeutic-use-exemptions-istue (last visited: 13.02.2023).

WADA, Technical Document TD2019DL, version 2.0, 01.09.2019, https://www.wada-ama.org/sites/default/files/resources/files/td2019dl_v2_finalb.pdf (last visited: 13.02.2023) (cit. WADA Technical Document TD2019DL).

WADA, The World Anti-Doping Code (WADC), version of 2021, https://www.wada-ama.org/en/resources/world-anti-doping-program/world-anti-doping-code (last visited 19.09.2022).

Horse Doping

Burden of Proof, Legal Interests and Human Rights Issues

Monika Gattiker*

Contrary to general perception, positive findings regarding a prohibited substance have multiple other causes than the abuse of a prohibited substance with the intention to enhance the performance. This is also true for horse sports. Nevertheless, jurisprudence has confirmed that provisional suspensions are compatible with Swiss fundamental rights and that the interest of the relevant association (the FEI) generally overrides the infringed interests of an athlete (in horse sport "Person Responsible"), unless the suspension is excessive.

Once the FEI has established the rule violation, the Person Responsible may appeal for an elimination or at least a reduction of the period of ineligibility, if they prove that they bear no (significant) fault or negligence. As a precondition, the Person Responsible must establish by the balance of probability how the prohibited substance entered into the horse's body.

Establishing the source of the adverse analytical finding can be very challenging. As a rule, the lower the concentration found in the horses' sample(s), the more difficult it is to prove the root cause for the positive finding. While the testing equipment in the laboratories becomes increasingly sensitive there are increasing amounts of pharmaceuticals' residues (many of them Banned Substances in horse sport) but also from cosmetics etc. in the environment, which can potentially cause adverse analytical findings in a horse's testing samples.

No doubt that this allocation of the burden of proof serves the effort of keeping the sport clean. However, the protection of clean sport does not relieve the FEI from its responsibility to protect the athletes' personality rights. In particular, it does not justify "collateral damages" or "collateral victims" regardless of whether these cases are rather exceptional. For these reasons, the FEI should not only focus on preclud-

* Monika Gattiker, Dr. iur. Attorney-at-Law, Lanter Lawyers & Tax Advisors, Zurich, Switzerland. Special thanks to Amanda Olivia Nold, LL.B. for her valuable research and support for this publication.

ing "all forms of cheating in sport," but also improve the knowledge about potential contaminations in which athletes may have difficulties to prove the source of the adverse analytical finding.

Table of Contents

I. The Importance of Discussing Doping Cases, Procedures, Sanctions, and Human Rights Issues

The general perception of any news in the media about a doping case is that it is just another case of cheating. This view ignores that a positive finding regarding a prohibited substance may have multiple causes other than the abuse of a prohibited substance with the intention of performance enhancement. Further, adverse analytical findings in many cases show concentrations which are far below any concentration with a potential to enhance the performance. Whether an adverse analytical finding is considered a violation of the respective rules and therefore subject to sanction under these rules depends on the specific circumstances.

Cases regarding the abuse of prohibited substances in horse sport are similar to human doping cases but still different in some respects. Indeed, in horse sport

most of the doping cases concern the horses, at least in the horse sport disciplines regulated by the International Equestrian Federation FEI[1] and probably also in Western riding. Many of the human doping cases in horse sport are not directly related to the sport itself, but are rather the result of other reasons, for instance a positive finding of Carboxy THC after smoking shisha in a bar in Morocco, or an abuse of anabolic substances to lose weight for reasons other than the sport.[2]

In horse sport we have two kinds of athletes: the horses and the human athletes. Even if the prohibited substance finding concerns the horse, the team around the horse is responsible and sanctioned for the rule violation, such as involved veterinarians, trainers, grooms, owners, human athletes etc.

Similar to the legal situation under the WADA Code, under the FEI rules the human athlete is always responsible for the presence of a prohibited substance in the body of a horse, regardless of whether a veterinarian, trainer, groom, or any other person of the team caused the positive finding, The human athlete, who is the rider or so-called "person responsible" (according to the FEI rules) bears the main consequences of a rule violation.

Already the accusation of having committed a prohibited substances rule violation often has serious consequences for a person responsible. In case of a banned substance rule violation, the person responsible is provisionally suspended with immediate effect upon receipt of the notification letter. This suspension applies to all international and national competitions in the FEI disciplines.

Unless the rule violation concerns a minor, it is published in the media. Sponsors are made aware of it and, in many cases, terminate their cooperation with the person responsible before he or she has even had a chance to prove his or her innocence. Many sponsors do not renew previous agreements, even if the person responsible is fully rehabilitated.

The consequences of a mere provisional suspension are quite harsh for a person responsible, who is literally deprived from generating the main source of income, at least to a large extent, from one day to the next. Also, such a provisional suspension is not lifted until and unless the athlete has been able to prove how the substance entered the horse's body and that they bear no fault or negligence.

1 Show jumping, dressage, endurance, eventing, driving and vaulting.

2 Weight is crucial in horse racing but not in the FEI disciplines or in Western riding.

A provisional suspension can easily last for several months. Professional riders usually generate their income from developing and selling horses, which they can successfully present at competitions, and from prize money they win at competitions. Consequently, an athlete can suffer irreparable financial and reputational damages because of a positive prohibited substance's test result, even though they bore no fault or negligence at all.

There is no doubt that the system of doping rules and related sanctions seems rather effective to protect the level playing field and fairness in sport. However, it cannot be denied that this system can cause "collateral damages" or "collateral victims".

II. International Horse Sport and Applicable Rules

A. International horse sport federations

The two leading international horse sport federations are the "Fédération Equestre International" (FEI) and the "International Federation of Horseracing Authorities" (IFHA).

Western Riding is very popular in many regions of the world. It seems that there are only national Western riding federations, but no international (umbrella) federation like in the case of the FEI and the IFHA, where the national federations are members of the international federation and are, as such, bound to the rules of the international federation.

The rules which apply to horse racing are significantly different from the FEI rules. This publication focusses on the FEI Rules as an example to discuss the procedure related to the use of prohibited substances in horse sport.

B. The FEI Equine Anti-Doping and Controlled Medication Regulations

1. Background and general information

Pursuant to Art. 1.1. of the FEI statutes, the FEI's objectives are, among others, to be the sole authority for all international events in dressage, jumping, eventing, driving, endurance, vaulting, para-equestrian and any other forms of equestrian sport approved by the General Assembly (the "equestrian disciplines"). To date, the FEI is the sole authority for all international events in dressage, jumping, event-

ing, driving, endurance, vaulting and para-equestrian sport. So far these are the equestrian disciplines represented by the FEI.

The FEI's objectives pursuant to the FEI Statues shall also "enable individual Athletes and teams from different nations to compete in International Events under fair and even conditions,"[3] and "preserve and protect the welfare of the Horse and the natural environment by establishing appropriate codes of conduct"[4].

This publication focusses on the rules of the FEI regarding prohibited substance violations regarding horses which are subject to the FEI Equine Anti-Doping and Controlled Medication Regulations ("EADMC Rules").[5] For cases of prohibited substances found in the bodies of human athletes/persons responsible the WADA Code applies.

Pursuant to their scope, EADMC Rules apply to the FEI, each National Federation, and each person responsible and their support personnel by virtue of their membership in, accreditation by, or participation in the FEI or National Federation, or in their activities, competitions, or events. To be eligible for participation in FEI Events, a person responsible or horse must be registered with the FEI and be a registered member of an FEI National Federation, unless special circumstances under the FEI General Regulations allow otherwise. Further, each National Federation shall guarantee that all registered Persons Responsible, members of their support personnel (where possible), and other persons (where possible) under its jurisdiction accept the statutes, regulations and all rules of the FEI, including these EADCM regulations and any other applicable rules or regulations.

The FEI EADMC Rules differentiate between two categories of prohibited substances: the "Banned Substances" and the "Controlled Medication Substances".

In fact, the EADMC Rules contain two categories of rules which are being presented in one comprehensive rule book, the Equine Anti-Doping Rules ("EADR"), concerning the rule violations with Banned Substances/methods and the Equine Controlled Medication Rules ("ECMR"), concerning rule violations with Controlled Medication Substances including methods.

The Equine Prohibited Substances List includes all the banned substances and the controlled medication substances. Some of these substances are identified as so-

3 Art. 1.3 FEI Statutes.

4 Art. 1.4 FEI Statutes.

5 The FEI Equine Anti-Doping and Controlled Medication Regulations, 3rd edition, effective 1 January 2021.

called "Specified Substances". According to the explanation on the Equine Prohibited Substances List, Specified Substances should not in any way be considered less important or less dangerous than other Prohibited Substances. Rather, they are simply substances which are more likely to have been ingested by horses for a purpose other than the enhancement of sport performance, for example through a contaminated food substance.

2. FEI Equine Anti-Doping Rules (EADR) and violations

The EADMC Rules define a "Banned Substance" as follows:

"*Substances (including their Metabolites and Markers) that have been deemed by the FEI List Group to have: a) no legitimate use in the competition Horse and/or b) have a high potential for abuse. Banned Substances are prohibited at all times.*"

For the definition of a "Banned Method" the EADR refer to the FEI "Equine Prohibited Substances List", which specifies banned methods as (1) "Manipulation of Blood and Blood Components (i.e. Blood Doping, ozone haemotherapy)"[6] and (2) "Gene Doping."[7]

"Doping" is defined as the occurrence of one or more of the EAD Rule violations set forth in Art. 2.1 through Art. 2.8 EADR:

2.1 The Presence of a Banned Substance and/or its Metabolites or Markers in a Horse's Sample;

2.2 Use or Attempted Use of a Banned Substance or a Banned Method;

2.3 Evading, Refusing or Failing to Submit to Sample Collection;

2.4 Tampering, or Attempted Tampering with any part of Doping Control by a Person Responsible; Member of the Support Personnel or Other Person;

2.5 Administration or Attempted Administration of a Banned Substance;

2.6 Possession of a Banned Substance(s) or a Banned Method(s) by a Person Responsible; Member of the Support Personnel;

2.7 Trafficking or Attempted Trafficking in any Banned Substance or Banned Method by a Person Responsible; Member of the Support Personnel or Other Person;

---

6 I.e., "withdrawal, manipulation and re-infusion of homologous, heterologous, or autologous, blood products or blood cells into the circulatory system with the exception of those performed for lifesaving purposes or the use of veterinary regenerative therapies for the treatment of musculoskeletal injury or disease."

7 I.e., "any form of genetic modification."

2.8 Complicity or Attempted Complicity by a Person Responsible; Member of the Support Personnel or Other Person;

2.9 Prohibited Association by a Person Responsible.

In case of a positive finding and after a review to confirm the absence of any apparent departure from the EAD Rules that caused the positive finding, the rule violation is reported to the person responsible[8] pursuant to Art. 7.3 EADR, including all the relevant information about the violation and the procedure, as well as the notification of a provisional suspension, except in cases where the Banned Substance found is a specified substance. In the latter case it seems more likely to have been ingested by horses for a purpose other than the enhancement of sport performance, for example, through a contaminated food substance. Such provisional suspension is upheld unless it is very likely that the person responsible will not be subject to a suspension; in such cases the person responsible and the FEI may request the lift of the provisional suspension.[9]

Of course, the person responsible may request a B Sample analysis and has the right to written submissions and a hearing. The procedure is very similar to the procedure laid down in the WADA Code.

If the EADR violation is confirmed by the FEI Tribunal, and, if appealed, also by the courts of higher instance (CAS and Swiss Federal Supreme Court) the person responsible faces sanctions. Apart from the automatic disqualification of Results,[10] there is a standard period of ineligibility of two years, a fine up to CHF 15 000, and appropriate legal costs shall be imposed for EAD Rule violations pursuant to Art. 2.1–2.6.[11] For violations of Art. 2.7 EADR, the period of ineligibility shall be a minimum of four (4) years up to lifetime ineligibility, depending on the seriousness of the violation.[12] In case of a violation of Art. 2.8, the period of ineligibility shall be up to two years and the fine up to CHF 15 000.[13] And finally, according to Art. 10.3.4 EADR, for violations of Art. 2.9, the period of ineligibility shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on

[8] Results can also be reported to the owner of the horse (if applicable) and/or member of the support personnel and/or other person (where applicable) under the said rule. For the sake of simplicity, the reference to person responsible hereafter shall include any other recipient of a notification.

[9] Cf. Art. 7.4.4 EADR.

[10] Cf. Art. 9 and 10.1 EADR.

[11] Cf. Art. 10.2 and 10.3.1 EADR.

[12] Cf. Art. 10.3.2 EADR.

[13] Cf. Art. 10.3.3 EADR.

the person responsible's and/or a member of the support personnel's or other person's degree of fault and other circumstances of the case. Under certain conditions the period of ineligibility can be reduced or eliminated.

As the grounds are the same as for violations of the ECMR and closely linked to the burden of proof, the reduction or elimination of the period of ineligibility is subject to further comments below.[14]

3. FEI Equine Controlled Medication Rules (ECMR) and violations

The situation in horse sport involving the horse requires a different approach to treatments of health issues; the horse cannot speak for itself. Therefore, it is considered the FEI's responsibility to speak on its behalf and to ensure that, at every stage of governance, regulation, administration, and practice of the sport, the welfare of the horse is paramount. This also includes that all veterinary treatments must be given in the best health and welfare interests of the horse and not for any other reasons. Further, no Controlled Medication Substance shall be given to any horse during or close to a competition, unless the appropriate FEI guidelines for medication authorization have been followed. Finally, horses which cannot compete as a result of injury or disease must be given appropriate veterinary treatment and rest (or recovery period).

Therefore, the ECMR serve the purpose of regulating the veterinary treatments of horses subject to the FEI rules. The legal structure of the violations and sanctions is very similar as in the EADR, apart from more minor consequences and sanctions.

The EADCM Rules define a "Controlled Medication Substance" as follows:

"*Any substance, or its Metabolites or Markers, so described in the Equine Prohibited Substances List. Controlled Medication Substances are considered therapeutic and/or commonly used in equine medicine substances, and considered to have: a) the potential to affect performance, and/or b) a potential welfare risk to the Horse.*"

Controlled Medication Substances are generally prohibited in competition, but may be exceptionally permitted in-competition when their use has been authorized by the appropriate Veterinary Form.

Equine Controlled Medication violations are defined in Art. 2 ECMR:

2.1 The presence of a Controlled Medication Substance and/or its Metabolites or Markers in a Horse's Sample;

[14] Cf. below b. Reduction or elimination of the sanction.

2.2 Use or Attempted Use of a Controlled Medication Substance or a Controlled Medication Method;

2.3 Tampering, or Attempted Tampering with any part of Medication Control that is not otherwise a violation of the ECM Rules by a Person Responsible; Member of the Support Personnel or Other Person;

2.4 Complicity: Assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an ECM Rule violation or any Attempted ECM Rule violation;

2.5 Administration or Attempted Administration of a Controlled Medication Substance.

The ECMR also provide Equine Therapeutic Use Exemptions ("Veterinary Forms"), i.e., the authorization to compete when a Controlled Medication Substance and/or a Controlled Medication Method has been administered or used for legitimate therapeutic purposes in a horse, as provided for in the FEI Veterinary Regulations.

As a consequence of the above-mentioned purpose of the ECMR, there are a few significant differences between a Veterinary Form (formerly ETUE) under the EADMC Rules and a TUE according to the WADA Code. Firstly, the WADA Code allows TUE for permanent treatments of human athletes with medical conditions, even with hormones like testosterone or insulin. The Veterinary Form is not provided for horses with conditions that require permanent treatments during competitions.

According to the applicable FEI veterinary rules, the veterinary committee or veterinary delegate must verify prior to signing a Veterinary Form whether the requested treatment or previously administered treatment may affect: a) the horse's fitness to compete; b) the fairness of the competition; and/or c) the welfare of the horse and/or athlete. Thus, there is a very narrow scope for the use of Veterinary Forms under the FEI rules. The most common use of the Veterinary Form is a hormone treatment for mares in season (regumate/altrogenest), as their temperament can be affected by the condition.

In case of a positive finding and after a review to confirm the absence of a valid Veterinary Form[15] and of any apparent departure from the ECM Rules, the rule

[15] As specified below, a Veterinary Form provides a specific permission to compete despite treatment of the horse which may still cause a positive result to a Controlled Medication Substance (similar to the TUE=Therapeutic USE Exemption under the WADA Rules).

violation is reported to the person responsible[16] pursuant to Art. 7.1.4 ECMR, including all the relevant information about the rule violation and the procedure. There is no provisional suspension related to ECMR violations.

Of course, the person responsible may request a B Sample analysis and has the right to written submissions and hearing.

In case the ECMR violation is confirmed by the FEI Tribunal, and if appealed, also confirmed by the courts of higher instance (CAS and Swiss Federal Supreme Court), the person responsible faces sanctions.

Under certain circumstances, in cases of ECMR violations a provisional suspension can be imposed even before the person responsible has had the opportunity to receive a full hearing.[17]

Considering the fact that ECMR violations are "minor violations", the rules provide the possibility of an administrative procedure (Art. 8.3 ECMR), if no more than one Controlled Medication Substance (including its metabolites or markers) is detected in the sample, the person responsible is a first-time offender (no record of a EAD or ECM Rule violations) without any pending or concluded cases within the last four years preceding the sample which caused the adverse analytical finding, and if the event during which the sample was taken from the horse is not part of the Olympic Games, Paralympic Games or World Equestrian Games. If the person responsible decides to take administrative procedure there is no sanction, but the disadvantage that the person responsible will face is more serious sanctions, should he be subject to another EADCM Rule violation within the next four years upon conclusion of the administrative procedure.

Apart from the automatic disqualification of results,[18] a period of ineligibility of six months for a violation of Art. 2.1–2.5, a fine of up to CHF 15,000, and appropriate legal costs shall also be imposed for any *Controlled Medication* violation.[19] Art. 10.4 ECMR provides aggravating circumstances for the actions and omissions stated in Art. 2.7–2.9 EADR, but related to Controlled Medication Substances and an additional period of ineligibility of up to six months.

---

16 Results can also be reported to the owner of the horse (if applicable) and/or member of the support personnel and/or other person (where applicable) under the said rule. For the sake of simplicity, the reference to person responsible hereafter shall include any other recipient of a notification.

17 Art. 7.4 ECMR.

18 Cf. Art. 9 and 10.1 ECMR.

19 Cf. Art. 10.2 and 10.3 ECMR.

Under certain conditions the period of ineligibility can be reduced or eliminated. As the grounds are the same as for violations of the EADR and closely linked to the burden of proof, the reduction or elimination of the period of ineligibility is subject to further comments below.

C. The burden of proof

1. Private law shifts the burden of proof onto the person responsible

As EADCMR violations result in significant sanctions for persons responsible, one could expect that the principles and burden of proof applicable in criminal law matters would apply, meaning the principle of judicial inquisition (including the duty to collect incriminating and exonerating evidence), as well as the presumption of innocence.

However, EADCMR violations are subject to Swiss private law (civil law), which allows a shift of the burden of proof to the person responsible. The principle of legality, as provided in Art. 5 of the Swiss Federal Constitution, does not prohibit a shift of the burden of proof as explained hereafter, and as applicable under the EADCMR. The same applies to the principle of good faith as defined in Art. 2 of the Swiss Civil Code.

The Swiss Federal Supreme Court has confirmed in several judgements that the private law principles and rules of evidence are neither subject to the presumption of innocence (applicable in criminal law matters), nor part of the fundamental rights as stated in the European Convention on Human Rights.[20]

In other words the Swiss courts, including the Federal Supreme Court, have confirmed that the burden of proof as applied in sport disciplinary measures (doping matters) is compliant with Swiss law, as well as constitutional law and the European Convention on Human Rights.

2. Burden of proof based on the EADCM rules

a. Burden of proof of the FEI and of the person responsible

Pursuant to Art. 3 of the EADR, the FEI bears the burden of proof that a doping rule violation has occurred and, bearing in mind the seriousness of the allegation which is made, the standard of proof shall be whether the FEI has established an

[20] BGer, 4A_80/2017, 25.07.2017, E. 2.1 with references to further judgements.

EAD Rule violation to the comfortable satisfaction of the hearing panel. Said rule specifies that this standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

The FEI also bears the burden of proof for an ECMR violation, but with a less strict burden of proof than in cases of EADR violations, namely only on the balance of probabilities.

Regardless of whether an EADR violation or an ECMR violation is at stake, when the EADR or the ECMR place the burden of proof upon the persons responsible to rebut a presumption or establish specific facts or circumstances, the standard of proof shall be on a balance of probability, except where a different standard of proof is specifically required.

Even though the person responsible may challenge the integrity of the test result by proving a departure from the rules that may have caused the adverse analytical finding, the chances of succeeding with these arguments are very small. The FEI laboratories have improved their procedures and methods significantly since the '90 s; the procedures and standards in the laboratories have a very high standard.

In many cases in equestrian sport, the only hope for the person responsible is the reduction of the suspension based on them bearing no significant fault or negligence, which may even lead to the removal of the sanction based on no fault or negligence as provided in Art. 10.5 and 10.6 EADR, and Art. 10.5 and 10.6 ECMR respectively.

b. Reduction or elimination of the sanction

Pursuant to Art. 10.5 EADR and Art. 10.5 ECMR respectively, it is the duty of the person responsible, along with their support personnel, that no prohibited substance enters the horse's body or is used as a precondition for a reduction or elimination of the period of ineligibility.[21] This principle applies under the WADA Code (for human athletes), as well as under the FEI rules (for equine athlete and the responsibility of the person responsible), and it has been confirmed by the CAS in multiple judgements.[22]

[21] Related to Art. 10.5 EADR "A Banned Substance" and related to Art. 10.5 ECMR "A Controlled Medication Substance".

[22] CAS 2007/A/1395, 31.03.2008; CAS 2016/A/4377, 29.06.2016, para. 51; CAS 2019/A/6186, 12.07.2019, para. 101 re. a violation of the EADR.

Art. 10.5 EADR provides the possibility to eliminate the period of ineligibility if the person responsible establishes in an individual case that he bears no fault or negligence for the EAD Rule violation. The same applies for an ECMR violation according to Art. 10.5 ECMR.

Further, Art. 10.6 EADR and ECMR respectively provide a reduction of the period of ineligibility, if the person responsible can establish that he bears no significant fault or negligence for the rule violation. This applies for cases of rule violations with banned and with controlled medication substances, where the positive finding concerns specified substances, contaminated products or other contaminations.[23]

For the person responsible the applicable standard of proof is the balance of probability.[24] This standard, which has long been established in CAS jurisprudence, requires the person responsible (and any other human athlete) convince the panel that the occurrence of the circumstances on which the person responsible relies to prove their innocence is more probable than their non-occurrence.[25] The CAS made clear in many judgements that it is not sufficient for a person responsible (or any other human athlete) to merely protest his or her innocence and suggest that the substance must have entered his or her body inadvertently as the consequence of the use of some supplement, medicine, or other product which the athlete was taking at the relevant time.[26] Rather, a person responsible must demonstrate based on concrete evidence that a particular supplement, medication or other product that the athlete took contained the substance in question.[27]

To meet the burden of proof for "no fault or negligence," the person responsible must establish that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had used or been administered the prohibited substance or prohibited method, or otherwise violated an anti-doping rule.[28] To benefit from a reduction of the period of ineligibility, the person responsible must show that their fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the antidoping rule violation.[29]

---

23 Cf. Art. 10.6.1.1 and 10.6.1.2 EADR and Art. 10.6.1.1 and 10.6.1.2 ECMR.

24 CAS 2016/A/4834, 29.09.2017, para. 72.

25 CAS 2016/A/4834, 29.09.2017, para. 72; CAS 2008/A/1515, 02.10.2008, para. 116 and CAS 2016/A/4377, 29.06.2016, para. 51.

26 CAS 2016/A/4834, 29.09.2017, para. 73; see also CAS 2017/A/5296, 25.01.2018.

27 CAS 2016/A/4834, 29.09.2017, para. 73.

28 CAS 2017/A/5296, 25.01.2018, para. 58.

29 CAS 2017/A/5296, 25.01.2018, para. 58.

CAS has found that a request for an athlete to present an alternative explanation for an adverse analytical finding than the presumed abuse of prohibited substances does not create a presumption of guilt or shift the burden of proof.[30]

The CAS also decided that a provisional suspension is compatible with Swiss fundamental rights, including the "ordre public matériel," which is understood by Swiss jurisprudence to embody fundamental principles which should comprise part of any legal order.[31] Even "the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings", only a result contradicting public policy may be grounds to annul.[32]

Also, the presumption of innocence is not violated by a provisional suspension, as a "reasonable possibility" that the athlete committed a rule violation is all that is required.[33] The CAS further holds that in any event, Swiss "fundamental principles", including those relating to proof of guilt, vary on a spectrum depending on the type of proceeding and cannot simply be transposed from criminal to private law.[34]

The CAS also denied a violation of the athlete's personality rights, as, in turn, it must be balanced against those of associational autonomy.[35] The personality rights are laid down in Art. 27(2) and 28 of the Swiss Civil Code, the first of which provides that no person may "surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals", whereas Art. 28(2) of the Swiss Civil Code forbids infringement of a personality right, but only absent of consent or an "overriding private or public interest or by law."[36]

According to CAS jurisprudence, an athlete who joins an association and thereby submits to that association's rules as a condition of participation may be deemed to have consented to those rules including (presuming compliance with due process) said rules' provisions on provisional suspensions.[37] Secondly, though a suspension infringes on an athlete's personality rights, it is permissible if it is propor-

30 CAS 2019/A/6226, 04.08.2020, para. 138.
31 CAS 2017/A/4998, 31.08.2017, para. 158.
32 CAS 2017/A/4998, 31.08.2017, para. 158.
33 CAS 2017/A/4998, 31.08.2017, para. 158.
34 CAS 2017/A/4998, 31.08.2017, para. 158.
35 CAS 2017/A/4998, 31.08.2017, para. 162.
36 CAS 2017/A/4998, 31.08.2017, para. 162.
37 CAS 2017/A/4998, 31.08.2017, para. 162.

tionate, meaning not "excessive."[38] A determination of excessiveness depends on a balance of interests including inter alia "the length of bondage, the economic implications of such bondage and the interest of the relevant association for the enforcement of the sanction at stake and the appreciable interest in guaranteeing for all athletes a "fundamental right to participate in doping-free sport."[39] This Swiss Federal Supreme Court has confirmed that the personality rights are not violated by sanction for a rule violation, including a ban.[40]

Sporting bans of considerable duration have been held to be proportionate.[41] Indeed, the sanctions, periods of ineligibility, and fines imposed based on EADR or ECMR violations, have never been considered disproportionate by the Swiss Federal Supreme Court.

According to CAS jurisprudence, the principle of proportionality is embodied in the provisions which provide the reduction of a period of ineligibility based on "no significant fault or negligence" or the elimination of a ban as a result of "no fault or negligence."[42] Thus, if the applicable rules include such provisions, there is no gap in the rules that may allow the principle of proportionality to be utilized, not even in case there is an "uncomfortable feeling" regarding a sanction mandated in the rules.[43]

This view has been confirmed by doctrine based on the above stated arguments of jurisprudence in a publication in Causa Sport 2020 on the "The Specific Circumstances of Fault Related to Doping in Horse Sport".[44] The author of this publication seems to agree with the approach and considers that riders have reasonable chances to establish how the prohibited substance entered the body of the horse in order to show that they bear no fault or negligence.

To justify this view, she mentions two doping cases related to the FEI: one involving a contamination of horse feed, the other involving tramadol. In both cases, the author's view does not sufficiently take into account the facts and the efforts

38 CAS 2017/A/4998, 31.08.2017, para. 162; BGE 120 II 369, E. 2; Advisory opinion CAS 2005/C/976 & 986, 21.04.2016, para. 140.
39 CAS 2017/A/4998, 31.08.2017, para. 162.
40 BGer, 4A_324/2018, 17.07.2018, E. 4.
41 CAS 2017/A/4998, 31.08.2017, para. 163.
42 CAS 2019/A/6541, 06.03.2020, para. 91.
43 CAS 2019/A/6541, 06.03.2020, para. 94.
44 Strub, Causa Sport 4/2020, 479 ff.

needed to prove the source of an adverse analytical finding. These two cases are not the only examples, but they demonstrate the flaws and errors in the system.

III. The System Causes Collateral Damage to its Victims

A. Proving the source of the adverse analytical finding can be challenging

The efforts for and the interest in clean sport are out of question. However, the balance of interests is crucial. The sanctions provided by the EADMC Rules are very serious for a person responsible. In fact, they are deprived from their possibility to earn a living and to exercise their profession. The perception that every adverse analytical finding is avoidable and a sanction is justified, does not sufficiently take into account the actual circumstances, specifically the significant consequences of a sanction due to a rule violation, and the difficulties resulting from the burden of proof. In horse sport it is even more challenging to avoid unintended ingestion of prohibited substances and contaminations as it is very difficult, if not impossible, to have complete oversight over every ingredient the horse consumes.

The testing equipment in the laboratories is becoming more and more sensitive. Further, there are increasing amounts of pharmaceutical residues from cosmetics and other substances in the environment. Most of the pharmaceuticals for human use are considered Banned Substances in equine sport.

A study published in 2014 listed 36 pharmaceuticals found in UK wastewater.[45] Among the aforementioned pharmaceuticals there are several Banned Substances under the FEI rules. According to said study, tramadol (the substance found in one of the equine cases discussed below) was found in considerable amounts in UK wastewater.

As early as 2015, a study found that tramadol is one of the human medicines which can trigger positive tests in horses at very low concentrations.[46] Available data for the US highlights that tramadol is a widely used medication with more than 44 million prescriptions in 2014.[47]

---

45 Petrie/Barden/Kasprzyk-Hordern, Table 1.

46 Fenger et. al.

47 https://drugabuse.com/library/tramadol-history-and-statistics/ (last visited 25.10.2022).

In northern Italy, where the horse racing authorities determined a cocaine threshold, about 30 % of the racehorses showed a concentration of up to 20 ng cocaine in their urine as a result of the cocaine pollution in the environment.

In Colombia, most of the horse feed (alfalfa) contains considerable amounts of caffeine, which can be a source of adverse analytical findings. In Colombia there are thresholds for caffeine in horse sport.

Bodies and authorities can deal with increased concentrations in the environment. For example, the states in the US have different thresholds for traces of illegal drugs (e.g. cocaine), because the amount of illegal drugs used in a region/city has a direct impact on the exposure of the environment, including humans and animals. For example the limit of quantification for a drug like cocaine would be much higher in a city like New York, Miami, London or Zurich than in some remote place in Alaska. So there is a differentiation based on the fact that in some places some substances are very common in the environment (e.g. waste water) and therefore the chance of a positive finding with a certain (low) concentration (resulting from unintended ingestion/exposure) seems more probable than in other places.

The FEI does not take such differences into account when determining thresholds, at least this is not communicated officially. Also, in some cases the rules lag behind new findings of sources of contamination.

As a rule, the lower the concentration of a substance found in the sample, the more difficult it is to establish the source of the positive result, unless the adverse analytical finding concerns a substance that is known as a source for contaminations, which is normally the case with specified substances. Yet also with specified substances, the person responsible still has to show that the horse ingested the substance.

It can also not be denied that the concentration found by the FEI provides an indication to the person responsible where the contamination could come from. This information is not provided by the FEI and therefore the person responsible always has to rely on some estimate of his expert.

Where the difficulties lie and why the current system with its burden of proof can also cause problems for persons responsible who have not contributed to the adverse analytical finding at all and who are rather victims of the system, can be demonstrated with examples.

B. Oripavine and codeine (Banned Substances) and Morphine (Controlled Medication Substance)

The first case in Y. Strub's publication[48] concerns a very successful and famous Swiss rider, Steve Guerdat, with a positive finding for the banned substances oripavine and codeine and the controlled medication substance morphine. S. Guerdat could successfully avoid a doping sanction due to the rights of defence provided by the FEI rules but only as a result of pure coincidence. In fact, the rider benefitted from the overall circumstances. The notification letter was dated 20 July 2015. Already one day later the FEI published a press release confirming another 3 pending cases from 2014, in addition to the cases of Steve Guerdat and of A. Bichsel (both from May 2015).[49]

At the time of the notification the FEI had already suspected that the presence of oripavine in all these (five) samples could be the result of contamination, as oripavine was not found in any veterinary products. The FEI had also realized that oripavine, codeine, and morphine were known for causing positive test results observable as contaminations after the ingestion of poppy seeds. Already in 2013, the FEI had downgraded morphine from a Banned Substance to Controlled Medication due to increasing evidence of poppy seed contamination resulting in positives. For 1 January 2016, Codeine was listed for "a similar downgrading to Controlled Medication" for the same reasons.

Under the given circumstances it is not surprising that Steve Guerdat was able to prove how the prohibited substances entered the body of the horse. The combination of three substances known for being characteristic for contaminations after the ingestion of poppy seed, with another 4 similar cases pending, made the defence much easier, much more efficient, and less costly. A defence which meant saving his professional career. Had Steve Guerdat been the first case the lifting of his provisional suspension would have been denied by the FEI Tribunal, as it was the case with the three cases occurred in 2014 before the FEI started its own investigations as indicated in the above mentioned press release.

Had the adverse analytical finding for instance been the result of a contamination in the production process of the feed, it would have been very difficult to establish

[48] Strub, Causa Sport 4/2020, 479 ff.

[49] FEI Press Release, Three Swiss Jumping horses test positive to prohibited substances, 21.07.2015, https://inside.fei.org/media-updates/three-swiss-jumping-horses-test-positive-prohibited-substances (last visited 25.10.2022).

how the substance entered the body of the horse, especially since the sample had been taken 2 months prior to the notification. After such a long time any feed products used at the time of the sampling would have already been used up.

In case of minor traces of substances in feed, it is not in the least unlikely that a feed manufacturer is completely unaware of a contamination of his products. As we can see from the Getzmann case explained below, even manufacturers of pharmaceuticals, where the quality standards are significantly higher than in horse feed manufacturing, we see minor contaminations which the manufacturer is not aware of. A pharmaceutical can even meet the rigorous regulatory requirements for pharmaceuticals, but still contain minor traces of active ingredients/prohibited substances in a concentration sufficient to cause an adverse analytical finding under the WADA or EADMC rules.

C. The case of N. P: Tramadol

The second case mentioned in the publication of Y. Strub raises a number of questions, especially if one reads the settlement agreement published in CAS 2020/A/6853. First of all, the person responsible could not provide the evidence, because the person on the picture (personnel of the Royal Guard Morocco, the show organizer), to which the person responsible had to hand over the horse during the price giving ceremony and whose hand the horse had licked (as visible on the picture), had disappeared when the person responsible tried to contact the witness through the show organizer. Also, the FEI could not get in contact with the witness.

It was not surprising that the witness was not available for a hearing of the FEI tribunal after the Royal Guard of Morocco had confirmed, in writing, to the person responsible that "the personnel had no contact with competition horses, which was clearly not true, as evidenced by the picture."[50] The Royal Guard had not only stated false facts in its letter, but had also violated standards about the handling of the competition horses during the prize-giving ceremony. Also, the abuse of tramadol is extremely common in Morocco and other countries in North Africa; Tramadol is the "cocaine of the poor people" in these countries. Additionally, the FEI's expert confirmed that the minor traces of the tramadol metabolite in the horse's sample could be explained as contamination from licking the hand of a person who had taken tramadol. In summary, there was reasonable grounds to accept the said scenario as a plausible explanation for the adverse analytical finding.

[50] FEI Tribunal case 2017/BS32, 24.02.2020, section 6.5.

Under the given circumstances, within its discretion the FEI tribunal could have also considered these facts as frustration of evidence, or to at least ease the burden of proof based on Art. 2 and 8 of the Swiss Civil Code. Despite all these circumstances of the case the FEI Tribunal imposed the standard period of ineligibility of 2 years.

As the case was settled between the FEI and the person responsible, the CAS could exercise a vast discretion. The CAS decision in the case explains that the person who had taken tramadol pills and then allegedly urinated into the hay the horses ingested, only confessed more than two years after the incident.[51] "Today, 2.5 years later, it is difficult to recall the exact details of the incident but the support person now accepts that his actions must be the source of the adverse analytical finding."[52] Considering that the CAS jurisprudence, as a standard, clearly holds that an athlete "must demonstrate based on concrete evidence that a particular supplement, medication or other product that the athlete took contained the substance in question,"[53] the standard of proof applied by the CAS in this particular case seems rather benevolent, but justified after the decision of the FEI Tribunal.

D. The case of a contamination in a pharmaceutical

The case of the Swiss handball player, Simon Getzmann, illustrates the huge difficulties in meeting the standard of proof when it comes to establishing how a prohibited substance entered the body of a human or equine athlete, especially in cases of minor traces of prohibited substances.[54] As Mr Getzmann explained to the newspaper NZZ, he contested any sort of wrongdoing from the beginning. He could not explain the adverse analytical finding for hydrochlorothiazid (a diuretic and masking agent according to the WADA List), even though he had undertaken huge efforts to analyze even shower gel or toothpaste, literally any product that could have potentially caused the positive test result. The concentration detected in his sample was very low, close to the limit of detection, but still considered positive.

---

51 CAS 2020/A/6853, 18.06.2020, para. 2.6.

52 CAS 2020/A/6853, 18.06.2020, para. 2.6.

53 CAS 2016/A/4834, 29.09.2017, para. 73.

54 Neue Zürcher Zeitung, "Ich war ja nicht ein Doper, der mit der Nadel im Arm erwischt worden war" – wie ein Schweizer Handballer gegen den Vorwurf des Betrugs kämpfte, 15.05.2020, https://www.nzz.ch/sport/ich-war-ja-nicht-ein-doper-der-mit-der-nadel-im-arm-erwischt-worden-war-wie-ein-schweizer-handballer-gegen-den-vorwurf-des-betrugs-kaempfte-ld.1555259?reduced=true (last visited 25.10.2022).

As a last possibility S. Getzmann tested a medication, a German anti-inflammatory product he had used upon consultation with the team doctor and the team physiotherapist. The team physiotherapist had bought the medication in a pharmacy in Germany. According to its list of ingredients the medication was not supposed to contain any prohibited substances. The quality control for pharmaceuticals is very strict, the standards for the manufacturing of medications are extremely high. For safety reasons it is also extremely unlikely that a medication contains a contamination, especially with an active ingredient.

S. Getzmann had one tablet left that could be analyzed. Indeed, the analysis revealed a contamination of the anti-inflammatory with hydrochlorothiazide. The athlete was extremely lucky that he had one tablet left that could be analyzed. Had he used all the tablets, the athlete would have not been able to prove how the substance entered his body. Also, finding the source of the adverse analytical finding can be very costly. Mr. Gretzmann had the privilege to know a pharmacist who performed the analysis for him.

The contamination was so minor that the medication still met all the legal and regulatory requirements for pharmaceuticals to be placed on the market. However, the contamination was sufficient for a positive doping test. Even experts were surprised about the source of the adverse analytical finding.

IV. Summary

Based on the examples and facts provided, it cannot be denied that there is a certain risk for every athlete to be confronted with an adverse analytical finding not be able to prove the source of the positive finding and thus being subject to doping sanctions.

We can only speculate about the number or percentage of athletes who are sanctioned just because they are not in the position to exonerate themselves. Every single case of such “collateral damage” is inacceptable.

A suspension or period of ineligibility is in fact a professional ban with drastic consequences for the athlete’s professional and personal future. In many cases a ban means the end of the athlete’s professional career. This affects the athlete’s personality rights as laid out in Art. 27 of the Swiss Civil Code and the economic freedom aspect of the personality rights.

There is an enormous public interest in keeping the sport clean. As the CAS points out inter alia: "The length of bondage, the economic implications of such bondage and the interest of the relevant association for the enforcement of the sanction at stake and the appreciable interest in guaranteeing for all athletes a fundamental right to participate in doping-free sport."[55] The methods of manipulation are very innovative, and sports associations can often merely react to them.

Nevertheless, the public interest does not relieve the sports associations, including the FEI, from their responsibility to protect the athlete's personality rights. The efforts to improve the system should not only focus on more sensitive methods of detecting banned substances. The discussions on the topic should also include the reconciliation of interests and focus on how athletes can be protected in cases of minor contaminations as explained above. The public interest in clean sport does not justify "collateral damages" or "collateral victims", even if there are only a few cases. Clean sport should not only focus on precluding "all forms of cheating in sport", but also improve the knowledge about potential contaminations in which athletes may have difficulties proving the source of the adverse analytical finding.

Bibliography

Clara K. Fenger et al., Trace Environmental Substances Showing up as Post-Race "Positives", What every horseman needs to know about being wrongly accused, Musings on Equine Medicine, 28 October 2015, http://musingsonequinemedicine.blogspot.com/2015/10/trace-environmental-substances-showing.html (last visited 25.10.2022).

Petrie Bruce/Barden Ruth/Kasprzyk-Hordern Barbara, A review on emerging contaminants in wastewaters and the environment: Current knowledge, understudied areas and recommendations for future monitoring, Water Research 72/2015, 3–27.

Strub Yael, Verschuldensrechtliche Besonderheiten beim gedopten Sportpferd, Causa Sport 2020, 479–482.

[55] CAS 2017/A/4998, 31.08.2017, para. 162; CAS 2014/A/3803, 05.06.2015, para. 87.

Regulation of Gene Doping in Horse-Racing

Norihide Ishido*

This article discusses issues arising with gene doping for horses, but references are also made to human doping matters where appropriate.

Gene doping is an outgrowth of gene therapy. There are various methods for gene therapy. Gene therapy or gene doping can be broadly grouped into three different types: gene transfer, gene silencing, and gene editing. The creation of CRISPR-Cas9 has brought about drastic advances in the field of gene editing. Furthermore, gene testing is closely related to gene therapy technology. Genetic testing has identified the predisposition for disease and injury in equine athletes, for example risk of fracture in thoroughbred racehorses. At the same time, genetic research found the genetic traits of enhancing the performance of athletes, such as the genetic basis of race distance aptitude and aptitude for speed or stamina in racehorses.

In spite of the strict registration in the Stud Book, the International Federation of Horseracing Authorities (IFHA) allows a method for the gene therapy for horses in the form of Exempted Genetic Therapy (EGT). The Art. 6 B of the International Agreement on Breeding and Racing Thoroughbred Stud Books (IABRW) allows EGT applications, but it does not publish a clear guideline regarding EGT. This article will consider problems caused by the particularity of gene doping while discussing the issues of TUE system under the WADA Code.

Consequently, many signatory countries made an enactment of the international agreement. In Japan, there is currently no provision for gene doping, but it is said that Japan is now under consideration for the future revision of the regulations. This article will discuss the legislative issues for the enactment, in particular from the perspective of biosafety.

* Norihide Ishido is a professor at the Chukyo University, Japan.

Table of Contents

I. What is Gene Doping?

Gene doping is an outgrowth of gene therapy. There are various methods for gene therapy, one of which incorporates a normal gene into the DNA of the nucleus of a cell by using a carrier called a virus vector. A gene is made up of DNA, which is the basic physical and functional unit of heredity. It seems that gene doping may increase as gene therapy becomes a more popular medical cure.

Most genes are the same in all people, but a small number of genes (less than one percent of the total) are slightly different between people. Alleles are forms of the same gene with small differences in their sequence of DNA bases. These small differences contribute to each person's unique physical features. DNA, or deoxyribonucleic acid, is the hereditary material in humans and almost all other organisms. Nearly every cell in a person's body has the same DNA. Most DNA is located in the cell nucleus, where it is called nuclear DNA. Cells are the basic building blocks of all living things. The human body is composed of trillions of cells.

The Human Genome Project, which was completed in April 2003 and identified the sequence of the human genome, estimated that humans have between 20 000 and 25 000 genes. Likewise, a horse genome project was completed in 2007, and the use of genetic technologies within equine industries has become increasingly common since the horse genome was published in 2009.[1]

Gene therapy and gene doping can be broadly grouped into three different types: gene transfer, gene silencing, and gene editing.

Gene transfer involves the introduction of exogenous genes called "transgenes" into living cells. This type of gene doping using transgenes treats genetic disorders by facilitating expression of the transgene in the targeted cells, after the transgene

[1] Wade, 865 ff.

has been successfully incorporated into the cell. Most gene therapy delivers a working gene into a cell using a viral vector as a carrier. When the vector carrying the working gene enters the cell, it provides new instructions to produce a targeted protein. There are two types of gene transfer: One involves taking the medicine into the body. The other method extracts cells from the body, then performs gene editing, before finally returning them to the body. In order to detect gene doping, it is therefore necessary to identify the vestige of gene editing in countless genes. This is generally a very difficult task.

Gene silencing is a relatively new treatment technique that makes use of the body's natural processes to control disease, by suppressing or "silencing" specific genes that are associated with certain diseases. In this context, "silencing" means temporarily blocking a specific gene's message that would otherwise trigger an unwanted effect.

The best-known gene editing method is CRISPR-Cas9, which won the 2020 Nobel Prize for Chemistry. CRISPR is an acronym for "Clustered Regularly Interspaced Short Palindromic Repeats". CRISPR-Cas9 is a genetic modification tool that creates double-strand breaks in DNA. CRISPR-Cas9 uses two core components. The first component is a small piece of RNA, called a guide RNA, that finds the sequence of DNA code to be edited. The second component is a protein, called a Cas9 enzyme or nuclease, that has the ability to cut and make the edit at the DNA location defined by the guide RNA. The guide RNA only binds to the target sequence and Cas9 follows the guide RNA to the same location in the DNA sequence, before making a cut across both strands of DNA. The use of CRISPR-Cas9 is accelerating genetic research more than ever before.

Scientists, however, noticed reliability and safety issues when using the CRISPR-Cas9. One of them is the "off-target effect", also known as genetic errors. When a sequence similar to the guide RNA sequence exists outside the target site, a genome other than the target genome site is also unintentionally edited. As a result, unexpected side effects (such as canceration) can occur.

Mosaicism is another potential drawback of any gene-editing system. Editing a single-cell embryo should result in all the cells of the adult animal containing that edit. Conversely, if gene editing is carried out once an animal is born, only some of the cells in that animal will contain the edit, causing the animal to be "mosaic". The risks are very serious issues for human society and also the wider ecosystem.

Furthermore, gene testing is closely related to gene therapy technology. Genetic testing has identified the predisposition to disease and injury in equine athletes,

and also the risk of fracture in thoroughbred racehorses. The focus of gene testing to find the genetic traits which enhance the performance of athletes, such as the genetic basis of race distance aptitude and the aptitude for speed or stamina in a racehorse, have been successful. In 2017, the first report on non-therapeutic gene editing of equine embryos aimed at enhancing performance in the absence of injury or disease, was published.[2]

Genetic diagnostic testing of embryos is the first reproductive genetic service combining genetic testing and in vitro fertilization that is widely available and offered in a clinical setting. Like prenatal diagnosis, it can allow for the selection of embryos that are free of single-gene defects (e.g., cystic fibrosis and Huntington chorea) and frequently occurring chromosomal abnormalities, including aneuploidy (e.g., Down syndrome), before the embryos are implanted in the uterus.[3]

Genetic testing of embryos is linked to the notion of the perfect child, also known as the "designer baby". In reality, the notion of the "à la carte creation" of the perfect child through genetic diagnosis of embryos underestimates the complexity of the human condition. Every individual is the result of not only genetic heredity, but also of the influence of coevolution with other species, coadaptation with the environment, and gene-gene interactions.[4] Moreover, the notion of "selective breeding" raises concerns about a "slippery slope" to eugenic selection.

II. Detection of Gene Doping

The development of the methods for detecting gene doping is extremely important, because the regulation would just be a dead letter without detection. However, it is said that identifying gene doping is very difficult. In order to identify genetically modified animals, it is necessary to determine the base sequence of the modified or edited genomic region, which is only possible when the practitioner knows the site where the mutation was introduced.[5]

There are two types of gene doping detection: direct detection and indirect detection. Direct detection is a method of detecting an administered gene doping substance by a PCR method, that is a base sequence determination method. Indirect detection is a method of identifying and detecting components within the body as

2 Vichera, 136.
3 Bouffard/Viville/Knoppers, 387 ff.
4 Bouffard/Viville/Knoppers, 387 ff.
5 Tozaki et al., 215 ff.

biomarkers (RNA, protein, metabolites, etc.), which are indirectly derived from administered gene doping substances and proteins.

The International Federation of Horseracing Authorities (IFHA) prohibits gene doping, while it remains silent on the detection of gene doping. On another hand, the Word Anti-Doping Agency (WADA) published the "Guidelines on Gene Doping Detection" in 2021.[6] The laboratory guidelines present information and technical requirements on the application of direct PCR-based analytical methods for the identification of gene doping agents. Direct analytical methods to detect gene doping target differences between sequences of a doping gene and an endogenous gene in human genomic deoxyribonucleic acid (hgDNA). The most likely form of a doping gene is based on complementary DNA (cDNA) derived from the gene's messenger RNA (mRNA) sequence.

As equine researchers, Tozaki and Hamilton pointed out the limitation of PCR detection. "Although PCR-based detection is a simple procedure with high specificity and excellent sensitivity, it has disadvantages including: (1) only a few known target genes can be detected in one reaction and (2) small alterations in the transgene design could prevent PCR amplification."[7]

Gene doping develops in tandem with the progress of biotechnology. This is like a cat-and-mouse game. Tozaki et al. suggests the possibility of new technology.[8]

One of the solutions is whole-genome decoding using a next-generation sequencer. In order to comprehensively decipher the entire genome, rather than a specific region, it is theoretically possible to detect modified/edited parts, by investigating the inheritance of the entire genome between the parent and child. The Laboratory of Racing Chemistry (LRC) in Japan are building a database at the whole genome level from more than 100 thoroughbreds. From the database it can be predicted which DNA polymorphic sites the thoroughbreds should have originally. If other sites than the original ones are identified, it is possible to suspect gene alteration. This is the result of having managed all thoroughbred pedigrees. Building the DNA database of all thoroughbred pedigrees is not limited to doping detection, but it will advance equine genetic research. The same does not apply for human beings.

---

6 WADA, Laboratory Guidelines, Gene Doping Detection based on Polymerase Chain Reaction (PCR), Version 1.0, January 2021.

7 Tozaki/Hamilton, 107 ff.

8 Tozaki et al., 215 ff.

III. Regulation of Gene Doping

A number of organizations regulate gene doping, but the definition of gene doping differs between them. For example, WADA places gene doping in the Prohibited List.

The following methods with the potential to enhance sport performance are prohibited:

1. The use of nucleic acids or nucleic acid analogues that may alter genome sequences and/or alter gene expression by any mechanism. This includes but is not limited to gene editing, gene silencing and gene transfer technologies.
2. The use of normal or genetically modified cells.

For the purpose of fair horse racing, the International Federation of Horseracing Authorities (IFHA) sets guidelines for horse racing, including doping control, and created an International Agreement on Breeding, Racing and Wagering (IABRW), which requires each race organizer to operate in accordance with it.

Art. 6B of the IABRW states the prohibition of genetic therapy, gene editing and genome editing.

Regarding the definition of genetic therapy[9], genetic therapy is defined as including any therapy, method or process which involves the use or administration of:

i. oligomers or polymers of nucleic acid
ii. nucleic acid analogues
iii. genetically modified cells
iv. gene editing agents which are capable, at any time, of directly or indirectly causing an action or effect on, and/or manipulating, gene expression in any mammalian body, including but not limited to gene editing agents with the capacity to alter genome sequences and/or the transcriptional, post-transcriptional or epigenetic regulation of gene expression.

The "nucleic acids" is the generic name for DNA and RNA. Polymers or oligomers of nucleic acids, and nucleic acid analogues are supposed to be man-made and use nucleic acid medicine.

[9] It also states that the use or administration of autologous conditioned serum or "platelet-rich plasma" treatments which do not involve the transfer of whole cells or DNA is not defined as genetic therapy.

Paragraph (iii) concerning "genetically modified cells" is somewhat abstract. On the other hand, Paragraph (iv) is specific and concrete. Paragraph (iv) is perhaps a new provision introduced to regulate CRISPR/Cas9.

Gene transfer is divided into two types of gene therapy. In-vivo gene therapy works through the help of a vector, which directly inserts functional copies of a gene into target cells. Ex-vivo gene therapy involves the genetic modification of cells outside of the body to produce therapeutic factors, followed by their subsequent transplantation back into patients. Ex-vivo gene therapy also applies the technique of embryo editing.

Art. 6B does not refer to embryo editing, but this is due to the definition of "thoroughbred", as we will see later.

Art. 6B also defines the gene editing and genome editing:

"Gene editing" is defined as any process or treatment in respect of a horse which involves the insertion, deletion and/or replacement of DNA at a specific site in the genome of the horse.

"Genome editing" is defined as any process or treatment in respect of a horse which involves the insertion, deletion and/or replacement of DNA in the genome of the horse.

The definitions of "gene editing" and "genome editing" are almost the same, except for the phrase "at a specific site" in the definition of genome editing. As we will discuss later, however, there is a clear differentiation between gene editing and genome editing.

The WHO also refers to gene editing. Genome editing is a method for making specific changes to the DNA of a cell or organism. It can be used to add, remove or alter DNA in the genome. Human genome editing technologies can be used on somatic cells (non-heritable), germline cells not for reproduction, and germline cells for reproduction.

The Fédération Equestre Internationale (FEI) classifies any form of genetic modification as a banned method in the 2022 FEI Equine Prohibited Substances List (EPSL), but it does not define "gene doping" itself. On the other hand, the FEI has announced that cloned horses may now compete in international competitions: "The FEI will not forbid participation of clones or their progenies in FEI competitions. The FEI will continue to monitor further research, especially with regard to equine welfare."[10]

[10] Berreth Lindsay, FEI Announces That Cloned Horses Can Compete, The Chronicle of the Horse, 03.07.2012, https://www.chronofhorse.com/article/fei-announces-cloned-horses-can-compete (last visited on 11.10.2022).

Moreover, World Arabian Horse Organization (WAHO) very strongly supports the concept of voluntary testing and disclosure of Arabian horses and encourages all member registries to do their utmost to educate, encourage and support their owners and breeders to do so.

Responsible owners are now regularly using the available genetic tests when planning breeding, so that carriers are not bred to carriers, along with the many other considerations that go into making such breeding decisions.

"The Equine Genome Project was first completed in 2007 and regularly updated since then. A full "map" of the horse's genes is now available to researchers worldwide and has dramatically advanced equine genetic research in many areas. Horses share over 90 hereditary diseases similar to those found in humans, so the sequencing of the horse genome has potential applications to both equine and human health. Already, more than 237 equine traits or disorders with a genetic basis have been catalogued, and tests are available for many of these, ranging from coat colour to genetic disorders. Arabians are not the only breed of horse to have problems with inherited disorders, however, some genetic disorders are breed specific and in this article we will be looking only at the most serious genetic disorders which are known to affect Arabian horses."[11]

On the other hand, the "Thoroughbred Stud Book" has a different approach. In the "International Agreement on Breeding and Racing, Thoroughbred Stud Books" (IABRW Art. 12), "thoroughbred" is defined:

"Thoroughbred is a horse which is recorded in the Thoroughbred Stud Book[12] of the country of its foaling, that Stud Book having been granted Approved status by the International Stud Book Committee (Appendix 8) at the time of its official recording, unless its Thoroughbred status is subsequently withdrawn by its Stud Book Authority."

In 2020, 84267 Thoroughbred foal crops were registered. In order to register in the Stud Book there are six requirements:

1) Status of sire and a dam

   The horse must be the product of a mating between a sire and a dam, basically, both of which are recorded in an approved Thoroughbred Stud Book.

---

[11] World Arabian Horse Organization (WAHO), Genetic Disorders in Arabian Horses, Genetic Disorders and Tests available in Arabian Horses, http://www.waho.org/genetic-disorders-in-arabian-horses-current-research-projects/ (last visited 18.10.2022).

[12] The history of the Stud Book is dating back to 1791 to the UK. It has almost 300 years history. The International Stud Book Committee (ISBC) started in 1979.

2) Service to produce an eligible foal

   The Thoroughbred must be the result of a Stallion's mating with a Mare which is the physical mounting of a Mare by a Stallion with intromission of the penis and ejaculation of semen into the reproductive tract. As an aid to the mating and if authorized by the Stud Book Authority of a country certifying the Thoroughbred.

3) Gestation to produce an eligible foal

   A natural gestation must take place in, and delivery must be from, the body of the same Mare in which the Foal was conceived. Any Foal resulting from or produced by the processes of Artificial Insemination, Embryo Transfer or Transplant, Cloning or any other form of genetic manipulation not herein specified, shall not be eligible for recording in a Thoroughbred Stud Book approved by the International Stud Book Committee.

4) Recording of the mating and result

   The details of the mating must be recorded by the Stallion owner or authorized agent on an official form or electronic system provided or approved by the Stud Book Authority certifying the Thoroughbred; name of the Stallion, name of the Mare, the first and last dates of mating to the Stallion and, a statement signed by the Stallion owner or authorized agent that the mating was natural and did not involve the processes of Artificial Insemination, Embryo Transfer or Transplant, Cloning or any other form of genetic manipulation.

5) Identification and description

   The description of the Foal must be recorded by a person authorized by the Stud Book Authority on an official form or electronic system provided or approved by the Authority certifying the Thoroughbred; name of the stallion, name of the mare, exact date of foaling, colour of the foal, gender of the foal, name of the breeder, etc.

6) Parentage verification

   The Stud Book Authority certifying the Thoroughbred must require further evidence of parentage based upon typing of genetic factors present in blood, hair and/or other biological samples and must certify: [...] that all genetic typing results and details are maintained in strict confidence and are only disclosed to other Stud Book Authorities granted approved status by the International Stud Book Committee [...].

It seems that the Stud Book strictly prohibits any genetic editing. The organizational response to gene editing is unsynchronized, but the diversity is due to the

history and characteristics of their competition. In the future, a unified definition and rules about gene doping will also be required.

IV. Gene Therapy and Therapeutic Use Exemption (TUE)

In spite of the strict registration requirements in the Stud Book, the IFHA allows for a possible horse gene therapy method. The Art. 6 B(c) of the IABRW about Exempted Genetic Therapy (EGT) provides the following:

> "A Genetic Therapy may be used or administered to a specific horse with the express prior approval of a Racing Authority if that Genetic Therapy is used to treat an injury or disorder formally diagnosed by a veterinarian, and:
>
> a. is not capable of modifying a horse's heritable genome;
>
> b. does not pose a threat to the welfare of horse;
>
> c. does not pose a threat to the integrity of racing, either by having the potential to enhance or harm the performance of a horse in a race."

As the general provision of Art. 6, IABRW says:

> "All therapies for a horse involved in racing or race training (including rest periods) should be based upon a specific diagnosis, administered in the context of a valid and transparent owner-trainer-veterinarian relationship, and given in the interests of the horse's health and welfare. Following any therapy given to a race horse, a sufficient period should elapse prior to racing such that the therapy (i) is not capable of giving the horse an advantage or causing it to be disadvantaged contrary to the horse's inherent merits or (ii) is detrimental to its welfare.
> No therapies should be administered on the day of the race to a horse without the authorization of the Horseracing Authority."

The IABRW prohibits the modification of a horse's heritable genome, but the IFHA has not published a clear guideline regarding gene doping and EGT. On March 2016, the IFHA Executive Council decided to create the Gene Doping Control Subcommittee of the Advisory Council on Equine Prohibited Substances and Practices.

The primary objectives of the Subcommittee are to:

- clearly define "gene doping", "gene therapy", "cellular therapy" and "cellular doping"
- give consideration to present and future "gene therapies" and "cellular therapies", as required by racing and breeding authorities
- make clear which genetic and cellular practices have no place in horseracing and breeding

– provide guidance for the proper control of legitimate "gene and cellular therapies"
– suggest revision to Art. 6, 12 and 13 of the International Agreement of Breeding, Racing and Wagering, where necessary
– recommend systems and policies for the detection of gene and cellular doping in horseracing

The WADA Code laid out the proceedings of TUE. When athletes have an illness or medical condition, they require a particular medication. If this medication contains a banned substance on the Prohibited List, they may need to apply for TUE. This gives the athlete an exemption to take the medication, while competing in sport.

According to the WADA Code:

> "A Therapeutic Use Exemption allows an Athlete with a medical condition to Use a Prohibited Substance or Prohibited Method, but only if the conditions set out in Art. 4.4 and the International Standard for Therapeutic Use Exemptions are met."[13]

The WADA Code provides three types of TUE: National-level athletes, international-level athletes, major games athletes. For national-level athletes, the athlete's physician fills out the TUE application form and then the athlete sends it to the National Anti-Doping Organization (NADO). International-level athletes send it to the International Federation (IF). A major Games athlete must provide the TUE application form to the Major Event Organizer (MEO).

Once a TUE is requested, in the case of national-level athletes, a panel of experts (TUE Committee) selected by the NADO reviews the TUE application. Then, the following criteria shall be satisfied to grant a TUE:

> "a. The prohibited substance or method is needed to treat a diagnosed medical condition.
> b. The substance does not enhance performance; it just brings the athlete back to normal health.
> c. There are no reasonable, permitted, alternative treatments available.
> d. The need to use the substance or method is not due to the prior use of the substance or method without a valid TUE.

[13] The Art. 4.4.2 of the WADA Code states that a Prohibited Substance or Prohibited Method shall not be considered an anti-doping rule violation, if it is consistent with the provisions of a TUE, granted in accordance with the International Standard for Therapeutic Use exemptions.

> WADA may review any TUE decisions at any time, the decision by WADA to reverse a TUE decision may be appealed by the Athlete exclusively to CAS (WADAC Art. 4.4.6 and 4.4.8).
> If a TUE is denied the athlete will be informed of the reasons. Athletes have the right to appeal the decision (WADAC Art. 13.4)".

It is unclear whether the TUE for gene editing will be permitted under the WADA Code, but from the original purpose of the TUE, the application in order to treat athletes' illnesses should be allowed.

V. The Issues Concerning TUE Schemes

If EGT (TUE) are implemented, however, there are still the issues relating to the TUE schemes and the particularity of gene doping.

First is the misuse of TUE system. In September 2016, the Russian-based cyber espionage group Fancy Bear published documents obtained by hacking into the WADA computer systems.[14] These documented a number of athletes taking medicines to treat long-term conditions under Therapeutic Use Exemptions (TUEs). One of said athletes was the famous British cyclist, Sir Bradley Wiggins. As a result, the Committee in the House of Commons conducted an inquiry on TUE systems within British cycling. TUE applications were, under the WADA rules at the time, approved by a single WADA doctor.

Ultimately, the Committee concluded that "the TUE system is open to abuse. The assessment of medical need has been based too closely on trying to achieve a peak level of physical condition in the athlete, rather than returning them to a normal state of health. [...] [W]hen TUEs could be granted based on the assessment of the team doctor, and a single doctor at the WADA, the potential for abuse in the system was even greater."[15]

---

[14] Ruiz Rebecca R., Computer Hackers Again Gain Access to Athletes' Private Medical Records, 03.04.2017, https://www.nytimes.com/2017/04/03/sports/computer-hackers-again-gain-access-to-athletes-private-medical-records.html (last visited 18.10.2022).

[15] House of Commons, Digital, Culture, Media and Sport Committee, Combatting Doping in Sport, Fourth Report of Session 2017–19, report of 27 February 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/366/366.pdf (last visited 18.10.2022).

A lesson from the scandal is, that the administration of TUEs behind closed doors has become a breeding ground for corruption. Therefore, there is a need to improve the transparency of the process.

Under the EGT scheme of the IABRW, genetic therapy is based on a veterinarian's diagnosis, but some are doubting the neutrality of a veterinarian and the trustworthiness of the TUE certificate, based on an assumption of the contract existing between a veterinarian and the horse owner.

Among athletes there is a distrust of the TUE system. Overbye and Wagner conducted research on elite Danish athletes about their experience and perception of TUEs through a web-based questionnaire. The results showed that 19% of the respondents had been granted a TUE, whist 51% believed that athletes in their sport received TUEs without a medical need. They concluded that athletes granted TUEs were more than twice as likely to distrust the efficacy of the system, compared to athletes who had never been granted a TUE.[16] On the other hand, Vernec and Healy conducted research on the correlation between medals awarded and athletes competing with a TUE during the Olympic Games from 2010 to 2018. They concluded that the number of athletes competing with valid TUEs at the Olympics is one percent or less.[17] The results suggested that there is no meaningful correlation between being granted a TUE and the likelihood of winning a medal.

They suggested to devalue the total number of 21 medals by TUE athletes in the Olympic Games, but the number is serious in horse racing, because it may harm the integrity of the gaming and foster a sense of distrust for gambling. Introducing the EGT system into a horse race might foster a sense of distrust towards gaming, especially the gambling industry. Even if there is just a one percent chance that an EGT horse wins, information on which horses took EGT would be a valuable clue for gamblers. In principle, medical treatment is prohibited on the day of the horse race: "No therapies should be administered on the day of the race to a horse."[18] However, the permanent effects of gene therapies may continue into the day of the race. If horse racing continues to keep the participation of EGT horses secret, horse racing will lose its credibility.

Another issue is drawing boundaries between "for therapy" and "enhancement by gene editing". Unlike traditional medicines, the effect of gene editing remains

16 Overbye/Wagner, 579 ff.
17 Vernec/Healy, 920 ff.
18 See Art. 6 IABRW.

poorly understood. For example, whether its curative power is limited to only one part of the cell or extends across the entire organization, or whether the effect is temporary or permanent, remains unclear.

The other question with EGT is the preventive use of gene editing. Should EGT application be permissive in the stage of preclinical diagnosis, when a genetic predisposition to disease is unveiled? In terms of animal welfare and a humanitarian viewpoint, using EGT to prevent genetic diseases should be permitted.

The big issue of using gene editing is the risk to biosafety. There are various risks, such as unexpected mutations of cells and genes, and the unknown impact on the next generation's ecosystem.

VI. Regulation of Gene Doping in Japan

The Japan Central Horse Racing Association (JRA) has held horse races every weekend on Saturdays and Sundays, and a total of 3500 races are held per year. About 10 000 specimens and about 45 000 urine samples are tested annually at the LRC. The LRC, established in 1965, is an internationally accredited horse racing doping control laboratory. The main purpose of the LRC is to provide analytical testing services for the analysis of equine biological samples including urine, blood, and hair.

Art. 31 of the Japan Horse Racing Act refers to doping, although there is no provision regarding gene doping. This article states:

> "A person who has used a drug or medication that temporarily increases or reduces the race ability of the race horse, shall be subject to imprisonment for up to 3 years or a fine of up to 3 million yen."

It further states that the trainer who manages the race horse will be punished for violating the management obligation according to the horse race enforcement regulations, even if a clear causal relationship is not found.[19]

This Act might be applicable to gene editing, because the words "increases or reduces the race ability of the race horse" are comprehensive. In order to introduce the EGT system to Japan, an amendment of the Act is necessary.[20] Furthermore,

[19] Yokota, 99 ff.

[20] The website of IFHA shows the Signatory countries. 38 countries adapted the Art. 6B of IABRW, except Japan and Czechia.

beyond the legislative issues with the amendment, there are some hurdles to implement EGT.

In January 2000, the Cartagena Protocol on Biosafety of the Convention on Biological Diversity (Cartagena Protocol) was adopted at the Conference of the Parties to the Convention on Biological Diversity, and in June 2003, Japan also signed the Cartagena Protocol and enacted the Act on the Conservation and Sustainable Use of Biological Diversity through Regulations on the Use of Living Modified Organisms (Cartagena Act).

The purpose of the Cartagena Act is to regulate the use of living modified organisms to transfer or replicate nucleic acid, and viruses and viroid. Under the Act, regulations are divided into type 1 and type 2. Type 1 regulations concern the use of living modified organisms, without taking preventive measures against their dispersal into the environment. Type 2 relates to the use of living modified organisms, while taking preventive measures against their dispersal into environment.

A person who creates and makes use of living modified organisms in an open area must submit a Biological Diversity Risk Assessment Report and obtain the approval of the responsible minister. In this report, the following must be included:

- The method of transferring nucleic acid;
- names and types of living modified organisms;
- methods of detection and identification of genetically modified organisms;
- content of monitoring plan;
- content of plan of emergency measure;
- judgment whether or not there is the likelihood of adverse effects on biological diversity;
- method of educational training for persons making type 1 use pertaining to the application;
- other matters concerning prevention of adverse effects on biological diversity due to type 1 use pertaining to the application.

In the case of horses with gene treatment, both type 1 and type 2 regulations are applicable, because breeding horses takes place outside. Therefore, horse owners are required to prevent egestion (including living modified organisms) of horses into the environment.

This framework suggests important key concepts for regulating gene therapy or gene doping: educational training for researchers, monitoring the animals under-

going the treatment, and an emergency plan. If necessary, the Inspection Body shall implement on-site inspection into a research laboratory and breeding facility under the ordinance of the competent ministries.

Moreover, the National Institute of Health Sciences published the Guideline for Assuring the Quality and Safety of the Gene Therapy Products as Procedures for Conducting Clinical Research.

The director of the research should prepare a project protocol including:

(1) The purpose, (2) Theoretical basis for the selection of the disease, (3) Genes involved and the methods of transferring genes, (4) Non-clinical research findings currently available, (5) Safety evaluation from non-clinical studies, (6) Basis for the conclusion that the research is feasible, (7) Plan, (8) Suitability of institutions where the planned research will be conducted, (9) Current situations of research related to the planned research, (10) Professional records and list of publications of researchers.

Researchers and breeders engaging with gene editing will take on the heavy burden to guarantee biosafety. These submitted documents should be disclosed. Horse owners may hesitate to use the EGT system, because the use of EGT implies that a horse has a genetic defect, which has the possibility of decreasing the horse's blooded value.

Although the Cartagena Act does not regulate doping per se, the Act does allow for the control of activities involving genetic manipulation by requiring notification of gene therapy and research and development. Violations of the law are punishable,[21] so it is expected to have an indirect deterrent effect.

VII. Conclusion

FHA allows a method of gene therapy by allowing TUE. This rule may bring about a new challenge into the equine community and human society. However, the crucial difference between gene therapy and general therapy is the danger to biosafety. From the viewpoint of animal welfare, active utilization can be considered, but it should be noted that it creates more risks for society as a whole. It has become necessary to make many-layered regulations against gene therapy and gene doping.

[21] A person who violates orders under the provision is subject to a punishment of not more than 1 year or a fine of not more than one million yen (the Cartagena Act, Art. 38).

Costa proposes the regulation on gene editing as follows:[22]

a) To establish legislation, regulation, and associated guidance distinguishing between treating a disease versus enhancing what is considered "normal", where international harmonization of these legislative and regulatory frameworks are the most desirable;

b) Allowing individual ministries to make policies governing this use of human genome editing;

c) The use of research funds solely for the health purposes and not for the purpose of enhancing athletic ability;

d) A moratorium on the use of genome technology in this capacity through use of bans by global governing bodies for professional and elite sports;

e) Professional self-regulation through the use of ethical guidelines;

f) Public advocacy and activism on the issue to determine the position of the many interest groups involved; and

g) Development of research ethics guidelines and research ethics review by review committees."

Whilst the author is engaging in the review of research ethics, in the field of advanced scientific sport science research, the demand of research ethics in this field has become apparent. On the other hand, the fragmentation caused by other horse organizations allowing horse cloning and genetic testing of embryos, shows the limitations of self-regulation and suggests that international regulation would be preferable from a legal perspective.

In order to make those regulations effective, it has become necessary to unify the various different definitions between regulatory organizations, in order to build a common ground of understanding.

In addition to developing gene doping detection techniques, we need to transcend the mere words of a blanket regulation. In May 2020, the People's Republic of China enacted the new law to regulate gene editing in response to the He Jiankui scandal.[23] Art. 1009 of the Civil Code of the People's Republic of China states:

---

22 Costa, 157 ff.

23 In November 2018, Chinese biophysicist He Jiankui completed experiments on human embryos that resulted in babies whose DNA had been engineered to make them less susceptible to contracting HIV.

> "A medical and scientific research activity related to human genes, embryos, or the like, shall be done in accordance with the relevant provisions of laws, administrative regulations, and the regulations of the State, and shall not endanger human health, offend ethics and morals, or harm public interests."

This provision imposes civil liability on those who violate ethics and morals in human germline experiments, as well as any possible criminal liability. Many countries discuss how to regulate genome editing for human embryos.[24] These issues are common to animals. From the viewpoint of international harmonization, the common legal definition and understanding of gene editing is important, because the current regulation is different from organizations.

The IFHA limits the use of gene therapy to TUE. However, the boundary between treatment and enhancement on the premise of the permanent cure by gene editing has become even more blurry. Focusing more research in this field has the potential to shift the priority from treating athletes to enhancing their performance. The movement promotes a biotechnological arms race and triggers a desire for gene doping. In the future research, the emphasis should be on the environmental surveys on post-clinical (gene) treatment. In considering the possibility of genetic mutation and the risk of biosafety, even the approved clinical treatment requires long-term monitoring against the research subject's change, along with environmental changes around the breeding facility, including a ban on breeding.

In discussing anti-gene doping, a WADA-like system in the international regulatory framework based on the Cartagena Protocol will be needed.

Bibliography

Bouffard Chantal/Viville Stéphane/Knoppers Bartha Maria, Genetic diagnosis of embryos: Clear explanation, not rhetoric, is needed, CMAJ 181 (6-7)/2009, 387–391.

[24] For example, Art. 16-4 of the French Civil Code states the following:
"Nobody may invade the integrity of mankind. Any eugenic practice which aims at organizing the selection of persons is forbidden. Any intervention having the purpose of causing the birth of a child genetically identical to another person alive or dead is forbidden. Without prejudice to researches aiming at preventing and treating genetic diseases, there may be no alteration of the genetic characters with a view to changing the descent of a person. In Japan there is still neither legislation nor legal regulations for clinical application of genome editing technology to human embryos.".

Campbell Madeleine L.H., The role of veterinarians in equestrian sport: A comparative review of ethical issues surrounding human and equine sports medicine, The Veterinary Journal 197 (3)/2013, 535–540.

Campbell Madeleine L.H./McNamee Michael, Ethics, Genetic Technologies and Equine Sports: The Prospect of Regulation of a Modified Therapeutic Use Exemption Policy, Sport, Ethics and Philosophy 15 (2)/2021, 227–250.

Costa Sean, The Current State of Gene Doping and the Future of Gene Therapy Regulations, San Diego International Law Journal 23 (1)/2021, 157–193.

Cox Luke/Bloodworth Andrew/McNamee Michael, Olympic Doping, Transparency, and the Therapeutic Exemption Process, Diagoras International Academic Journal on Olympic Studies 1/2017, 55–74.

Gerrard David/Pipe Andrew, Therapeutic Use Exemptions, Med Sport Sci. 62/2017, 55–67.

Yokota Toshifumi, Drug regulation (Anti-Doping) System in Horse Racing, Journal of Japan Veterinary Medical Association 61/2008, 99–103.

Overbye Marie/Wagner Ulrik, Between medical treatment and performance enhancement: An investigation of how elite athletes experience therapeutic use exemptions, International Journal of Drug Policy 24 (6)/2013, 579–588.

Schröder Wiebke/Klostermann Andreas/Distl Ottmar, Candidate Genes for Physical Performance in the Horse, The Veterinary Journal 190 (1)/2011, 39–48.

Tozaki Teruaki, Advances in Genomics and Genetics of Horse, The Journal of Animal Genetics 41/2013, 23–35.

Tozaki Teruaki/Kusano Kanichi, Gene therapy and gene doping, Equine science 53 (3)/2016, 201–205.

Tozaki Teruaki/Kusano Kanichi, Gene Doping and Genome Editing, Equine science 55 (3)/2018, 207–213.

Tozaki Teruaki/Kusano Kanichi, The Revision on Policy of the Paris Agreement on Gene Therapy and Development of Testing Methods for gene doping, Equine science 54 (3)/2017, 215–220.

Tozaki Teruaki et al., Gene Doping Control in Horseracing Industries, Equine science 56 (4)/2019, 215–222.

Tozaki Teruaki/Hamilton Natasha A., Control of Gene Doping in Human and Horse Sports, Gene Therapy 29/2022, 107–112.

Vernec Alan/Healy David, Prevalence of Therapeutic Use Exemptions at the Olympic Games and Association with Medals: An Analysis of Data from 2010 to 2018, Br J Sports Med. 54 (15)/2020, 920–924.

Vichera G. et al., 20 Generation of myostatin knockout horse embryos using clustered regularly interspaced short palindromic repeats/CRISPR-associated gene 9 and somatic cell nuclear transfer, Reproduction, Fertility and Development 31 (1)/2018.

Wade et al., Genome Sequence, Comparative Analysis, and Population Genetics of the Domestic Horse, Science 326 (5954)/2009, 865–867.

Authors and Editors

Christian Schwarzenegger

Following his studies at the University of Zurich, Prof. Dr. Christian Schwarzenegger earned his doctoral degree in 1992 and, a year later, was admitted to the bar in the canton of Schaffhausen. From 1994 to 1999 he served as an Assistant Professor at two universities in Japan. Since 1999, he has been holding a Chair in Criminal Law, Criminal Procedure Law, and Criminology at UZH. From 2010 to 2014, he was Vice Dean and Dean of the Faculty of Law, and since 2014 he has been Vice President of the University of Zurich.

Dominique Diethelm

Dominique Diethelm is a research assistant and PhD candidate at the chair of Prof. Dr. iur. Christian Schwarzenegger for criminal law, criminal procedure, and criminology at the University of Zurich. Her main fields of interest are criminal procedure, criminal law and healthcare, and secondary criminal law. Her thesis assesses the necessity and current possibilities of audio-visual recordings of interrogations, as well as their conduction via video conference under Swiss criminal procedure law.

Gian Ege

Gian Ege is an assistant professor for criminal law and procedure at the Faculty of Law of the University of Zurich. He holds a PhD as well as a Master of Law and a Bachelor of Law from the University of Zurich.

Hanjo Schnydrig

Hanjo Schnydrig, MLaw, CAS Sports Management, DAS Associations/NPO Management, is head of legal of the former Antidoping Switzerland Foundation and its successor organization Swiss Sport Integrity in Bern since 2017.

Jakob Hajszan

Jakob Hajszan studied law at the University of Vienna from March 2017 to March 2021. During his studies he worked as a student research assistant at the Department of Law in Economics and the Department of Criminal Law and Criminology. Since June 2021 he is a research assistant (Univ.-Ass. prae doc) and PhD-candidate at the Department of Criminal Law and Criminology, Chair of Univ.-Prof.in Dr.in Ingeborg Zerbes, writing his doctoral thesis on doping in Austrian criminal law.

Kanako Takayama

Kanako Takayama, born in 1968, studied law at the University of Tokyo and worked there first as an assistant, then as a lecturer at Seijo University. After two years of research stay at the University of Cologne she moved to Kyoto University, where she has been a professor for criminal law since 2005.

Malte C. Claussen

Malte Christian Claussen is a sports psychiatrist and a specialist in psychiatry and neurology. He is a senior physician and head of the sports psychiatry outpatient units at the Psychiatric University Hospital Zurich, Private Clinic Wyss AG and Psychiatric Services Grisons. Malte Claussen is founder and co-President of the Swiss Society of Sports Psychiatry and Psychotherapy and member of the Scientific Commission of the International Society for Sports Psychiatry. He is the author of a large number of publications on various topics in sports psychiatry. Malte Claussen is also editor-in-chief Sports Psychiatry – Journal of Sports and Exercise Psychiatry and editor of the first German-language textbook on sports psychiatry.

Monika Gattiker

Dr. Monika Gattiker was admitted to the bar of Zurich in 1997. She advises and litigates in national and international legal matters primarily in the areas of healthcare, life sciences, and equestrian sports.

Norihide Ishido

Norihide Ishido is a professor at the Chukyo University, board member of the Japan Sports Law Association, board member of Japan Para Table Tennis Association, vice commissioner of the Legal Affair Commission in the Japan Olympic Academy and an arbitrator of the Japan Sports Arbitration Agency.

Patrick Koch

Patrick Koch, MLaw, attorney-at-law, CAS International Sports Law, CAS Forensics, is a public prosecutor in the canton of Aargau since 2021. From 2013 to 2017, he was head of legal of the former Antidoping Switzerland Foundation.

Sena Hangartner

Sena Hangartner is a research assistant and PhD student at the chair of Prof. Christian Schwarzenegger, professor of criminal law and criminal procedural law at the University of Zurich in Switzerland. Her research interest lies in sports law, especially in the field of doping from a criminal law perspective. In her doctoral thesis Ms. Hangartner analyzes the need for criminalization of self-doping in Switzerland.

Shoichi Sugiyama

Shoichi Sugiyama is a Tokyo-based lawyer working at Field-R Law Offices. He has handled doping-related disputes as a case manager to the Japan Sports Arbitration Agency. He stayed at the University of Zurich as a visiting scholar in 2018 to comparatively research legal systems on anti-doping between Japan and Switzerland.

Yoshihisa Hayakawa

Yoshihisa Hayakawa works as a professor of law at Rikkyo University, Tokyo, and also teaches and researches in a number of foreign universities including Columbia University, Cornell University, QM College of University of London and Australian National University. He works as a partner at Uryu & Itoga, Tokyo and serves as a counsel in many cases of transnational litigation and international commercial arbitration, as well as an arbitrator in many arbitration cases. He represents Japan for a number of inter-governmental organizations including UNCITRAL, APEC (ODR Project), ISO (ODR Project) and the Hague Conference on PIL, and serves as Japanese member for commission on arbitration and ADR of ICC, Japanese Member of Users Council of SIAC and arbitrator for Court of Arbitration for Sport.

Doping in sports is a salient issue often discussed in the news, especially during major events such as the Olympics. However, there are still many uncertainties regarding the appropriate legal response. Because of the international nature of sport, there is great need for an in-depth comparative assessment and harmonized legal frameworks.

The chapters included in this volume address doping related questions which were discussed at the Joint Workshop on Legal Response to Doping organized by the University of Zurich and the Kyoto University. In the workshop, experts in the field of doping and sports law came together to analyze the existing antidoping regulations and laws with the objective to identify strengths and shortcomings of the current legal framework.

Dike Verlag, Zurich/St. Gallen
ISBN 978-3-03891-489-1

Nomos Verlag, Baden-Baden
ISBN 978-3-7560-0661-8

Facultas Verlag, Vienna
ISBN 978-3-7089-2398-7