

Legal aspects – fairness, fault and football

Doping control in football

In 1970, FIFA was among the first international sports federations to introduce an anti-doping programme in 1970. The fundamental aims as stipulated in the FIFA Doping Control Regulations (2006) are quite similar to the purpose of the World Anti-Doping Code Programme.

Definitions

The word “doping” is probably derived from the old Dutch word ‘*dop*’, the name of an alcoholic beverage made of grape skins used by Zulu warriors in order to enhance their prowess in battle. The term originally referred to the drugging of racehorses and came into mainstream use in the early 20th century.

According to the definition of doping in the World Anti Doping Code, doping is defined as the occurrence of one or more of the following violations:

- The presence of a prohibited substance, its metabolites or its markers in an athlete’s bodily specimen (strict liability rule)
- Possession by an athlete at any time or place of a substance that is prohibited in out-of-competition testing or a prohibited method, unless the athlete establishes that possession is pursuant to a therapeutic use exemption granted in accordance with the FIFA Doping Control Regulations regarding the therapeutical use of forbidden substances or other acceptable justification.
- Possession of a substance that is prohibited in out-of-competition testing or prohibited method by athlete support personnel in connection with an athlete, competition or training, unless the athlete support personnel establishes that the possession is pursuant to a Therapeutic Use Exemption as described previously.
- Trafficking in any prohibited substance or prohibited method is still a violation of the anti-doping regulations and in most legal systems an illegal act against the medical preparations law.

- Administration or the attempted administration of a prohibited method to any athlete, or assisting, encouraging, aiding, abetting or covering up as well as any other type of complicity involving an anti-doping rule violation or any attempted violation.

As set forth in the preamble of the World Anti-Doping Code, the purposes of the World Anti-Doping Programme are:

- To protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness, and equality for athletes worldwide; and
- To ensure harmonised, coordinated, and effective anti-doping programs at the international and national level with regard to detection, deterrence, and prevention of doping.

Prohibited substances in the context of these regulations are regularly published in the:

- WADA (World Anti Doping Agency) list of prohibited substances (<http://www.wada-ama.org>) and
- Appendix A of the FIFA Doping Control Regulations (www.FIFA.com)

The "Strict liability" rule

The reason for the strict liability rule has been comprehensively stated by the Court of Arbitration for Sport (CAS) in Lausanne in several cases, e.g. the case of Quigley v. the International Shooting Union (UIT) in 1995:

"It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Quigley, where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition be altered to undo unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.”

The “Whereabouts” rule

Effective doping controls are bonded to out-of-competition tests. Without accurate information on the athlete’s location, such controls may be inefficient or even impossible. The so called “whereabouts rule” requires athletes and/or teams that have been identified for out-of-competition control to provide and update information on their whereabouts, so that they can be located for no-advance-notice out-of-competition controls. The applicable requirements are set by the responsible sport federation or National Anti-Doping Organisation (NADO) in order to allow flexibility based upon varying circumstances encountered in different sports and countries. It is known that the whereabouts rule may not be realistic in international team sports where players are normally playing for a club far from their home nation. So far, FIFA has not introduced an own whereabouts system, but is evaluating the matter carefully. It has to be considered that in between international tournaments, international football players are almost permanently subjected to doping controls in their respective national leagues with only short seasonal breaks.

Separation of power

An important legal principle is the separation of power between the anti-doping executive authorities and the disciplinary committee responsible for the administration of anti-doping sanctions. This is to minimise any bias or conflict of interest in applying the Code.

Under FIFA regulations, this principle is applied by having, on the one hand, the Doping Control Sub-Committee representing medical, pharmacological and medical-legal expertise and dealing with the medical and biochemical aspects of the alleged doping

event. On the other hand, a separate Disciplinary Committee decides on the appropriate sanction in view of the individual circumstances of the player concerned.

Medical-legal aspects of doping control procedures

The full details of the FIFA doping control procedure are set out in the annually updated FIFA Doping Control Regulations. Regarding the medical-legal aspects of doping control procedures, the process is as follows:

- Once an A sample has tested positive, then the FIFA Doping Control Sub-Committee investigates the documentation of the case and prepares a report for the FIFA Chief Doping Control Officer. The FIFA Chief Doping Control Officer has to verify that the correct doping control procedures have been completed according to the doping control regulations. This usually involves contacting the testing laboratory as well as the doping control officer who tested the athlete.
- If the analysis of specimen A is confirmed as positive by the FIFA Doping Control Sub-Committee's report, the FIFA General Secretary shall at once confidentially notify the chairman of the Disciplinary Committee, the Sports Medical Committee and the member association of the player concerned, which shall, within 24 hours of being notified, have the right to request a second analysis using sample B.
- If a second analysis is requested, FIFA shall communicate this immediately to the head of the laboratory where the sample B is being kept. The analysis shall be carried out, as soon as possible by personnel who were not directly involved with the analysis of sample A. The association concerned shall have the right to have a representative present, in addition to the player concerned. The results of the analysis of sample B shall be sent immediately to the FIFA Chief Doping Control Officer by fax or e-mail. If no request for a second test is made, the laboratory shall dispose of sample B after 30 days have elapsed.

In addition, the FIFA Chief Medical Officer and the Doping Control Sub-Committee also have to estimate the seriousness of the individual offence from a medical point of view

as to whether the violation was intentional, meaning partially autonomous but not fully self responsible, deliberate, meaning fully autonomous, or negligent. They also have to examine whether any exceptional circumstances may apply. Finally, a written statement about the medical analysis of the case including an estimation of the medical-legal aspects has to be submitted to the FIFA Disciplinary Committee for consideration of sanctions.

The same procedure is carried out in cases where FIFA is asked by a national federation or a confederation to take over the sanction or decide about a sanction on the international level.

The individual case management as outlined above and the principle of fault are integral parts of FIFA's approach to doping control and is based on Swiss Sanction Law. This means that there must be evidence that the player is personally guilty of the offence being sanctioned and the unjustness of his behaviour has to be obvious to him. Thus, every sanction inevitably contains a distinctive individual component.

Problems that remain to be solved

With regard to the ongoing development of new substances and laboratory methods, regular review of standards and regulations is necessary for appropriate anti-doping action in accordance with the scientific evidence and sport ethics. Whereas harmonization of the strategies of national and international anti-doping agencies is reinforced, the legislation and politics of different countries constitute a permanent obstacle. Any regulation concerning medical-legal aspects should therefore be based on scientific evidence and juridical expertise and has to be supported by close collaboration of national and international bodies.

T/E ratio

The lowering of the threshold for the ratio of testosterone (T) to epitestosterone (T) from 6 to 4 has led to intense discussion with the accredited laboratories and raised concerns on behalf of FIFA. According to the FIFA database 2005, none of the samples with elevated ratios between 4 and 6 showed evidence of exogenous intake, as assessed by GC-Isotope Ratio Mass Spectrometry (GC-IRMS), the current state of the art method to

prove exogenous intake. In face of the logistic impact and additional costs, FIFA should strongly advocate detailed statistical analysis of the WADA data, examining the true incidence of exogenous intake of testosterone in samples with T/E ratios between 4 and 6.

Alpha-reductase inhibitors

The increasing use of alpha-reductase inhibitors for treatment of male pattern baldness has led to positive urine samples of athletes for finasteride, the main metabolite. Finasteride is a banned substance listed under S5 Diuretics and masking agents. A situation not covered by the World Anti-Doping Code arises when more sensitive analytical methods cannot identify any traces of anabolic steroids in the sample. Other questions surround whether male pattern baldness represents a psychological disease and might be eligible for a Therapeutic Use Exemption.

Recreational drugs

Recent years have shown a constant increase in the number of positive tests for recreational drugs. While this finding reveals a social rather than a doping problem, an important legal aspect has to be considered: The consumption of marihuana presents a severe offence against the law in some countries, especially in Africa and Asia, even if consumed abroad. Here, the publication of a positive result may lead to serious consequences for the respective player in his home country that could include a prison sentence. Anti-doping bodies should therefore carefully reconsider the unconditioned ban of recreational drugs, preferably based on a juridical expert's opinion.