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Germany's anti-doping legislation

As the first few practical cases have been established relating to Germany's anti-doping legislation, Simon Karlin, Associate Counsel at Lentze Stopper Rechtsanwälte, explains the measures provided in Germany's anti-doping legislation, the potential legal issues, the possible impact on the relationship between criminal proceedings and sports jurisdiction and assesses whether Germany's anti-doping legislation may solve the hidden doping problem¹.

A recent survey on doping in international sport reveals that doping in international and German football is evident - though not yet publicly. The study anonymously asked 150 football players for their doping/drug consumption, which resulted in the finding that up to 35% of German professional football players could have doped². At the end of 2015, Germany became the latest country in Europe to implement specific anti-doping legislation making doping in sport a criminal offence. The relevant question at stake is whether criminal law is a suitable measure to fight doping³? And what are the potential implications on the relationship between criminal proceedings and sports jurisdiction?

New criminal provisions on anti-doping

The new anti-doping law in Germany came into force on 18 December 2015⁴. Before the implementation of the anti-doping law, athletes could not have been sentenced for 'self-doping' by applying Germany's existing medication law. However, according to Section 4 of the anti-doping law, doping is now a criminal offence and three year prison terms are to be considered and/or fines which the law primarily pronounces for top athletes, coaches, officials and doctors for using or possessing forbidden performance enhancing substances. Foreign athletes caught doping in Germany also risk imprisonment. In 'serious cases' such as underage doping or devised team doping, prison sentences of up to 10 years are now possible. The relevant innovation within the anti-doping law is the prohibition of the consumption of performance enhancing drugs, meaning the criminalisation of 'self-doping' pursuant to Section 3 of the anti-doping law. Nevertheless, only professional

athletes are open to investigation and punishment for doping pursuant to Section 4 para 6 of the anti-doping law. Amateurs and mass sport are excluded, as well as 'therapeutic use' of prohibited substances.

First cases

On the basis of the anti-doping law only a few practical cases have been established and prosecuted so far. Two athletes from the German wrestling club ASV Nendingen have been prosecuted by the competent state attorney following accusations of self-doping⁵. The investigations have closed and a penalty order has been issued in both cases. The penalty orders have been disputed by the athletes, which means that an oral hearing will occur in court in the near future. These cases are not final so the first results of criminal proceedings on the basis of the anti-doping law are still to come.

Legal implications

The law has not been spared from criticism from the academic field⁶ and from sport itself⁷. Critics say that the goal of clean sport will not be reached with the law and that the legal problems raised are not settled yet.

Substantive criminal law implications

According to Section 1 of the anti-doping law the goal is the protection of athletes' health, equal opportunities in sport and integrity. The question is whether these goals are suitable as an object of legal (criminal) protection. From a criminal law perspective paraphrasing pure legal objectives might not constitute an object of legal protection in general itself. Criminal law is always meant to be the *ultima ratio* to regulate a certain issue.

In this context the integrity of sport might be an ideal but might not constitute an object of legal protection (the same could be said about the goal to protect equal opportunities in sport)⁸. The integrity of sport is not even constitutionally guaranteed in Germany. The fact that the integrity of sport might be of social interest does not justify that it being an object of legal protection. The intended field of protection is too broad and unspecific. Why not protect other fields, e.g. the integrity of art or music? What kind of sport shall be captured by the anti-doping law, should e-sports for example?

As to the protection of athletes' health it is widely disputed whether the goal is compatible with the constitutionally guaranteed right for personal development (pursuant to Article 2 para. 1 of the German Constitution) including the right, *inter alia*, to decide whether to harm the person's own health or not. This may include in general consuming doping⁹.

Criminal procedure vs sports jurisdiction

The principle of *nemo tenetur se ipsum accusare*

The introduction of the criminalisation of self-doping raises the issue of the principle of *nemo tenetur se ipsum accusare* which is elementary in criminal proceedings (incorporated in Section 136 para. 1 of the German Code of Criminal Procedure). According to this principle, the accused person/athlete may not be forced to support their criminal prosecution actively and therefore have the right not to testify. This principle does not exist in general within sports law. Athletes regularly agree to submit themselves under the relevant sports jurisdiction

and the doping controls by WADA and NADA to processes that require testimony by signing the respective athlete agreement leading to a factual pressure to testify. As long as the results of the doping controls are transmitted to the state prosecutors to be used in criminal proceedings the athlete will be forced to actively support investigations against them. Since the submission under the relevant sports jurisdiction is basically voluntarily¹⁰ the use and/or consideration of doping results in criminal proceedings is unlawful and the resulting factual pressure may be inadmissible as evidence in the criminal proceedings.

The standard and burden of proof

First of all, the required 'standard of proof' in both systems differs fundamentally. Criminal procedural rules require a proof of 'beyond reasonable doubt' to find someone guilty. On the contrary, athletes can be sentenced with a ban on participating in competitions if there are 'indications' or 'indirect reasoning' is determined (e.g. abnormal blood test results). As such, the standard of proof within sports jurisdiction is a reversal of the burden of proof.

Secondly, the 'burden of proof' is different in both systems as well. In criminal proceedings the principle of *in dubio pro reo* applies, meaning the accused athlete has to be acquitted if not proven guilty. Whereas within the jurisdiction of sport the principle of 'strict liability'¹¹ is regularly applied meaning that intent, negligence and guilt do not have to be proven¹². This constitutes a burden of proof for the athlete releasing the respective sports federation from the proof of fault. This leads to a reversal of the burden of proof. The athlete will be forced to demonstrate that the positive doping test is not based on the consumption of doping. Furthermore, the existence of a positive doping test might not be used in a criminal proceeding against an athlete. Such reversal of the burden of proof or the presumption against the athlete is unknown to German criminal proceedings which could lead to a potential conflict with sports jurisdiction in doping cases. A lowering of the standard of proof in favour of sports jurisdiction could only be justified by the fact that sports federations do not have the authority to investigate a case.

Diverging decisions

Another issue arising out of the anti-doping law - providing legal acknowledgement

for the institution of sports jurisdiction in Germany through Section 11¹³ - is the relation and coexistence of sports jurisdiction and criminal proceedings. In general, the coexistence of sports jurisdiction and criminal proceedings may lead to diverging decisions, even criminal proceedings in doping are intended to be an amendment of the existing sports jurisdiction. In the event that an accused athlete is acquitted by a court with sports jurisdiction but found guilty by a criminal court, competitors could challenge the results of the competition. Vice versa, an athlete convicted by a court with sports jurisdiction and banned from competition and later acquitted by a criminal court could claim compensation from the sports federation for the competition ban.

Instead of the intended harmonisation of both systems in light of the issues there could be a collision of the two systems instead of unanimous proceedings. Nevertheless, Section 8 of the anti-doping law could be an appropriate measure to avoid a collision between the decisions of the two systems. An exchange of information between the criminal courts, state attorneys and the NADA could enable courts with sports jurisdiction to base their decisions on investigations carried out by the state authorities in order to align the judgments¹⁴. But the competent body with sports jurisdiction would be forced to suspend proceedings until the end of the criminal proceedings. This would give potential dopers the ability to participate in competitions as long as no decision is found and criminal proceedings are not final. It is doubtful whether weakening the jurisdiction of sport will achieve the goal of protecting the integrity of sport and the trust of people in 'clean' sport.

The prohibition of double jeopardy

Nevertheless, once could argue that two diverging decisions could lead to double jeopardy for the athlete. The principle on the prohibition of double jeopardy in criminal cases is stipulated in Article 103 para. 3 of the German constitution (*ne bis in idem*). But the character of the sanctions of both systems are different in this respect, since the sports jurisdiction judgment has private law character (association law guarantees sports' autonomy) and the criminal proceeding is of course of criminal sanctioning character. Though the principle prohibiting double jeopardy only applies to two sentences with criminal character,

a potential conflict with the principle of *ne bis in idem* is most likely not at stake.

Conclusion

Numerous legal issues in connection with the anti-doping law are still at stake and have not been solved by the German legislator. As described, criminal law is not meant to be a suitable measure to fight anti-doping since, *inter alia*, many potential issues between criminal proceedings and sports jurisdiction are likely to arise. Nevertheless, it is the duty of the sports federations and the sports jurisdiction to legally and actually 'fight' doping by its own means rather than the legislator's task. But in order to properly perform this task the stakeholders of the anti-doping system are requested to adequately empower and fund the anti-doping system¹⁵

1. The article is an extract from a speech given by the author on the '1. International Congress on International Criminal Law' at the Universidad Libre from 15 - 17 March 2017 in Bogota.
2. Study of Lotfi El Bousidi, former professional football player, available at <http://www.sueddeutsche.de/sport/doping-im-fussball-der-fussball-hat-definitiv-ein-dopingproblem-1.3434850>
3. The German professor of Criminal Law Prof. Dr. mult. h.c. Claus Roxin answered the question: "It is most likely that the German Criminal law is not suitable as a means to solve the doping problem," see Roxin, Criminal Law and Doping Strafrecht und Doping, in commemorative publication for Prof. Samson, 2010, page 448.
4. For the legislative process of the Bill see Stopper/Karlin in World Sports Advocate, formerly World Sports Law Report, Volume 12, Issue 12.
5. <http://www.spiegel.de/sport/sonst/verdacht-auf-doping-der-ringer-vom-asv-nendungen-ausgeweitet-a-1082445.html>
6. Bundestag document, 18 (5), 109, available at: <https://www.bundestag.de/blob/377972/0160cceb71d52f7b03e7514d9a6cb4a/stellungnahme-dr-b-data.pdf>
7. https://www.dosb.de/de/leistungssport/antidoping/news/detail/news/dosb_statement_zu_koalitionsverhandlungen_anti_doping/
8. See reference Lehner/Nolte/Putzke, Handbook on Doping, 1. Ed. 2017, page 35, para. 50 following.
9. See reference Lehner/Nolte/Putzke, Handbook on Doping, 1. Ed. 2017, page 35, para. 71 following.
10. German Federal Court, Judgment KZR 6/15 of 7 June 2016 (available in German).
11. For further instruction see Schmidt, in Handbook on 'Football Law', Stopper/Lentze, 1. Ed. 2012, Chapter 19, para. 47.
12. According to Sec. 2.1 of the NADA Code.
13. For this aspect see Graf v. Westphalen in Sports and Law (SpuRt), Volume 2015, Issue 6.
14. For more on data protection see Stopper/Karlin in World Sports Advocate, formerly World Sports Law Report, Volume 12, Issue 12. For the Dutch situation see also Dijk van de Beek, in World Sports Advocate 2017, Volume 15 Issue 3.
15. See Richard W. Pound QC, Founding Chairman of the World Anti-Doping Agency in World Sports Advocate, Volume 15 Issue 3.