

German Bill to make doping a criminal offence

Germany is the latest country in Europe set to introduce specific anti-doping legislation. The German government has presented an anti-doping Bill which makes doping in sport a criminal offence, seeking the 'criminalisation of self-doping of athletes.' Martin Stopper and Simon Karlin from Lentze Stopper Rechtsanwälte, explain the measures provided in detail and examine potential legal issues, as well as the potential impact on German sports law - in particular the relation of arbitrational sports jurisdiction and State jurisdiction.

Content of the Bill on anti-doping

On 12 November 2014, the German Minister of Justice, along with the German Minister of the Interior, revealed a Bill for a new German anti-doping law¹. This legal project would allow Germany to follow other nations already fighting against doping in sport through legislative acts, such as France (since 1965), Italy and Spain.

In the past, athletes could not be punished via Germany's existing medication law. However, according to Sec. 4 of the draft law against doping in sport ('the Bill'), doping is a criminal offence and three-year prison terms are to be considered in 'very serious cases' - or fines, which the Bill 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 particularly 'bad cases,' such as underage doping or devised team doping, prison sentences of up to 10 years are possible.



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Putting drugs intended for use in doping in sport into circulation has already been criminalised, i.e. prescribing them or applying them to other persons, as foreseen in Sec. 6a and Sec. 95 of the German Pharmaceuticals Act. The relevant innovation within this new regulation is the prohibition of the consumption of performance-enhancing drugs, meaning self-doping. Hence, self-doping of athletes will be criminalised.

But under the new regulations of the Bill, only athletes 'earning a significant amount from sport,' receiving 'public funding or employed in public service,' 'members of national team or corresponding cadre' are open to investigation and punishment for doping². Amateurs and mass sport are excluded, as well as 'therapeutic use' of prohibited substances. The law targets 7,000 athletes from the testing pool of the German Anti-Doping Agency (NADA), as well as foreign athletes competing at events in Germany.

Potential legal issues

As usual, the Bill is not spared from criticism. In particular, critics say that the goal of clean sport will not be reached and legal problems - such as data protection or the relationship with sport's unique jurisdiction, as compared to ordinary State jurisdiction - are not settled yet.

Data protection

Data privacy activists complain that the Bill would constitute a disproportionate and unacceptable interference with fundamental rights. According to the guidelines of the World Anti-Doping Agency (WADA), top athletes have to file detailed reports on where they live and practice on a day-to-day basis. The Bill seeks to introduce a legal basis permitting the NADA to collect, process and use the

personal data of the athletes (see Sec. 9 of the Bill). The current legal situation in Germany with respect to data protection is dominated by a strict prohibition for collecting, processing and using personal data under the German Data Protection Act (BDSG) without the written prior consent of the affected individual (Sec. 4 a BDSG). The new regulations would constitute a severe interference with fundamental rights, such as a person's right to informational self-determination. But in the end, after a careful assessment, this interference could be justified by the proportionality of the law - the achievement of the social objective of a cleaner sport that is seen as having integrity.

Sport's jurisdiction

Another subject arising out of the planned anti-doping law is the question of the relation and coexistence of sports jurisdiction and ordinary State jurisdiction. The question at stake is: Is the coexistence of criminal and civil sanctions, along with sport's own regulations within its jurisdiction to govern itself without outside interference possible, or will these two systems slow each other down and become ineffective?

The basic idea of sport's jurisdiction is its strict independence from the ordinary State jurisdiction and that, in principle, decisions of courts within sport's jurisdiction cannot be appealed to State courts. Sport's jurisdiction has its own national and international rules, and so each sporting federation is entitled to define its own regulations within sport's jurisdiction.

The foreseen Sec. 11 of the Bill expressly provides legal protection and acknowledgement for the institution of sport's jurisdiction in Germany. This proclamation is as new as it is

unique. This statement is even more surprising considering the recent decision of the Regional Court of Munich¹ in the case of the German speed skater Claudia Pechstein versus the International Skating Union (ISU) and its German member association, Deutsche Eisschnelllauf-Gemeinschaft (DESG). The Court found the arbitration clause contained in the athletes' agreement between Pechstein and the federation to be invalid, due to a structural monopolistic imbalance existing between Pechstein and the sport federations (commonly ISU and DESG). According to the court's verdict, Pechstein did not enter into the agreement voluntarily, but only because she had no choice.

The outcome of the case, if confirmed upon appeal by the Higher Regional Court of Munich, is meant to have a significant impact on sport's jurisdiction in Germany. An unsuccessful appeal could weaken German sport federations and the system of sporting jurisdiction as a whole, being independent from ordinary State jurisdiction until the present day.

But the foreseen Sec. 11 of the Bill explicitly acknowledges the system of sports jurisdiction and its principle independence from ordinary State jurisdiction. This is a clear statement in favour of sports jurisdiction, strengthening German sport federations and the system of sports jurisdictions in Germany. Nevertheless, a coexistence of both systems bears potential risks.

● First of all, the required 'standard of proof' in both systems is different. Criminal procedural rules require a proof of the malpractice to find an accused person guilty. Athletes within the proceedings of a sport's jurisdiction can already be

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sentenced with a ban on participating in competitions if 'indications' or an 'indirect reasoning' are determined. In the end, this standard of proof within the proceedings of sports jurisdiction means a reversal of the burden of proof. But such reversal of the burden of proof is unknown to the German criminal jurisdiction. A lowering of the standard of proof in favour of sports jurisdiction could, in particular, be justified by the fact that sports federations do not have institutions which have the authority to investigate a case with the same means as the criminal jurisdiction.

● Secondly, the coexistence of sports jurisdiction and ordinary State jurisdiction could lead to diverging decisions. In the event that an accused athlete is acquitted by a court of sport's jurisdiction but found guilty by a criminal court, competitors could challenge the results of the competition a long time after the competition due to long term criminal proceedings. Vice versa, an athlete convicted by a court of sport's jurisdiction and banned from competitions and later acquitted by a criminal court could claim compensation from the sporting federation. This could lead to a collision of the two systems instead of unanimous proceedings. The foreseen Sec. 8 of the Bill could be an appropriate measure to avoid a collision of decisions as mentioned. Hence, an exchange of personal data information between state authorities and NADA should enable sports jurisdiction to base their decisions on investigations gained by state authorities.

Therefore, the body within sport's jurisdiction would be forced to suspend proceedings until the end of criminal proceedings. But this would give potential dopers the ability to participate in

competitions as long as no sports jurisdiction decision was found. This would turn sporting jurisdiction into a 'lame duck.' It might be doubtful whether a weakened sports jurisdiction can reach the goal of protection of the integrity of the sport.

Nevertheless, there is still a chance for a coexistence of sports jurisdiction and ordinary State jurisdiction. This becomes greater with respect to further potential changes to the Bill within the legislative process.

Legislative process

The Bill has just been introduced into the legislative process. Next steps will be three hearings at the Parliament with further expert hearings within the Parliament's sports committee. The Bill is expected to go to the cabinet for approval in April 2015, and could be passed in early summer 2015 after being presented in the German Parliament.

Conclusion

After all, data protection and the relation of sports jurisdiction to ordinary State jurisdiction will be the relevant legal issues most likely occurring in the further public discussion and should be settled within the legislative process. This landmark piece of specific anti-doping legislation could also boost any bid from a German city to host future Olympic Games in 2024 or 2026.

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1. <http://bit.ly/1F9s5bM>
2. See Sec. 4 para. 6 of the Bill.
3. <http://bit.ly/1w0lga>