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The 2009 WADA Code: A More Proportionate Deal for Athletes?

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ABSTRACT

This article seeks to assess the leading force in developing anti-doping policy in sport; the World Anti-Doping Agency. This article will analyse the 2009 World Anti Doping Agency Code, which came into force on 1 January 2009. The 2009 Code represents the latest effort to fight doping in sport, and contains a considerable number of new provisions from that which was previously in place. The main question this article poses is whether the changes made in the 2009 Code are justifiable as being proportionate in order to take forward the fight against doping whilst at the same time respecting athletes' rights. The article goes on to detail the new provisions of the 2009 Code and assesses the proportionality of each in the light of standard principles of justice and specific sporting jurisprudence on the matter, particularly the judgments of the European Court of Justice on this issue. The conclusion reached is that several of the provisions contained in the 2009 Code are in breach of the proportionality principle by violating the personal rights of athletes, particularly those relating to economic livelihood, privacy and procedural fairness. Accordingly, aggrieved athletes will inevitably bring legal disputes.

KEYWORDS

Proportionality - doping - sport - WADA - human rights

INTRODUCTION

Sport needs WADA but we need a WADA that polices by consensus, not by diktat. WADA is supposed to act for sport, not against sport. It's made players into the enemy rather than allies. WADA has picked a fight on something that is both morally and legally very dubious (Simon Taylor, Head of the Professional Players Federation, cited in Gibson, 2009). 1

This statement accurately sums up the current resentment among some top athletes towards the policies and powers that the World Anti-Doping Agency (WADA) imposes upon athletes in their fight to eradicate doping from sport. In attempting to do so, WADA has implemented a number of policies that have come in for particular scrutiny in light of their newly revised 'Code' (herein the '2009 Code') which, as Simon Taylor suggests, are 'legally very dubious.' The revised World Anti-Doping Code was approved on 17 November 2007 and entered into force on 1 January 2009 (WADA, 2009a). The Code brings about a series of significant changes, based around two main themes, namely firmness and fairness. These themes are both broadly related to one all-encompassing principle: proportionality. 2

It is this aspect of proportionality that this article will focus on, by asking the question; 'are the changes in the 2009 Code proportionate?' This article will briefly outline WADA's structure and purpose, before providing a summary of the elements of the proportionality principle. This will be followed by an analytical assessment of whether the changes in the 2009 Code comply with the principle of proportionality, followed by a conclusion which assesses the future impact of the WADA Code and any further developments that may be necessary to 3

ensure that athletes' rights are respected.

STRUCTURE AND AIM OF WADA

WADA was established in February 1999 under the auspices of the International Olympic Committee (IOC), which recognised the urgent need for action, with the aim of coordinating the international fight against doping in sport. Despite its IOC origins, WADA operates as an independent, private law organisation, whose task is to produce an anti-doping code with the aim of harmonizing anti-doping regulations globally while ensuring that athletes are treated equally by sports bodies and governments regarding anti-doping issues. 4

MAIN FEATURES OF THE WADA CODE

The original WADA Code, effective from 2003, consisted of two basic components: (i) a list of doping offences; and (ii) a number of sanctions to be enforced when an athlete is convicted of committing such offences. The most common doping offence is the presence in the athlete's body of a substance on the 'Prohibited List'. Typically, this brings about the imposition of a suspension (or 'Ineligibility Period') during which the athlete is prohibited from participating in any competition that comes under WADA's jurisdiction. The Prohibited List was particularly contentious when introduced because recreational drugs such as cocaine were effectively treated in the same way as performance-enhancing drugs under the strict liability principle, detailed below. 5

The 2003 Code also provided for a range of other offences which could bring about a period of ineligibility besides from a positive test, including missing three drugs tests, as in the case of Christine Ohuruogu, the UK 400m runner (BBC News, 2006), drugs trafficking and/or possession of prohibited substances, or by tampering with the sample (as Irish swimmer Michelle de Bruin did: Humphries, 1999). The maximum period of ineligibility under the 2003 Code for a first offence was two years (which has now been extended under the 2009 Code.) The Code further provided that any anti-doping dispute, concerning international events or athletes, would be decided exclusively by the Court of Arbitration for Sport (CAS). The 2003 Code, while broadly similar to the 2009 Code in its basic structure, was driven principally by the strict liability system and as such proved inflexible in failing to adapt its provisions to the highly complex and legally problematic nature of such a variety of doping offences. 6

This inflexibility is addressed in the 2009 Code, the key changes of which are detailed below. 7 The definition of doping is defined in the new Code as the occurrence of one or more anti-doping violations under Article 2.1-8. Further, the Code itself contains an extensive list of expressly Prohibited Substances. The new WADA Code is highly technical and detailed, and accordingly this article does not seek to give detailed analysis to every Article, but rather to assess the most significant changes made from the 2003 WADA Code, and to evaluate whether such principles are proportionate. In other words, do the new provisions achieve a justifiable balance between protecting the legal and human rights of athletes, while ensuring that doping authorities achieve their legitimate aim of eradicating doping in sport?

BURDEN OF PROOF

The 2003 Code was based upon the strict liability principle, whereby an athlete is automatically deemed to have committed an anti-doping violation when a prohibited substance is found in their system, regardless of whether that athlete intended to dope, acted negligently or was in some other way at fault (see CAS 94/129, *USA Shooting & Quigley v UIT*, May 23, 1995). The main policy objective behind this principle is that if guilt was only found through proving that the athlete intended to cheat, then the evidential burden may be too difficult to overcome in the majority of doping cases, and further, the financial strains which such litigation would cause would be unsustainable for the majority of anti-doping organisations (*USA Shooting* at p. 193, section 15). 8

The 2009 Code differs from its predecessor in that it does not operate on this principle. 9 Instead the burden of proof is placed on the athlete, whereby he is guilty until he can explain to the satisfaction of the doping authorities why that substance was detected in his system. This therefore improves the position for athletes in that under the previous Code they could merely plead mitigating circumstances to reduce any punishment. By shifting the onus onto the athlete, they now stand a better chance of having their suspension overturned, although

to overturn what is *prima facie* strong scientific evidence of doping is easier said than done. This is exacerbated given the media witch hunt which generally ensues following the outbreak of doping allegations, summed up by the German cyclist Georg Totschnig who sued German TV station *ARD* for libel and defamation for claiming he was a part of a doping ring named 'Humanplasma', admitting that despite his potential compensation 'the damage [to his reputation] can't be mended' (Robbins, 2009).

Reversal of the burden of proof, despite giving athletes a fairer crack of the whip than 10 previously in contesting doping allegations, still raises some contentions. It was often been pointed out that reversing the burden of proof is in contravention of Article 6(2) of the European Convention on Human Rights (Soek, 2006, p. 399-401). Further, this is exacerbated by the fact that international federations essentially operate as monopoly organisations in their sport (Oschutz, 2006, p. 253). When an athlete's positive sample comes from an in-competition test, that athlete's results are deleted instantly (Article 9, 2009 Code). An athlete can however attempt to have his ineligibility period reduced or possibly even completely overturned if he can show that there was no fault or significant fault (Article 10.5), or even if they can establish that they did not intend to enhance their performance (Article 10.4).

This is a point of major significance in terms of how future doping allegations will be 11 contested. In essence, this is a reflection on the need to respect athlete's personal rights and an admission from sports governing bodies that not all doping convictions can be simply placed in the same bracket. This, in effect, is due to the influence of the proportionality principle, and it is this principle that underpins the 2009 WADA Code in a more prominent manner than its 2003 predecessor.

THE PROPORTIONALITY TEST

The main question this article poses is whether the changes made in the 2009 WADA Code 12 are justifiable as being proportionate in order to take forward the fight against doping while respecting athletes' rights. The exact criteria for a rule to be proportionate must be assessed in all the circumstances. While ultimately such an assessment unavoidably contains an element of subjectivity, it must still adhere to general criteria applicable to all proportionality assessments under most national and international legal codes.

As a general rule, a restriction of an athlete's personal liberty and right to work is justified if it 13 is proportionate to the legitimate aim pursued (Kaufman-Kohler and Rigozzi, 2007, p. 42; para. 262 of AG Lenz in *Bosman*, Case 415/93, [1995] ECR I-4921). The European Court of Justice also requires proportionality to justify the anti-competitive effects which arise from a doping ban (18 July 2006, *Meca-Medina & Majcen v. Commission*, case C-519/04 P, at para 42). The proportionality principle is not only applicable to doping cases specifically, but is a 'general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private.' (Kaufman-Kohler and Rigozzi, 2007, p. 42). There are also two requirements for the proportionality principle to be enforced:

1) *Capacity* - any restriction must be suitable to achieve the aim it pursues i.e. deterring athletes from doping.

2) *Necessity* - implies that no less intrusive restrictions are equally suitable to achieve the legitimate aim pursued (McLaren, 2006, p. 21).

So, while there is no doubt that the eradication of doping is a legitimate aim, the methods 14 used have caused considerable debate as to whether they are necessary in order to achieve this aim. Where a rule goes beyond what is necessary, this is considered to be disproportionate and in certain cases this can be deemed to have violated the fundamental human rights of the aggrieved party.

With regard to the interaction of EC law and doping rules in sport, the case of *Meca-Medina & 15 Macjen* is the most significant to date in terms of outlining what is required by sports governing bodies in devising their regulations. The court outlined that 'any restriction...must remain limited to its proper objective...the mere fact that a rule is sporting in nature does not have the effect of removing it from the scope of the Treaty' (para 26-7). Specifically, it

referred to the Competition provisions contained in the Treaty stating that 'even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity, that fact means neither that the sporting activity in question necessarily falls outside the scope of Arts 81 EC and 82 ECT [now Arts 101 and 102 Treaty on the Functioning of the European Union (TFEU)] nor that the rules do not satisfy the specific requirements of those articles' (para 31).

In essence, the ECJ outlined that anti-doping rules are subject to EU law and that the restrictions they impose on athletes must be shown to be inherent and proportionate with regard to the sporting objectives pursued, namely the fight against sporting fraud (Dios Crespo, 2006). Their stance was recently reaffirmed in *MOTOE (Case C-49/07 Motosyklesistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio)*. Prior to this case, Weatherill predicted that 'one could certainly not exclude the possibility that Art 82 ECT [now Art 102 TFEU] could play a role in the review of sporting practices...This is particularly pertinent in circumstances where a sports federation which enjoys monopoly power in making the rules that govern the sport makes decisions with direct commercial implications' (2005 page). The ECJ confirmed that forecast, holding that sports activities, namely the non-profit ELPA (who regulated motorcycling events in Greece), are not excluded from the application of EU law. The fact that they were a public body for the purpose of the administration of state powers did not alter the fact that some of its activities were of an economic nature. ELPA's conduct from a monopoly position in its field accordingly had the potential to breach Arts 102 and 106(1) TFEU. The ECJ held that although its activities were not abusive *prima facie* on the grounds of objective public policy reasons, the fact that there was no appeal system for those whose applications were rejected, such as MOTOE, could indeed constitute an abuse of its powers (Miettinen, 2008). 16

The *MOTOE* case involved the combination of regulatory powers and organisation of competitions with economic activity in the regulated market, similar to the F1/FIA investigation into alleged abuses by the FIA in making commercial gains (Parrish, 2003). *MOTOE* declares that mere risk of abuse is sufficient for an infringement of Art 106(1) considered in conjunction with Art 102 TFEU. As Miettinen notes 'the *MOTOE* judgment provides some reasons why sports services will not often constitute services of general interest that are shielded from the full force of the Treaty's internal market rules' (2008). Accordingly the distinction between economic and non-economic activities remains a central function in applying EU competition law to sports governance, despite, as Weatherill reminds us, the demise of the 'purely sporting' justification (2006). However, as the ECJ noted, many sports governing bodies have internal dispute resolution mechanisms, making it difficult to obtain a truly impartial review of grievances. It is once again a reminder that 'economic sporting activity is subject to EC rules just as any other economic activity, even if regulated by a non-economic public body' (*MOTOE*, Para 22). 17

Following on from this, opinions regarding the WADA Code can be roughly divided into two groups (Teitler and Ram, 2008, p. 42). First are those who defend it on the basis of necessity in enforcing anti-doping policies. Alternatively, there are those who feel that those policies constitute a blatant infringement of an athlete's basic human rights. Traditionally, athletes have attempted to challenge their sanction by claiming that it violates their fundamental rights. It is this issue that we now turn to in relation to the 2009 Code. 18

CHANGES IN THE 2009 CODE

Given the huge range of signatories to the Code, (WADA 2009b), the changes that it makes will affect practically all athletes. There are several significant changes, and this article shall analyse each in order to assess its compliance with the proportionality principle. 19

RECREATIONAL DRUGS

The classification of recreational drugs within the WADA code has been one of the most controversial issues to date. While the criteria for the Prohibited List are quite clear, there is a continuing debate as to how exactly these criteria are applied. Indeed, in reality the Code indicates a compromise agreement between the various stakeholders, particularly national and international federations and national anti-doping authorities, as well as government organisations (Teitler and Ram, 2008, p. 43). 20

Evidently, this must be weighed against the current media climate within which sport now resides. Sports stars are role models and global icons. One need only look at the recent actions of Tiger Woods and Thierry Henry to see that their immoral actions, despite going unpunished by sporting authorities, have considerable repercussions, both morally and economically with the transgressions of the former are particularly significant as he has reputedly lost up to 40% of his sponsorship income; yet has not acted immorally within the sporting arena *per se* (Guardian online, 2010). In the case of recreational drugs themselves, the economic consequences can be huge, with Adrian Mutu ordered to pay in excess of €17m for testing positive for cocaine (CAS 2008/A/1644 *Adrian Mutu v Chelsea Football Club Limited*). Accordingly, despite the distinction between the 'recreational' use of drugs and the use of recreational drugs, sporting federations refuse to be seen to be turning a blind eye to any illegal actions that tarnish the image of their sport. 21

Indeed, in 2007 the previous WADA president Dick Pound stated that 'the overwhelming majority of doping cases are planned and deliberate, and are carried out with the full knowledge that it is cheating, with the specific objective of gaining an unfair advantage over the competitors.' (WADA Annual Report 2006, cited in Teitler and Ram, 2008, p. 43). While this may strike some as overly cynical, it is unfortunately accurate in the majority of cases. It is this element of intentional performance enhancement that has received increased emphasis in the 2009 Code, which introduces an increased flexibility in comparison to the previous Code by giving the option to punish athletes more severely where there are proven instances of deliberate doping, as opposed to merely negligent actions (Article 10.4). 22

One issue that arises with any disciplinary system that places such a high burden on the accused to disprove an allegation is that innocent athletes, in the sense that they have not sought to deliberately enhance their performance, will be found to have violated the anti-doping regulations. This dilemma has indeed been the topic of discussion by the CAS panel, which stated that: 23

[T]he problem with any 'one size fits all' solution is that there are inevitably going to be instances in which one size does not fit all...It is argued that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim. (CAS 2006/A/1025 *Mariano Puerta v ITF*).

And, as is the case in any war, it is the level and severity of this collateral damage that comes under the most scrutiny. In essence, are the means used sufficiently proportionate and justifiable in order to achieve the ultimate goal? 24

WHERE A SUSPENSION IS UNLIKELY

An area that the 2009 Code does not address is the test result management and sanctioning of cases where a suspension is unlikely to be enforced. Such a scenario can arise in certain circumstances due to the substance involved or the timing of the adverse analytical finding (Teitler and Ram, 2008, p. 44). Despite the inevitable outcome in such cases, they will still have to go through the entire process at a considerable expense. While this may not only have a disproportionate effect on an athlete, it has also been argued that 'many feel that resources should be directed at different areas of the fight against doping' (Teitler and Ram, 2008, p44). Given the limited financial budget of anti-doping organisations, such an argument is of merit in light of the need to catch the 'real' dopers. 25

INCREASED FLEXIBILITY

The 2009 Code has introduced additional criteria for the reduction of a sanction concerning use of a particular substance, which could prevent athletes from reducing their period of ineligibility (Teitler and Ram, 2008, p. 44). The previous Code simply stipulated that the only requirement in reducing the standard two year ineligibility period was for the athlete to prove 'that the use of such a substance was not intended to enhance sport performance.' However, given the loose approach in applying this provision by certain anti-doping bodies (indicating further the difficulty in achieving a universally harmonious application of the Code) the 2009 Code has consequently inserted two further provisions: 26

1. The athlete has to establish how the specified substance entered his body; and
2. The athlete's degree of fault shall be the criteria considered in assessing any reduction of the period of ineligibility.

The purpose of the first provision is to put the onus of proof firmly on the athlete (Article 10.4). This has been further bolstered as the panel are now permitted to infer liability where an athlete fails to attend a doping hearing, or alternatively, refuses to answer questions (Article 3.2.4). While this may seem draconian at first, this is a normal rule of evidence, and consequently anti-doping authorities are within their legal rights to make such an inference based on such omissions. 27

As to the second provision, the intention is to reiterate that each athlete is ultimately responsible for their actions, regardless of their intention. This 'expected standard of behaviour' (Comments to Article 10.4-5) could ultimately be a considerable burden of proof for an athlete to overcome, particularly where they have ingested a particular nutritional supplement on the Prohibited List, or a recreational drug. Where a panel simply has the word of the athlete on which to base his culpability, it is highly unlikely that he would be absolved of any wrongdoing in the absence of corroborating evidence. However, it is ultimately up to athletes to ensure that where they take any supplements that they either contain no prohibited substances, or if eligible, that they have a valid Therapeutic Use Exemption (TUE). Ignorance is no defence, and given the literature now available to athletes (WADA, 2009c), in the interests of sporting fairness such excuses are invalid. 28

With regard to how a specified substance entered an athlete's body, proof is based on a balance of probabilities (Art 3.1). This however leaves considerable discretion to the deciding body as to how this burden of proof is fulfilled (Teitler and Ram, 2008, p. 45). The problem for an athlete in such cases is that if they cannot establish how the substance entered their body, the standard period of ineligibility will be imposed, even if it is a recreational drug or nutritional supplement, unless an athlete can show that there was no significant fault or negligence on their part (Art 10.5). If the panel are unable to find the athlete's story credible, he could potentially receive the maximum four-year sentence under Article 10.6 of the 2009 Code for a first offence. Can such an outcome be justified proportionately on the basis of ensuring fair and equal competition? 29

At first glance, it would seem that such a ban is disproportionate to the doping authorities overall aim of eliminating cheats from competitive sport. However, as outlined above, in light of athletes' responsibilities, and given their place within the public profile, they should know exactly what they ingest at all times given the negative consequences of such actions. Indeed, if such athletes are truly seeking the pursuit of sporting excellence then control over what goes into their system should be foremost in their mind at all times, particularly given the consequences of failing to adhere to the rules. 30

However, if an athlete does meet the required standard of proof, Article 10.4 states that 'the athlete's or other person's degree of fault shall then be the criteria considered in assessing any reduction of the period of ineligibility.' The wording 'any reduction' suggests that the application of this provision will be restrictive. Teitler and Ram (2008, p. 45) note that '[to] combine this with the increase of the maximum ineligibility period in a case of first offence from one to two years...one could wonder whether the position of the athlete has improved all that much.' This somewhat dilutes any advantage to the athlete if they do manage to overturn the burden of proof. So, despite the apparent fairness which the increased flexibility in the 2009 Code suggests, an innocent athlete will still potentially receive a career-threatening suspension (see for example, CAS OG 04/003 *Torri Edwards v IAAF and USATF*, where an athlete received a two-year sanction despite the CAS panel noting 'that she has conducted herself with honesty, integrity and character, and that she has not sought to gain any improper advantage or to 'cheat' in any way'). Given this scenario, it would seem that under the proportionality principle, Article 10.4 would come in for particular scrutiny, and the addition of "any reduction" would seem to put an unfair bias against the athlete having satisfied the burden of proof. Accordingly, it is submitted that Article 10.4, if construed narrowly by the authorities, would go beyond what is necessary in achieving its particular aims. 31

A further problem in enforcing the Code is that national disciplinary bodies have failed to apply the rules in a consistent manner. This inconsistency has ultimately forced WADA to limit the discretion of such bodies in the 2009 Code, particularly by establishing minimum or fixed sanctions, and by adding extra criteria with regard to satisfying the exceptional circumstances requirements. Following *Modahl v British Athletic Federation Ltd* [2001] EWCA Civ 1447, it is unclear if where exactly WADA derive the authority to take such an action. For disciplinary purposes, the athlete contracts with the national association. However, for international events the organisers may be the world governing body. If, as in *Modahl*, there is no presumption of a contract between the athlete and the world body, how does that body have such authority over the actions of the national associations? Does it derive authority from its own rules, and if so in what circumstances can they enforce them (*Wilander v Tobin* (No 2) [1997] 2 Lloyd's Reports 293, *per* Lord Woolf, at 294)? The legal relationship between an athlete and the world governing body's doping rules, which in turn incorporate WADA, are not clearly defined (as evidenced in CAS 2006/A/1190 *WADA v Pakistan Cricket Board & Akhtar & Asif*). Unless the rules are clear and uniform then it is very difficult to ensure consistency in the decisions of national anti-doping bodies. 32

In light of this, if WADA is able to limit the discretion of national anti-doping bodies in such a way this seems like an abuse of their power. In restricting the autonomy of others, they are straying into dubious legal territory. The effect of this is that capable anti-doping adjudicators are put somewhat in a straightjacket in that they are unable to make a decision that accounts for all the relevant circumstances. 33

BREACH OF A SANCTION

Another important issue is whether anti-doping organisations should undertake a role where athletes are penalised for taking part in sporting activities that fall outside of the jurisdiction of such organisations. This in particular relates to Article 10.10.2, a new rule whereby an athlete who violates their period of ineligibility by participating in a competition directly linked to the Olympic movement or WADA Code will have their suspension automatically restarted from the date of that offence (unlike Dwain Chambers whose unsuccessful stints in NFL and Rugby League did not violate his ineligibility period). This is a point of particular legal relevance and certainly appears arbitrary and indeed unenforceable when scrutinised. Marshall and Hale (2008, p. 40) state bleakly that 'there is no 'fairness and equality' ...contrary to the statement of the primary purpose of the Code.' Essentially, the relationship of the athlete through their membership of bodies such as the ATP Tour is based on the establishment of a legally binding contractual relationship (although *Modahl* now makes this a much more restricted proposition). Therefore, it could be argued that this relationship is terminated during their period of ineligibility, and as a result they operate outside the statutory ambit of that organisation (Teitler and Ram, 2008, p. 46). Therefore, they can no longer be subject to their rules. How can a private body sanction an individual who is no longer a member? 34

It is submitted that the notion of further sanctioning an athlete where they have not necessarily breached any rules in the sense of doping or some other violation, is not legally viable. That the new Code fails to find a more proportionate alternative is a genuine criticism, and one that should be reviewed seriously when drafting the next Code. 35

PRIVACY

Despite WADA's best endeavours, questions are being raised about the controversial new 'whereabouts requirement' which will run alongside the missed tests rules. The requirement is provided for in the 2009 Code, and in enforcing such a measure, considerable privacy violations and freedom of movement issues will inevitably arise. This rule contains the onerous requirement of quarterly 'Whereabouts Filing' (Art 2.4) in which a pool of elite athletes in every sport are required to state where they will be for a single hour of every day. Three missed tests in 18 months will lead to an automatic ban of at least a year, drawing the criticism of several leading tennis players, including Rafael Nadal and Andy Murray (Chambers, 10 Feb 2009). Further, it is now the subject of legal challenge to the CAS by two players who have fallen foul of the new requirement, namely Yanina Wickmayer and Xavier Malisse (press release available at <http://www.tas-cas.org/d2wfiles/document/3758/5048/0/2009.11.18%20PR%20Eng.pdf>) The new regime has been at the 36

centre of a row about human rights and privacy, with the European Commission initially warning that the Code breaches data protection rules. Notably however, Sepp Blatter announced that WADA has declared FIFA compliant with the whereabouts rule, despite the FIFA head having been previously opposed to it (Marshall and Hale, 2008, p. 39).

Negotiations have currently stalled between the FA and UK Sport with regards to implementing the 'whereabouts' rule. In contrast, The English FA has also stressed the importance of proportionality in any whereabouts rules, with the PFA Chief executive Gordon Taylor stating 'We don't want to be an exception, but we do want the rules to be proportionate' (Guardian online, 2009a). UK anti-doping authorities had hoped to introduce an elite-player 'testing pool' for every England player in June 2009. Although in principle the bodies agree, they have still not settled on the details. UK Sport, under pressure from WADA, initially demanded that the pool be composed of a 25-man England squad, but has ceded ground, by preparing to accept elite-women players and junior players. The FA however wants a broader base by testing long-term injury victims rather than the top players. Inevitably, the impasse has been reached due to the potential of future litigation, and the FA wants to assurances over a shared liability on costs should it be challenged in the UK courts. 37

The FA, whose response is not dissimilar to FIFA's previous position (Donegan, 2009), seems to want the benefits of being a signatory to the 2009 Code, without the inconvenience of having to obey those rules. Why should football be given special dispensation while other signatories to the Code are not? It has been suggested that this reluctance may be in part because of suspicions that there is a hidden doping problem among professional footballers, which they would prefer to ignore rather than risk opening a can of worms by fully implementing the 'whereabouts requirement.' In any case, this if anything is an incentive to adopt the provision, rather than simply deny the existence of a problem, as other sports such as cycling have previously done. 38

The harshness of this rule is striking, particularly when put in the context of team sports. Many footballers will not know three months in advance their exact movements, depending on various factors such as the success of their team in cup competitions, international call-ups, injuries and transfers. Other individual sports have also expressed unhappiness at the stringency of the rules. One must ask is this a proportionate measure given the onerous and extensive reporting requirements, as well as privacy issues under both national and international law, despite WADA's revision of the whereabouts requirements. 39

To answer this, one must go back to the proportionality principles laid out by the ECJ in *Meca-Medina*. When the privacy rules are analysed, one must remember that these rules are not merely designed to root out cheaters from sport, but also to prevent athletes from suffering economic injustice, then accordingly the justification for enforcing strict privacy rules seems objectively more justifiable than if devised for 'purely sporting' reasons. Therefore in light of Art 102 TFEU, WADA have a strong case to suggest that their restrictions are legitimate in light of the economic damage and injustice which doping can bring about. However, while these attempts to legitimise their regulations must be welcomed, there are still further problems with the issue of privacy. 40

One issue is that where such detailed information is known about the whereabouts of an athlete that this is of some concern. Given that Ian Thorpe's confidentiality was breached by WADA-affiliated organisations, it has led to questions as to whether WADA can be trusted to keep that information confidential (Marshall and Hale, 2008, p. 39). Therefore, to require an athlete to consent to information being shared as a future condition is particularly harsh (Para E.23(c) before Art 1), especially when there are no express provisions in place to punish those who leak such information. This seems particularly hypocritical where athletes are punished for breaches, yet WADA officials are not. Due to this potential clash with national and international privacy law, anti-doping organisations have now started to realise the risks of publicising highly sensitive and personal data (Teitler and Ram, 2008, p. 47). In response to this disregard of such a basic human right, WADA have introduced a new International Standard on the protection of athlete's data in an attempt to reflect EU standards (Directive 95/46/EC of EU and of the Council on the protection of individuals with regard to processing of personal data and on the movement of such data). Already, 65 athletes who argue the rule 41

violates EU privacy laws have also initiated a legal challenge in Belgium.

Marshall and Hale (2008, p. 39) suggest that there are more proportionate methods of testing an athlete without forcing them to comply with such onerous requirements e.g. a test on a half-hour's notice by telephone. Further, they suggest that WADA should publish more material on the conduct and success of these tests in order for transparency, or otherwise 'accept its onerous requirements are not justifiable.' The new amendments came into effect on 1 June 2009. The standard is billed by WADA as a one-year trial. These include ensuring that not only participants themselves are protected more fully, but that other persons to whom the information may relate are also protected (WADA 2009c). It also states that national laws will prevail in cases where there may be a privacy violation due to the carrying out of a 'whereabouts' test (Art 4.1) Further, an athlete's name cannot be announced unless it complies with applicable privacy laws (Art 7.1), and athletes must be notified without unnecessary delay (Art 7.2). Further, athletes must not have their information retained any longer than is completely necessary (Art 10.1), and are granted an increased right to request information held on them from the relevant anti-doping organisation (Art 11.2). While this may alleviate some of the initial fears, it remains to be seen if it will operate successfully in practice, and more importantly whether it meets the required standards of EU and national privacy laws. 42

THE OPEN LIST

On close scrutiny, the WADA list extends prohibited substances in certain instances to those 'with (a) similar chemical structure or similar biological effects(s).' The principle behind this is to 'provide a safety net against those who try to beat the system by developing new performance enhancing substances or methods, and new masking agents' (Teitler and Ram, 2008, p. 47). While there is scientific logic behind the inclusion of such a clause, one must ask whether an athlete can be held accountable for ingesting a substance which is not explicitly mentioned on the Prohibited List, and to the best of their knowledge (and indeed their national organisation) they could not possibly have known with any certainty whether such a substance was prohibited by WADA. 43

In the context of professional sport, where the financial stakes are so high, it is imperative to have an acceptable degree of certainty in WADA's provisions if they are to be enforceable under any just disciplinary system. It is arguable to say that for an athlete to have been found to have violated the WADA Code for a substance that is specifically omitted from the List, goes against the basic principles of due process and human rights, both nationally and internationally. 44

Once again, the apparent harshness of this provision must be viewed in light of the legitimate aim of sport in eradicating doping from competition. As the retrospective tests from the Beijing Olympics and the 2008 Tour de France proved, the science of doping moves faster than the testers, allowing for athletes to use derivatives of known drugs that have not yet been detected or listed on the Prohibited List, notably CERA (Continuous Erythropoiesis Receptor Activator), which was developed from the prohibited performance enhancing drug EPO (Erythropoietin). Athletes have a duty not to be negligent with regard to what substances enter their body, but this must be counter-balanced with a proportionate rule which does not unduly punish them for committing a violation where they had no reason to believe that they were undertaking such an action. To enforce such a high burden of proof where, strictly speaking, an athlete has not ingested a substance expressly mentioned within the extensive list provided for by considerable scientific research, must be exercised with due caution so that those unwitting athletes who do make honest mistakes (albeit very few), are not punished. In other words, it must be enforced in keeping with the principles of proportionality laid down in *Meca-Medina* and *MOTOE*. 45

One exception to this may be in the case where an athlete specifically looks for substances that provide performance-enhancing qualities but as yet are not mentioned on the List. However, proving intention in such an instance is once again difficult from an evidential perspective, hence the use of reversed burden of proof on the athlete. While this illustrates the difficulties once again that doping authorities face from deceitful and calculating athletes who unfortunately exist, to burden all other athletes as a result is difficult to justify legally under basic human rights principles. Teitler and Ram (2008, p. 47) make three 46

recommendations in order to provide greater legal certainty and protection for athletes:

1. More clarity and transparency regarding the designation of a substance as 'related';
2. Increased and better communication for athletes and anti-doping organisations about these substances;
3. A more exhaustive list of such substances provided for by WADA.

Further inconsistency in the future looks likely to arise from the fact that many International Federations (IFs) have not incorporated Article 15.4.1, which provides for such organisations to respect the decisions of other signatories. This means that the goal of harmonisation is further hampered by the clear omission by some authorities not to respect the decisions of other bodies. Further, WADA seems to have conceded in the new Code that TUEs have been left the IFs to have unfettered discretion in setting out the requirements for TUE applications, and are not covered by Article 15.4.1. For WADA to take this step is a considerable backward step in their goal of harmonisation. 47

PROVISIONAL SUSPENSION AFTER A POSITIVE FINDING IN THE ATHLETE'S 'A' SAMPLE

The new Article 7.5.1 provides for the provisional suspension of an athlete upon obtaining a positive result for a Prohibited Substance in their 'A' Sample. Again this is of dubious legality. Why must an athlete be prevented from competing where they have not conclusively been shown to have committed a doping offence? If the B sample is also positive, then any results in-competition that they achieve can be wiped retrospectively. If the B sample comes back negative, then this will justify the fact that they should be innocent until proven guilty. By imposing a burden that is even higher than the criminal standard adopted in most countries, it must surely be questionable whether this provision is proportionate. 48

This again mirrors the scenario with ingesting drugs not on the Prohibited List and the responsibility of athletes not to ingest anything that could potentially contain banned substances. Under the ECJ's proportionality principles under *Meca-Medina* and *MOTOE*, this would in all likelihood be deemed compatible with the relevant Treaty provisions due to the necessity to eradicate doping. However, the inherent unfairness on an athlete could be reduced if appeal processes and testing procedures could be made more efficient to allow their period of provisional suspension to be reduced, and therefore making any interim ban more proportionate. One need only look at the lengthy legal developments of the Floyd Landis doping case to see the need for such appeals to be made more quickly (*CAS 2007/A/1394 Floyd Landis v. USADA*). Athletic careers are brief, so provisional suspensions must be minimised to reflect any injustice. 49

NEW DEFINITION OF "SPECIFIED SUBSTANCES"

The 2009 Code provides for two types of sanctions for using prohibited substances. First, there is the basic period of ineligibility from competition (Art 10.2); second, there is a reduction in the sanction where the substance concerned comes under the 'specified substances' list (Art 10.3). If an athlete can show that they did not intend to enhance their performance, accordingly they may receive a reduced sanction. However failure to prove the absence of any such intention will result in the original period of ineligibility being enforced. Notably the 2009 Code significantly widens the scope of what constitutes a 'specified substance' (Celli et al, 2008, p. 36). Essentially, the use of all substances on the list, with the exception of anabolic agents, certain hormones and stimulants (Art 4.4.2), could technically provide for a reduced sanction in the right circumstances, providing much more scope for athletes to challenge any such sanction. However, athletes must now satisfy additional criteria in order to be eligible for a reduced sanction (Art 10.4). So, whilst initially seeming to favour the athlete, in reality the evidential burden now placed upon them may be so onerous as to negate any benefit derived from the increased number of specified substances provided on the Prohibited List. Accordingly, it is likely that there will be more challenges made by athletes to have their sanction reduced, with a corresponding drop in the percentage of cases where that athlete successfully satisfies the new criteria. Therefore, while allowing for increased flexibility in sanctioning, the proportionality of this new provision is again questionable. 50

INCREASED POSSIBILITY OF REDUCED SENTENCE UNDER 'NO FAULT OR NEGLIGENCE PROVISION'

Similar to the previous Code, the 2009 Code also allows for athletes to have their sentence 51 reduced either in part, or completely if they can prove that either they have demonstrated no fault or negligence (Art 10.5.1), or no significant fault of negligence (Art 10.5.2). However, while the list of circumstances was limited previously, the 2009 Code can be applied to any anti-doping violation. Again however, while there is more scope theoretically for being eligible for a reduced sanction, in reality, where the offences committed are trafficking or attempted trafficking, the intention is an element of the violation itself (Celli et al, 2008, p. 38). Therefore proving fault or negligence in such circumstances is unlikely. Consequently, the perception of an improved system for athletes is off-set by the higher evidential threshold they must now satisfy.

INCENTIVES TO COME FORWARD

The 2009 Code, in a further effort to foster a spirit of openness and transparency to doping in 52 sport, has now bolstered the incentives for athletes to come forward to admit to doping or the knowledge of doping, with the incentive being a reduced sanction. First, a new provision allows for an athlete to voluntarily come forward and admit to doping in the absence of a positive test, making them eligible for up to a 50% reduction in their sanction (Art 10.5.4). Unfortunately cynics would argue that athletes would only admit such liability if they knew they were highly likely to be caught, and is therefore an escape route of sorts by enabling athletes to get a reduced sanction in such circumstances.

Secondly, the 2009 Code now extends the reduction in suspension to three-quarters (from 53 one-half previously) of an ineligibility period where the athlete co-operates with doping authorities and national criminal organisations in helping to provide evidence of anti-doping violations. This also has been extended now to apply to all violations.

Thirdly, the 2009 Code introduces another rule that allows athletes to have their sanction 54 reduced to one-quarter of the original suspension (Art 10.5.5), where they can prove that they are entitled to such a reduction in more than one provision in Article 10. This is obviously a welcome bonus for athletes in such circumstances. Fourthly, the 2009 Code also provides a host of justifications for starting the suspension earlier than the date of the decision, as was the case previously (Celli et al, 2008, p39). This includes where there are delays not attributable to the athlete (Art 10.9.1), early admission of the anti-doping violation (Art 10.9.2) and provisional suspension (Arts 10.9.3-5).

These measures give hope to those deemed to have committed anti-doping violations that 55 there is a reasonable chance that their ineligible period could be substantially reduced. This is particularly the case where there is an early admission of the doping violation, whereby they would not only reduce their ineligible period but also prevent the continuation of a lengthy legal battle with the anti-doping authorities.

GREATER FLEXIBILITY OF SANCTIONS WHERE MULTIPLE VIOLATIONS OCCUR

The 2009 Code now provides for greater flexibility in sanctioning athletes who have 56 committed multiple anti-doping violations. Article 10.7.1 provides a table that outlines the sanctions to be imposed for a combination of various different violations. Further, the range of sanctions has been increased significantly (Art 10.7), and has introduced variable sanctions as opposed to the fixed sentence of life ineligibility (although the minimum punishment of eight years would in most cases have the same effect). With regard to specified substance offences, the two year fixed sentence can now vary between one and four years (Art 10.7.1). Further, Article 10.7 adds further that both offences must occur within the same eight-year period in order to be deemed multiple violations (Art 10.7.5).

The overall effect of these new provisions allows for anti-doping bodies to reduce or increase 57 sanctions in the appropriate circumstances. In theory, athletes should welcome this. However, just how many athletes are afforded reduced sanctions in practice cannot be determined until such cases arise and are dealt with by these bodies.

INTRODUCTION OF AGGRAVATING CIRCUMSTANCES THAT COULD INCREASE INELIGIBILITY PERIOD

Article 10.6 introduces the possibility of imposing an increased ban where aggravating 58

circumstances exist, outside those already provided in Article 2.7-8 of the previous Code, by including trafficking and administration to another person. An exhaustive list is not set out as to what constitutes aggravating circumstances, with instead a list of examples set out in the comment to Article 10.6.

Despite support that the 'aggravating circumstances' provision is sufficiently defined 59 (Kaufman-Kohler and Rigozzi, 2007, p. 50), it is likely (as in the case of 'related substances') that athletes will contest findings of aggravated circumstances on the basis that it is insufficiently defined to be enforceable in law (Celli, Velloni, Pentsov, 2008, p49). Where there is 'a thicket of mutually qualifying or even contradictory rules' (Celli et al, 2008, p. 49) anti-doping authorities should not be allowed to simply extend an athlete's ban based on 'aggravating circumstances' which would most likely be held to violate an athlete's right to due process and fair disciplinary procedures. Given the effects of such an action, one must ask whether anti-doping bodies are acting ultra vires in enforcing such draconian sanctions.

Particularly interesting is the Legal Opinion provided on WADA's website regarding whether 60 Article 10.6 is compatible with the fundamental rights of athletes (Kaufman-Kohler and Rigozzi 2007). It seems somewhat convenient that their report finds no reason why this provision does not comply with proportionality principles regarding athletes' rights. It also finds that it is indeed sufficiently defined to be considered as legally enforceable (Kaufman and Rigozzi, 2007, p. 49). It is not without some merit however, noting that should a lower adjudicating body apply any anti-doping regulations in a way that is inconsistent with the athletes' fundamental rights, that athlete would expect CAS to restore fairness on appeal. Indeed, there may be circumstances where an increase of a sanction is clearly appropriate (such as the Michelle Collins case, at USADA v. Collins, AAA No. 30 190 00658 04, Award of 9 December 2004) where they have blatantly tried to defraud the sport.

The opinion concludes that Article 10.6 complies with the fundamental rights of athletes. They 61 state that 'a more lenient sanction for a first offence is likely to seriously jeopardize the effectiveness of the fight against doping' (Kaufman and Rigozzi, 2007, p. 45). However, even this is qualified due to the fact that 'a four-year ban would most often put an end to an athlete's (high level) career and thus be tantamount to a life ban. Therefore, an aggravated first offence could de facto be punished as harshly as numerous second offences (Article 10.7.1) and almost all third offences (Article 10.7.3).'

TEAM SANCTIONS

Finally, the 2009 Code introduces new measures regarding the sanctioning of teams where 62 two or more of their members commit doping offences. Under the previous Code, it was not mandatory to sanction a team where only one athlete committed an offence, but was a discretionary option. The 2009 Code now makes the imposition of sanctions mandatory when two athletes commit an offence under Article 11.2. Again, while the threshold has been raised, the automatic nature of the sanction would seem to underline the potential harshness of the new provision. To punish all the team members due to the violations of another team member seems disproportionate in that they are being punished for the mistakes of others, with their only crime seemingly that they are members of the same team. Again, such a provision appears to be unenforceable in reality. Such logic seems legally dubious, and as has been illustrated recently by the frequent and notorious doping scandals within professional cycling, such sanctions enforced against teams have far-reaching economic and sporting consequences that have been the subject of considerable legal action.

CONCLUSION

With athletes' health often taking second place to their desire for success, it is understandable 63 that sports authorities such as WADA feel that they must implement anti-doping rules that adequately reflect the severity of the problem with which they are faced. What is not understandable is that in enacting and applying those rules, why they have continually failed to respect the personal rights of athletes accordingly. Practically all sporting individuals accept that in order to effectively tackle doping, they may occasionally have to sacrifice some of their personal privileges to an extent, in order to help catch the cheaters. However, the key phrase is 'to an extent' - to what extent does a limitation on one's personal rights become more than simply a doping deterrent, but actually crosses the line from being a necessary action in pursuit of a legitimate aim to that of a measure which disproportionately infringes

one's rights?

Whatever conclusion is reached on the effects of the new provisions, it cannot be doubted 64 that it will further incentivise athletes to adhere to competing without drugs, and ultimately further the goal of drug-free competitive sport. While satisfying all major stakeholders was always likely to be difficult, for example FIFA, the increased flexibility is to be welcomed, so long as this flexibility is applied in practice in a fair and consistent manner that does not disproportionately disadvantage the athlete in question. Indeed doping disputes between national doping authorities and WADA occur all too often.

While the WADA Code, like any regulatory system, cannot be perfect, it must be assessed 65 whether the current arrangement has achieved an acceptable balance between protecting the rights of athletes, while ensuring that the fight against doping is still maintained. A central problem is simply that the complexity and impracticality of some of WADA's rules in certain circumstances may be almost impossible to comply with, particularly the 'Whereabouts Requirement.' As has been mooted, athletes are now just as likely to be punished for taking prohibited substances as they are for being bad at paperwork (Marshall and Hale, 2008, p. 42). There must surely be a better way of preventing innocent athletes being sanctioned for such seemingly trivial and non-sporting violations, while still being able to catch and punish those who do cheat. While the need to eradicate drugs in sport is imperative in order to enhance competitive sport, it must not come at any cost – it must always be proportionate. Indeed one author sums up the disproportionate and bureaucratic nature of the 2009 Code:

That morally innocent athletes have been caught by this system is an undeniable fact. That morally innocent athletes will continue to be caught by this system seems inevitable. What is also clear is that more cheats will be caught as a result of the new Code. That is provided that not too much time, effort and expense is wasted on checking how well athletes fill in forms and chasing down athletes for substances that many astute medical advisors believe should not be on the list (Marshall and Hale, 2008, p. 42).

This assessment outlines a blunt but accurate view of the current situation. While providing 66 for increased flexibility and prima facie, fairness, the reality is that unless the new provisions are interpreted in a manner that properly takes into account the potential injustices to an athlete who has not tried to cheat, then those provisions will fail the proportionality test. Despite this, it is naive to think that all those who challenge their doping allegations are innocent and have merely erred. By and large, they are cheats. Given the economic implications in such a lucrative industry, their actions are not just morally abhorrent, but defraud other athletes financially by denying them the opportunity to earn potential multi-million pound fortunes by preventing them from succeeding. Even if they have not intentionally tried to cheat, they bear a responsibility as role models and as figures in the public spotlight to act to a higher standard to ensure they do not take any risks that would allow them to fall foul of the Code.

Despite the undoubted problems of doping within sport, as the above analysis has outlined, 67 the 2009 WADA Code has failed to make their rules consistently comply with the basic principle of proportionality. The 'whereabouts' rules, the team sanction rules and the provisional suspension for a positive 'A' sample are almost certainly disproportionate in their current format, even under Meca-Medinaprinciples. The presumption that innocent athletes are guilty until proven innocent and that this is an unfortunate but acceptable consequence is unacceptable, even if sadly the vast majority of athletes accused of doping are guilty. However, the new Code cannot operate on the basis that individual injustice is necessary for the greater good of sport. Such a position is legally untenable and wholly opposed to the principles of natural justice and fairness. The new Code actually makes the situation worse as it provides for many more subjective judgements to be made concerning the length of any suspension period or whether suspension should take place at all. Indeed, the new rules in practice may operate in a materially similar manner to previous CAS rulings, rendering any changes as insignificant in reality. It replaces a degree of certainty with doubt and inconsistency. While this exists, the ultimate goal of harmonising anti-doping rules shall only be impeded and allow doping cheats to take advantage where possible. Above all else, that would be the last thing that sport needs.

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