Where is the Privacy in WADA's "Whereabouts" Rule?

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WHERE IS THE PRIVACY IN WADA’S “WHEREABOUTS” RULE?

I. INTRODUCTION

Imagine if your boss required you to provide where you would be for one hour of every day at least three months in advance. It would seem impossible to comply with such an absurd requirement. Most people would find such a request to be unreasonable or an invasion of one’s privacy. Well, this is exactly what international and Olympic athletes are forced to do under the anti-doping rules of the new 2009 World Anti-Doping Agency (WADA) Code. Under WADA’s “whereabouts” rule, all athletes must make themselves available to drug testers for one hour a day, between 6 a.m. and 11 p.m., ninety days in advance, for out-of-competition testing. Failure to be present at the “specified time” on three occasions within an eighteen-month period results in a doping offense, punishable by a one-year suspension. Recently, a group of Belgian athletes filed a lawsuit, claiming that this “whereabouts” rule violates European Union (EU) privacy laws. In addition, a group of soccer player associations have begun to mount a challenge to the new rule based on the European Working Time Directive (the “Directive”).

This paper will provide a thorough analysis of WADA’s new “whereabouts” rule. First, it will supply an overview of WADA and its Code. Next, it will take a close look at WADA’s old “whereabouts” rule, focusing attention on the challenge to this rule brought by women’s track star, Christine Ohuruogu. This section will be followed by a detailed analysis of the new “whereabouts” rule in the 2009 WADA Code and the firestorm of controversy surrounding its implementation. Then, it will address the potential success of challenges to this new rule under EU law, specifically, the Directive and privacy laws. Finally, it will assess the fairness of this “whereabouts” rule and
provide recommendations for improvements, balancing one’s individual right to privacy against the ever-growing need to eradicate doping in sports.

II. BACKGROUND AND HISTORY OF THE “WHEREABOUTS” RULE

The development of the WADA and its Code, the enactment of the old “whereabouts” rule, and the ruling in the case of Christine Ohuruogu played a significant role in shaping the landscape for out-of-competition drug testing throughout the world. These efforts effectively combated doping in sport and, ultimately, paved the way for the implementation of WADA’s new “whereabouts” rule in 2009.

A. WADA and the Code

In 1999, the WADA was established following the World Conference on Doping in Sport held in Lausanne, Switzerland, by the International Olympic Committee (IOC). As an independent governing body, WADA’s goal is to “promote, coordinate, and monitor the fight against doping in sports in all its forms.” WADA ensures harmonization and equity in athlete drug testing by maintaining uniform minimum standards, imposing sanctions for doping violations, and “coordinat[ing] the efforts of sports’ organi[z]ations, anti-doping organi[z]ations and governments to combat doping in sport.” It accomplishes all of this through the “World Anti-Doping Program . . . which consists of the [WADA] Code, International Standards (including the Prohibited List, Testing Standards, Laboratory Standards, and Therapeutic Use Exemptions), and Models of Best Practice.”

The first WADA Code was approved by almost eighty national governments and all of the major international sports federations at the World Conference on Doping in Sport held in Copenhagen in 2003. “It is described as ‘a core document that will provide a framework for anti-doping policies, rules and regulations within sport organizations and among public


10. Mitten et al., supra note 8, at 346.
The WADA Code, accompanied by the International Standards, has since been adopted and implemented by virtually all international federations (IFs) and, in turn, applied to their respective national governing bodies (NGBs) and athletes. National governments have demonstrated their support for the Code through the creation of the International Convention Against Doping in Sport (ICADS) developed by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in 2005. By 2007, forty-seven nations ratified the ICADS in a movement to eradicate doping in sport worldwide. Essentially, all Olympic and international athletes are subject to the doping standards, testing procedures, and disciplinary sanctions established by the WADA Code and enforced by their respective IFs, NGBs, or National Anti-Doping Organizations (NADOs).

B. The Old "Whereabouts" Rule in the 2003 WADA Code

"Out-of-competition drug testing is central [to the WADA Code];" surprise and no-notice testing serve as the cornerstone of this policy. Testing is initiated and administered by IFs and NADOs and reported to WADA in order to coordinate testing. The ultimate effectiveness of out-of-competition testing depends on the ability of IFs and NADOs to collect and maintain accurate information concerning their respective athletes’ “whereabouts.” Under the 2003 WADA Code, the requirements regarding an athlete’s “whereabouts” were governed under Article 2.4, entitled “Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide required whereabouts information and missed tests, which are declared based on reasonable rules.”

Article 2.4 defined vague standards and loose requirements for

11. Id.
12. Id.; see also Foschi, supra note 9, at 462.
13. DAVID, supra note 6, at 5; see also Goldstein, supra note 7, at 158-59.
14. Goldstein, supra note 7, at 159.
15. See Foschi, supra note 9, at 462-64.
16. DAVID, supra note 6, at 147.
18. DAVID, supra note 6, at 147.
19. Id.
“whereabouts” information, leaving a great deal of discretion for setting applicable rules in the hands of an athlete’s IF or NADO. The comment to Article 2.4 simply stated that athletes, who were subject to out-of-competition testing, were “to be responsible for providing and updating information on their whereabouts so that they [could] be located for No Advance Notice Out-of-Competition Testing.” However, the specific rules and the particular details surrounding “whereabouts” information were to be set by individual IFs and NADOs. Accordingly, a number of organizations established strict “whereabouts” regimes whereby their athletes would have to provide information, three months in advance, on their particular location for one hour a day, five days a week, when they could be found for testing without notice. “Athletes could pick any hour between [5 a.m.] and [11 p.m.], and they would only have to be in the stated place for a portion of that hour, the onus being on the testers to be in the right place at the right time.”

Article 2.4 applied to both intentional and negligent conduct by the athlete; whereby an athlete’s failure to be present at a test or failure to provide accurate information as to the athlete’s whereabouts constituted a violation. Though sanctions had to be in accordance with Article 10.4.3 of the WADA Code (suspension between three months and two years), IFs and NADOs were free to set up disciplinary procedures as they saw fit. Normally, these organizations established that three missed no-notice out-of-competition drug tests in an eighteen-month period constituted a doping violation under their applicable “whereabouts” rules.

C. Ohuruogu v. UK Athletics Limited

Christine Ohuruogu, a British track star and current Olympic and world 400-meter champion, was suspended on August 6, 2006, for one year by UK Athletics Limited (UKA) for committing a doping offense after violating its “whereabouts” rules. UKA is the NGB for athletics in the United Kingdom, and it had adopted the out-of-competition drug testing rules of the

21. See id.; DAVID, supra note 6, at 119-20.
22. 2003 WADA CODE, supra note 20, at art. 2.4 Comment.
23. Id.; DAVID, supra note 6, at 120.
26. DAVID, supra note 6, at 120.
27. Id.
28. Id.
International Association of Athletics Federations (IAAF), the world governing body for athletics.\textsuperscript{30} According to IAAF rules, Ohuruogu committed a doping offense after she failed to be present for three out-of-competition tests within an eighteen-month period.\textsuperscript{31} "[Ohuruogu] gave her schedule details to UKA as required, but changed the schedule and did not notify changes on three occasions and was not available for testing where her schedule indicated she would be."\textsuperscript{32} Ohuruogu appealed the UKA's decision to the Court of Arbitration for Sport (CAS).\textsuperscript{33} She argued that the IAAF's "whereabouts" rules should be construed narrowly in favor of the athlete and that a doping violation should only occur after the athlete has been given notice of the evaluation for all three offenses.\textsuperscript{34} Additionally, Ohuruogu contended that given her circumstances, a one-year suspension for violating the rule was a disproportionate penalty.\textsuperscript{35}

The CAS arbitration panel disagreed with Ohuruogu and upheld the IAAF's decision, noting that "out-of-competition testing is at the heart of any effective anti-doping programme."\textsuperscript{36} The CAS panel backed the IAAF's "whereabouts" rules, declaring that if the athlete failed to provide adequate whereabouts information or was unable to be located for a no-notice test on three occasions within eighteen months that athlete had committed a doping offense.\textsuperscript{37} In addition, CAS held that the one-year suspension imposed under IAAF rules was just and proportionate because it fell within the range set by WADA, "the oracle of the anti-doping movement" for these types of offenses.\textsuperscript{38}

Most importantly, CAS stressed the importance of the "whereabouts" rules for no-notice drug testing and the need for effective penalties against athletes who do not provide accurate "whereabouts" information.\textsuperscript{39} The Panel

\textsuperscript{30} \textit{Id.} at 2.
\textsuperscript{31} \textit{Id.} at 4.
\textsuperscript{32} DAVID, \textit{supra} note 6, at 121; \textit{see} Ohuruogu, CAS 2006/A/1165 at 3. Ohuruogu's second missed test occurred after she changed her "whereabouts" to a different training facility due to an injury. \textit{Ohuruogu}, CAS 2006/A/1165 at 3. Before she received notification of the evaluation for her second missed test, Ohuruogu missed a third out-of-competition test. \textit{Id.} This time she failed to be at her specified location for testing because her training facility was unavailable for the day. \textit{Id.}
\textsuperscript{33} \textit{Ohuruogu}, CAS 2006/A/1165 at 4.
\textsuperscript{34} \textit{Id.} at 6.
\textsuperscript{35} \textit{Id.} at 7.
\textsuperscript{36} \textit{Id.} at 12-13.
\textsuperscript{37} \textit{Id.} at 10-11. "There was no requirement that the athlete had to be notified of evaluation for a missed test before a further missed test could be declared." DAVID, \textit{supra} note 6, at 122.
\textsuperscript{38} \textit{Ohuruogu}, CAS 2006/A/1165 at 12.
\textsuperscript{39} \textit{Id.} at 12.
concluded its opinion by stating:

[T]he burden on an athlete to provide accurate and up-to-date whereabouts information is no doubt onerous. However, the anti-doping rules are necessarily strict in order to catch athletes that do cheat by using drugs and the rules therefore can sometimes produce outcomes that many may consider unfair. This case should serve as a warning to all athletes that the relevant authorities take the provision of whereabouts information extremely seriously as they are a vital part in the ongoing fight against drugs in the sport.\(^4\)

III. THE NEW "WHEREABOUTS" RULE IN THE 2009 WADA CODE

On January 1, 2009, the updated version of the WADA Code, along with the revised version of its International Standards for Testing (IST), was put into effect to be administered and adhered to by all its signatories.\(^4\)\(^1\) In order to end the inconsistencies of “whereabouts” regimes across different IFs and NADOs, WADA implemented a uniform series of strict “whereabouts” requirements in order to harmonize the procedures and sanctions for no-notice out-of-competition testing.\(^4\)\(^2\) Article 2.4 of the 2009 Code now declares that the specific rules and regulations regarding adequate “whereabouts” information and athlete availability for out-of-competition testing are defined by the IST.\(^4\)\(^3\) These standards are mandatory for participating IFs and NADOs, unlike the 2003 Code, which gave these organizations a great deal of discretion in setting their “whereabouts” requirements.\(^4\)\(^4\) Specifically, Article 2.4 maintains that “[a]ny combination of three missed tests and/or [sic] filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation.”\(^4\)\(^5\)

Section 11 of the IST, titled “Athlete Whereabouts Requirements,” provides further details regarding this new rule.\(^4\)\(^6\) The section begins by declaring that “[i]t is recogni[z]ed and accepted that (a) No Advance Notice Out-of-Competition Testing is at the core of effective Doping Control; and (b)

\(^{40}\) Id. at 13.
\(^{41}\) 2009 WADA CODE, supra note 3.
\(^{42}\) DAVID, supra note 6, at 121.
\(^{43}\) 2009 WADA CODE, supra note 3.
\(^{44}\) Id.; 2003 WADA CODE, supra note 20; DAVID, supra note 6, at 120.
\(^{45}\) 2009 WADA CODE, supra note 3.
\(^{46}\) INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.
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without accurate information as to an Athlete's whereabouts, such Testing can be inefficient and often impossible."47 To ensure that this testing is effective, the IST requires that any athlete in an IF or NADO registered testing pool must make a quarterly—every three months—filing providing full and accurate "whereabouts" information for the upcoming quarter regarding routine activities.48 This encompasses an athlete identifying where the athlete will be living, training, working, attending school, or competing during the quarter, so that the athlete can be located for a drug test at any time.49

In addition, an athlete must specify in his or her quarterly "whereabouts" filing, a one-hour time slot where the athlete can be found at a particular location for testing.50 Whereas the old "whereabouts" rules only required this information to be provided five days a week between 5 a.m. and 11 p.m., the new "whereabouts" rule has imposed stricter demands on all of its complying athletes.51 Under the new rules, all athletes in a registered testing pool must specify a sixty-minute time slot between 6 a.m. and 11 p.m. for every day, 7 days a week, 365 days a year.52 To make matters worse, athletes must be available for testing at the specified location for the entire hour or run the risk of missing a test, as opposed to the past when they had to be at that location for only a portion of the hour.53

Though an athlete can choose to delegate to a third party, such as a coach or manager, the responsibility of making the athlete's "whereabouts" filings, the athlete ultimately remains accountable at all times for providing complete and accurate information.54 If circumstances change, causing an athlete to be in a different place than expected, the athlete must update the previously filed information to reflect these changes.55 Under the IST, IFs and NADOs are required to establish a secure and workable system where athletes can easily enter and update existing "whereabouts" information and where IFs and NADOs can securely access, maintain, and share this information.56 The IST recommends that IFs and NADOs use an online system to record information,

47. Id. § 11.1.1.
48. Id. §§ 11.1.3, 11.3.1, 11.3.1(e) Comment.
49. Id. §§ 11.1.3, 11.3.1(e)-(f).
50. Id. § 11.1.4.
51. Id. § 11.3.2; Slater, supra note 24.
52. INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.3.2.
53. Id. § 11.1.4; Slater, supra note 24.
54. INTERNATIONAL STANDARD FOR TESTING, supra note 1, §§ 11.3.6, 11.3.7.
55. Id. § 11.4.2.
56. Id. §§ 11.7.1(d), 11.7.3(d).
but they require at least the use of fax, email, text messaging, or all three.\textsuperscript{57} Under these new rules, a failure to provide full and accurate information regarding one’s “whereabouts” or a failure to be present for a doping test during one’s sixty-minute time slot constitutes a “whereabouts failure.”\textsuperscript{58} Three “whereabouts failures” in an eighteen-month period constitutes a doping offense under Article 2.4, punishable with a period of ineligibility in accordance with Article 10.3.3 of the WADA Code.\textsuperscript{59} This article imposes a minimum penalty of one year and a maximum penalty of two years for violating WADA’s new “whereabouts” rule.\textsuperscript{60}

IV. THE PUBLIC CONTROVERSY SURROUNDING THE NEW “WHEREABOUTS” RULE

Before even a month passed after its inception, the new “whereabouts” rule in the 2009 WADA Code set off a firestorm of opposition by top athletes and athletic organizations all over the world.\textsuperscript{61} In January, a group of sixty-five Belgian athletes—cyclists, soccer players, and volleyball players—brought a challenge to WADA’s new “whereabouts” rule under EU privacy laws.\textsuperscript{62} In particular, the group believed that the “whereabouts” rule runs afoul of Article 8 of the European Convention on Human Rights (ECHR), which protects an individual’s right to privacy.\textsuperscript{63} “The Belgian lawyer who helped put the legal challenge together likened the current system ‘to putting a whole town in prison to catch one criminal.’”\textsuperscript{64}

In addition, the Fédération Internationale Des Associations de Footballeurs Professionels (FIFPro), the international group of soccer players’ unions, has begun to mount its own challenge to the new “whereabouts” rule.\textsuperscript{65} FIFPro has urged its forty-two member associations to complain about the rule to their respective data protection agencies.\textsuperscript{66} Specifically, the organization is considering basing its challenge on the Directive, which states

\begin{itemize}
  \item \textsuperscript{57} Id. § 11.7.1(d).
  \item \textsuperscript{58} Id. §§ 11.1.3, 11.1.4.
  \item \textsuperscript{59} Id. § 11.6.6 Comment; 2009 WADA CODE, supra note 3.
  \item \textsuperscript{60} 2009 WADA CODE, supra note 3, at art. 10.3.3.
  \item \textsuperscript{62} Slater, supra note 4.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Ennis, supra note 61.
  \item \textsuperscript{66} Slater, supra note 4.
\end{itemize}
that every employee is entitled to twenty days of holiday a year. In February, WADA president, John Fahey, rejected the Fédération Internationale de Football Association’s (FIFA) request for athletes to be left alone from out-of-competition testing during holidays. Michel Platini, the president of the Union of European Football Associations (UEFA), also petitioned for athletes to be given a break from testing during one holiday stretch per year. In response, Fahey stated that “FIFA and UEFA’s suggestion to give athletes a holiday break from testing would undermine anti-doping controls and give cheats time to start doping with impunity.”

In addition to legal challenges, many athletic organizations and high-profile athletes have openly voiced their disdain and contempt for WADA’s “whereabouts” rule through the media. Chief executive for the British Athletes Commission, Pete Gardner, was outspoken about his belief that the new rules have caused real problems that must be reversed. He went on to say that “[t]here are some athletes who are so worried about missing tests inadvertently they have said if they got to two missed tests they would seriously consider retiring before missing a third.” The general secretary of the Professional Players Federation, a group of professional player associations in the U.K., has deemed the new system “in danger of becoming a fiasco.” The widespread backlash against the “whereabouts” rule is most evidently expressed through the public statements of two of the world’s most well-known athletes. Rafael Nadal, the world’s number second-ranked men’s tennis player, said:

Intolerable harassment . . . We are humans . . . [athletes should not be made to feel like] delinquents . . . Neither my mother nor my uncle sometimes know where I am . . . . And to have to send a message or be concerned all day long if there is a last-minute change seems to me [to] be totally excessive.

Christine Ohuruogu, the women’s Olympic and world 400-meter track champion, said:

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67. Id.
68. WADA Rejects FIFA Call for Testing Break, supra note 17.
69. Id.
70. Id.
71. Slater, supra note 24.
72. Id.
73. Id.
74. Id.
You are sunning yourself on a beach and yet you still have to remember to text or email the anti-doping authorities before you go on a boat-trip or a shopping expedition, just in case a drug-tester turns up. I can think of no other profession where a person would be subject to such restrictions. Not even prisoners on parole get treated like that. . . . We are athletes but we are also human, with human fallibilities. . . . Sometimes things don’t always go to plan, which is why I ended up missing tests.76

Other professional athletes, including world indoor hurdles champion, Lolo Jones, and Olympic pole vault champion, Yelena Isinbayeva, have publicly condemned the new anti-doping rule as overly intrusive and out of line.77 Serena Williams, America’s top-ranked women’s tennis player, called the rule “over the top” and “very invasive.”78 The world’s fourth-ranked men’s tennis player, Andy Murray, described it as being “so draconian that it makes it almost impossible to live a normal life.”79

In February, responding to all of this harsh feedback, WADA invited a number of athlete associations to attend a special meeting in London where WADA defended its new “whereabouts” rule.80 Attempting to calm fears surrounding the rule, both sides shared information and listened to opposing arguments.81 Ultimately, however, WADA officials stated that nothing is about to change.82 In fact, “WADA president John Fahey [has] insisted there will be no changes to the whereabouts testing rule in the short term, saying any

81. Baker, supra note 79.
82. Id.
possible reform might be at least one year away." Fahey urged athletes to
give the new rule time to work, calling it silly for people to be demanding
changes after only eight weeks. WADA emphasized that there was an
eighteen-month consultation before the new rule was introduced and at no
point during this review process did any athlete organization express concerns
about privacy.

WADA publicly defended its new policy by stressing that to catch cheats,
no-notice tests and strict “whereabouts” rules are essential since many
prohibited substances can become untraceable within twenty-four hours. David Howman, the director general of WADA, insisted that surprise out-of-
competition testing is the cornerstone of an effective anti-doping policy and
that the “whereabouts” rule is the best way to accomplish its goals and prevent
cheating. A WADA source maintained that the new rule is “an
improvement and should make life easier on athletes instead of turning them
into victims of round-the-clock doping supervision.” Howman has noted
that WADA took special care to avoid making the new measures excessive
and that the rule actually reduces surveillance to one hour a day from the
“twenty-four/seven” requirement previously applied by a number of
NADOs. Believing that the rule simply requires planning and responsibility
on the part of the athletes, Howman publicly stated that updating one’s
“whereabouts” information is easy, quick, and “not rocket science.”

Despite widespread protest, a number of athletic organizations supported
WADA and its “whereabouts” rule. Most notably, IOC president Jacques
Rogge defended WADA’s new rules, asserting that a number of “high-profile
doping cases ha[ve] turned the tables against the athletes.” Though he
conceded that the “circumstances could be adapted,” Rogge maintained that
the principle behind the “whereabouts” rule cannot be changed and that

83. WADA Rejects FIFA Call for Testing Break, supra note 17.
84. Id.
85. Baker, supra note 79.
86. Doping Notes: WADA Seeks Special Meeting, supra note 80.
87. Id.; Matt Slater, WADA Hits Back in New Doping Rule Row, BBC SPORT ONLINE, Feb. 6,
88. Doping Notes: WADA Seeks Special Meeting, supra note 80.
89. Slater, supra note 4.
90. Id.; Doping Notes: WADA Seeks Special Meeting, supra note 80; WADA Rejects FIFA Call
for Testing Break, supra note 17.
92. Rogge Defends WADA’s Rules for Drug Testing Availability, TSN.CA, Feb. 20, 2009,
http://www.tsn.ca/olympics/ story/?id=267920.
"[s]ports today has to pay a price for suspicion." The IAAF also backed WADA’s new out-of-competition testing policy, stating that the system is both “proportionately fair” and “absolutely mandatory” to effectively fight doping in sport. While acknowledging that the requirements place a heavy burden upon athletes, the IAAF believes that the new “whereabouts” rule strikes a proper balance between the need to locate cheaters and the rights of clean athletes. UK Sport, Britain’s anti-doping organization, provided further support for WADA’s new rules, maintaining that “it would be impossible to run a drug testing program without knowing where athletes are.” Its director, Andy Parkinson, believes that the new rule is “a small price to pay for clean athletes to help drive cheats out of sport.”

In addition, a number of professional athletes have voiced their approval of WADA’s new testing policy. Roger Federer, the world’s number two men’s tennis player, said that he is fine with the rule, adding that “it’s a pain, but I would like it to be a clean sport, and that’s why I’m OK with it.” Many athletes are aware that doping is tarnishing their sport and that they must follow strict “whereabouts” requirements to ensure that the problem is eradicated. Paula Radcliffe, women’s marathon world record holder, said:

We are all committed to doing what we can to keep our sport clean. That means sacrifices by clean athletes but we know those running anti-doping understand we are human and are there to help with any update problems. For truly international fair testing everywhere we need this.

Koji Murofushi, multiple Olympic men’s hammer throw medalist, said:

I do it as a daily chore hoping for a clean world of sports. I think it is the results of the efforts put in by the testers to protect the sport. It may be a bit difficult until you get used to

93. Id.
95. Id.
96. Slater, supra note 4.
97. Slater, supra note 87.
98. IAAF, supra note 94.
100. Radcliffe Backs WADA Testing Policy, supra note 91.
it, but once you get used [to] it, I do not think it is difficult.¹⁰¹

Blanka Vlastic, women’s world high jump champion, also said:

I understand that it is necessary for IAAF to know where the athletes are at all times because there is no other way in this moment to fight the doping problem. Especially this 60 minute slot is a good idea, because each of us could tell with 99% when are we at home for sure. In this way we would be able to avoid inconveniences with anti-doping controls.... This is a part of my job and professional behavior. It is a price which I’m willing to ‘pay’ for being a top athlete.¹⁰²

As demonstrated by the athletes’ quotes referenced above, WADA’s new “whereabouts” rule sparked a whirlwind of athletes and organizations either lashing out against the rule or defending it and its firm stance. With all of the controversy surrounding the implementation of the rule, EU Sports Commissioner Jan Figel, the EU’s top sports regulator, called for WADA to suspend the rule until he gives his legal opinion on it in the upcoming months.¹⁰³

V. THE LEGAL CHALLENGE TO WADA’S NEW “WHEREABOUTS” RULE

In Ohuruogu v. UK Athletics Limited, CAS upheld the IAAF’s old “whereabouts” policy that was very similar to WADA’s current “whereabouts” requirements.¹⁰⁴ This decision essentially leads to the conclusion that any challenge of the “whereabouts” rule to CAS would probably be unsuccessful. Ultimately, as illustrated by the actions of a number of players groups in Europe, the best route for challenging WADA’s new “whereabouts” rule is made under EU law.¹⁰⁵

A. THE EU AND EU LAW

The EU is a collection of European countries that have joined together to

¹⁰¹ IAAF, supra note 94.
¹⁰² Id.
¹⁰³ Ennis, supra note 61.
achieve political and economic objectives. These countries have agreed to abide by a uniform set of laws, founded upon the Treaty of Rome (the EC Treaty and the Treaty Establishing the European Community) in 1957 and the Treaty on European Union in 1993. These two treaties serve as the basis for EU law, with the Charter of Fundamental Rights of the European Union (the "Charter") and the ECHR being incorporated into EU law by Article 6 of the Treaty on European Union. EU law is enforced by the European Commission and interpreted by the European Court of Justice (ECJ). The ECJ has "the power to settle legal disputes between EU member states, EU institutions, businesses, and individuals," and challenges brought under EU law in national courts may eventually be decided by the ECJ. In order to decipher how the ECJ might handle a challenge to WADA's new "whereabouts" rule under EU law, it is important to first analyze the prior case law bearing on this issue.

B. Prior Case Law

Two cases decided by the ECJ could serve as a strong basis under which an athlete could challenge WADA's new "whereabouts" rule under EU law. In the 1995 case of UEFA v. Bosman, Bosman, a professional soccer player in Belgium, brought suit against UEFA, RC Liege—his soccer team—and Union Royale Belge des Societes de Football Association (URBSFA)—his NGB—alleging that UEFA's transfer rules and nationality clauses were illegal under EU law. Specifically, he contended that these sporting rules violated Article 48 of the EC Treaty, which guarantees the freedom of


movement of workers among EU countries.\footnote{113} The ultimate question in this case was whether sporting rules and regulations could be subject to the provisions of the EC Treaty,\footnote{114} which protect an individual’s economic freedoms in the European community.\footnote{115} The ECJ answered this question in the affirmative, stating, “sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the [EC] Treaty.”\footnote{116} For purposes of Article 48, the court held that sporting activity is “economic activity” when it involves an employment relationship or payment for services, and therefore, the provisions of the EC Treaty apply to professional or semi-professional athletes.\footnote{117} The ECJ ruled that player restraints—here, the transfer and nationality rules—laid down by professional sports organizations must comply with the provisions of the EC Treaty, specifically Article 48.\footnote{118}

After concluding that UEFA’s transfer and nationality rules were subject to Article 48, the ECJ conducted a type of “rule of reason” analysis to determine whether these rules were illegal under EU law.\footnote{119} First, the ECJ court looked at whether the rules conflicted with Article 48 by presenting an obstacle to an athlete’s freedom of movement.\footnote{120} Then, it considered UEFA’s justifications for establishing the rules.\footnote{121} After balancing the two sides, the ECJ concluded that UEFA’s transfer and nationality rules were illegal under Article 48 of the EC Treaty.\footnote{122}

While the Bosman case held that sporting rules and regulations, in general, could fall within the scope of EU law,\footnote{123} Meca-Medina held, specifically, that anti-doping rules could fall within the purview of EU law.\footnote{124} In 2001, two long-distance professional swimmers were suspended by Fédération Internationale de Natation (FINA), the IF for swimming, after testing positive for a banned substance.\footnote{125} CAS upheld the suspension, and the two swimmers

\footnotesize{\begin{itemize}
  \item \footnote{113}{Id. ¶ 41, 78.}
  \item \footnote{114}{Id. ¶ 69.}
  \item \footnote{115}{DAVID, supra note 6, at 229.}
  \item \footnote{116}{Bosman, 1995 E.C.R. I-04921, ¶ 73.}
  \item \footnote{117}{Id. ¶¶ 73-74.}
  \item \footnote{118}{Id. ¶ 48.}
  \item \footnote{119}{Id. ¶¶ 92-137.}
  \item \footnote{120}{Id. ¶¶ 92-104, 116-20}
  \item \footnote{121}{Id. ¶¶ 105-114, 121-37.}
  \item \footnote{122}{Id. ¶ 114, 137.}
  \item \footnote{123}{Id. ¶¶ 73-74.}
  \item \footnote{124}{Meca-Medina v. Comm’n of European Cmtys., 5 C.M.L.R. 18, ¶¶ 33-34 (2006).}
  \item \footnote{125}{Id. ¶ 3.}
\end{itemize}}
chose not to appeal the award to the Swiss Federal Court.\textsuperscript{126} Rather, they filed a complaint against FINA and the IOC with the European Commission, alleging that FINA’s Doping Control Rules violated Articles 49, 81, and 82 of the EC Treaty.\textsuperscript{127}

The European Commission, along with the Court of First Instance, found that the complaint could not be sustained because FINA’s Doping Control Rules were not subject to the EC Treaty.\textsuperscript{128} It said that anti-doping rules were purely sporting rules and did not involve any economic considerations.\textsuperscript{129} However, on appeal, the ECJ “held that anti-doping regimes had an effect on the economic activities of those bound by them, and that, accordingly, the protections under the [EC] Treaty were applicable.”\textsuperscript{130} The two swimmers were professional athletes receiving payment for their services, and since these rules banned them from professional swimming, their economic interests were impaired and they were entitled to the protections of Articles 49, 81, and 82.\textsuperscript{131} Following the same reasoning as in Bosman,\textsuperscript{132} the ECJ concluded that the anti-doping rules laid down by FINA fell within the scope of the EC Treaty.\textsuperscript{133}

In the end, the ECJ upheld the challenged anti-doping rules and dismissed the complaint, stating that “[t]he rules represented justifiable restrictions on rights protected under the Treaty and were not excessive in nature.”\textsuperscript{134} The court recognized that anti-doping rules serve legitimate objectives, such as ensuring fair competition between athletes, protecting the health of athletes, and preserving the integrity and ethical value in sport.\textsuperscript{135} Although the anti-doping rules were deemed to be valid under EU law, this case illustrates that anti-doping rules can be challenged under EU law.\textsuperscript{136} In addition, it shows that arbitration awards delivered by CAS can potentially be reviewed by the ECJ.\textsuperscript{137}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. \textsuperscript{3-12}.
\item \textsuperscript{129} Id. \textsuperscript{25-31}.
\item \textsuperscript{130} DAVID, supra note 6, at 229.
\item \textsuperscript{131} Meca-Medina v. Comm’n of European Cmtys., 5 C.M.L.R. 18, \textsuperscript{33-34} 44 (2006).
\item \textsuperscript{132} Case C-415/93, Bosman, 1995 E.C.R. I-04921, \textsuperscript{73-74}.
\item \textsuperscript{133} Meca-Medina, 5 C.M.L.R., \textsuperscript{33-34}.
\item \textsuperscript{134} Id. \textsuperscript{54-55}, 60; DAVID, supra note 6, at 229.
\item \textsuperscript{135} Meca-Medina, 5 C.M.L.R. \textsuperscript{43}.
\item \textsuperscript{136} Id. \textsuperscript{33-34}.
\item \textsuperscript{137} Id. \textsuperscript{5}.
\end{itemize}
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C. Potential Claims Under EU Law

As demonstrated in the case of Meca-Medina, European professional athletes can challenge their organization’s anti-doping rules under EU law, even in the face of an unfavorable CAS decision. The best way to legally attack WADA’s new “whereabouts” rule is under the Directive, which lays down minimum safety requirements, health regulations, and rest periods for workers in the European community. The Directive is incorporated into the EC Treaty through Article 118(a) of the Treaty, which gives the European Council the power to adopt and implement minimum requirements for improving working conditions. Specifically, athletes could challenge the “whereabouts” rule under Article 5 of the Directive, “Weekly Rest Period,” and Article 7 of the Directive, “Annual Leave.” Article 5 of the Directive provides that every worker is entitled to a minimum uninterrupted rest period of twenty-four hours, once a week, and Article 7 of the Directive states that every worker is entitled to paid annual leave, or holiday time, for at least four weeks per year.

As illustrated in the case of Meca-Medina, anti-doping rules of professional sports organizations are considered economic activity and, therefore, must be in compliance with the EC Treaty. Because the Directive is incorporated into the EC Treaty, anti-doping rules must also act in accordance with its provisions, including Articles 5 and 7. Thus, WADA’s new “whereabouts” rule must not interfere with an athlete’s right to have a weekly rest period and paid annual leave as guaranteed by these articles. If the rule were to infringe upon these rights, European professional athletes would have standing to bring suit under the EC Treaty.

In determining whether the “whereabouts” rule violates Articles 5 and 7 an EU court will likely follow the same framework used by the ECJ in Bosman and apply a type of “rule of reason” analysis. In regards to Article 5, it will first look at whether WADA’s anti-doping rule obstructs an athlete’s

138. See id.
140. Id.; EC Treaty, supra note 107.
142. Id.
143. DAVID, supra note 6, at 229.
144. European Working Time Directive, supra note 139, at art. 5.7; EC Treaty, supra note 107.
145. European Working Time Directive, supra note 139, at art. 5.7.
right to have a weekly rest period. A strong case can be made that the new “whereabouts” rule clearly infringes on this right. Under the rule, an athlete is subject to a potential no-notice drug test for one hour out of every day, 7 days a week, 365 days a year. By having to provide information on where the athlete can be located during this sixty-minute time period, the athlete is essentially put “on call” every day. There is no point in time when the athlete would be able to enjoy an uninterrupted twenty-four hours of rest and relaxation as guaranteed by Article 5. The athlete must be present at the “specified location” during the “specified time” no matter what. WADA’s new “whereabouts” rule requires compliance every day and clearly obstructs an athlete’s right to a weekly rest period.

Regarding Article 7, the court will assess whether the rule obstructs an athlete’s right to have four weeks of holiday time per year. For many of the same reasons explained above, an athlete would likely have a strong argument that WADA’s new rule also impairs this right. The “whereabouts” rule, in actuality, anchors an athlete to a particular location for one hour out of every day. The athlete is not free to go wherever he chooses at any time, but rather, the athlete must stay at the “specified location” for the entire hour. Vacation time is usually considered a time when the athlete has the freedom to go anywhere and do as the athlete pleases, without any work responsibilities tying him down or encumbering his actions. Under WADA’s “whereabouts” rule, an athlete has no such freedom. The athlete is responsible for his “whereabouts” everyday; the athlete cannot come and go as he pleases, and must immediately update any changes to his or her schedule. WADA’s requirement that an athlete anchor him or herself to a particular location for one hour out of every day for drug testing does not leave an athlete with even one day of holiday time, let alone the four weeks guaranteed to workers under Article 7 of the Directive.

After establishing that an athlete’s protected rights under Articles 5 and 7 are infringed by the “whereabouts” rule, the EU court will assess any

149. INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.3.2.
150. European Working Time Directive, supra note 139, at art. 5.
151. INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.3.2.
153. INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.3.2.
154. Id. § 11.1.4.
155. Id. § 11.4.2.
156. See id.; European Working Time Directive, supra note 139, at art. 7.
legitimate justifications offered by WADA for implementing these rules.\textsuperscript{157} WADA will likely claim that the rule is designed to ensure fair and equal competition among its athletes, preserve the integrity and sanctity of sport, and protect the health of its athletes.\textsuperscript{158} It will likely argue that “whereabouts” rules are the cornerstone of an effective drug policy and that without these rules out-of-competition testing would be impossible.\textsuperscript{159} As recognized in the case of \textit{Meca-Medina}, the court will likely find WADA’s justifications compelling;\textsuperscript{160} however, it remains to be seen whether these reasons would be enough to uphold such a strict and demanding policy. After balancing both sides, the court would be faced with a tough decision, but there is a real possibility that it would find the “whereabouts” rule to be in violation of Articles 5 and 7 of the Directive.

While challenging the “whereabouts” rule under the Directive may be the best chance for success, a European athlete could also challenge the rule under EU privacy laws; specifically, Article 8 of the ECHR.\textsuperscript{161} Article 8, titled the “Right to respect for private and family life,” states:

\begin{itemize}
\item[(1)] Everyone has the right to respect for his private and family life, his home and his correspondence.
\item[(2)] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{162}
\end{itemize}

This principle, repeated in Article 7 of the Charter,\textsuperscript{163} has been incorporated into EU law through Article 6 of the Treaty on European Union.\textsuperscript{164}

The main problem in bringing a lawsuit under Article 8 of the ECHR depends on whether WADA’s “whereabouts” rule falls within the purview of

\begin{itemize}
\item[\textsuperscript{157}] Meca-Medina v. Comm’n of European Cmty’s., 5 C.M.L.R. 18, ¶¶ 54-55, 60 (2006).
\item[\textsuperscript{158}] Id. ¶ 43.
\item[\textsuperscript{159}] \textit{Doping Notes: WADA Seeks Special Meeting}, supra note 80.
\item[\textsuperscript{160}] \textit{Meca-Medina}, 5 C.M.L.R. ¶ 43.
\item[\textsuperscript{162}] Id.
\item[\textsuperscript{164}] Id.; \textit{Treaty on European Union}, supra note 107, art. 6.
\end{itemize}
the ECHR. Although the ECHR is a part of EU law, it only applies to “public authorities” and not private organizations.\(^\text{165}\) However, an athlete may be able to successfully argue that his respective IF or NADO, which implements WADA’s “whereabouts” rule, acts as an extension of the state and in furtherance of the policies adopted by the state. He could contend that an IF or NADO performs public functions, equating it to a “public authority.” Regardless, there is a good chance that an EU court will find that an IF or NADO is a private organization, rather than a “public authority,” and, therefore, does not have to comply with the provisions of the ECHR. Thus, WADA’s “whereabouts” rule could not be challenged under Article 8 of the ECHR.

If an athlete could somehow overcome this threshold requirement and prove that WADA’s rule falls within the scope of the ECHR, an EU court would certainly find that this rule violates an athlete’s right to privacy guaranteed under Article 8. The “whereabouts” requirement forces an athlete to provide information regarding where he is living, training, working, attending school, or competing.\(^\text{166}\) He is subject at anytime, anywhere to a no-notice drug test.\(^\text{167}\) He is practically under constant surveillance by his IF or NADO, and all of his privacy, with respect to his family life and home, is lost. Though one’s privacy is clearly infringed upon, WADA would argue that this interference is justified because its “whereabouts” rule is for the “protection of health and morals” of its athletes, one of the legitimate state objectives listed in Article 8.\(^\text{168}\) Ultimately, after weighing the two sides, it is likely that a court would find that WADA’s rule violates Article 8 of the ECHR. However, because this conclusion ignores the major problem discussed earlier concerning the applicability of the ECHR, the best avenue to challenge WADA’s “whereabouts” rule is under Articles 5 and 7 of the Directive, which is, in essence, privacy protections for workers.

VI. POLICY ISSUES AND RECOMMENDATIONS

The policy arguments on both sides of this issue, as discussed throughout the paper, are each compelling and persuasive. Over the past decade, doping scandals have run rampant through international sports, including the Tour de


\(^\text{166}\) INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.3.1 (e)-(f).


\(^\text{168}\) Id.
France and track and field.\textsuperscript{169} The use of performance enhancing substances by some of the world’s most prominent athletes has tarnished the image of competitors, damaged the integrity of sports, caused physical harm to individual athletes, and set a poor example for the youth of the world. The viewing public has become suspicious of its athletes and has placed a heavy burden on sports organizations to eliminate doping in sports. To put an end to this widespread and growing problem, WADA took firm action in January 2009, and laid down a strict policy for out-of-competition drug testing, referred to as its “whereabouts” rule.\textsuperscript{170}

No-notice, out-of-competition testing is required for a successful anti-doping regime and necessary to stamp out doping in sports.\textsuperscript{171} In order to effectively test athletes out-of-competition, IFs and NADOs must be able to gather complete and accurate “whereabouts” information, enabling them to locate an athlete.\textsuperscript{172} Without an athlete’s “whereabouts” information, out-of-competition testing is nearly impossible.\textsuperscript{173} However, WADA’s new “whereabouts” rule takes this principle much too far.

WADA’s “whereabouts” rule effectively turns athletes into prisoners. Athletes must be in a specified place at a specified time every day, no questions asked. What if their plans change, their car breaks down, they fall asleep, or they forget to be where they are supposed to? What if they cannot update their “whereabouts” because their cell phone batteries died or they are not near a computer? Things happen; people are human and make mistakes. However, these common occurrences, along with a million others, could subject an athlete to harsh punishments if they cause the athlete to miss a test. Furthermore, the “whereabouts” rule deprives an athlete of any privacy the athlete may have once enjoyed. The athlete’s everyday activities must be chronicled, and there is no place or time that is off limits for a possible drug test. While some may argue that this is a small price for athletes to pay in order to have a clean sport, it seems more appropriate to say that the individual rights of all athletes are being substantially sacrificed to pay for the cheating of a few.

With the incredible uproar of disapproval for WADA’s new “whereabouts” rule, it is clear that this policy is not working and must be modified. Some athletes have suggested that the implementation of a Global Positioning System (GPS) tracking devices in athletes’ phones could be used

\begin{itemize}
\item \textsuperscript{169} Slater, supra note 4.
\item \textsuperscript{170} See generally INTERNATIONAL STANDARD FOR TESTING, supra note 1.
\item \textsuperscript{171} DAVID, supra note 6, at 147.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.1.1.
\end{itemize}
to provide constant information of an athlete’s whereabouts. However, this solution is not plausible because, in general, testing needs to be planned at least a day in advance. GPS tracking devices would tell us where an athlete was at that very moment; however, it would provide zero information on where that athlete would be the next day or anytime in the future.

Ultimately, the most realistic recommendation for improving WADA’s “whereabouts” rule would be to simply loosen the restrictions on athletes before their first missed test. Reducing the requirements for the sixty-minute time slot from seven days a week to only five days, expanding the hours permitted for the time slot, and giving each athlete two holiday breaks would go a long way in restoring an athlete’s privacy rights, while bringing the rule into closer compliance with Articles 5 and 7 of the Directive. Under this regime, once an athlete misses a test or commits a “whereabouts” failure, the athlete would be subject to the current “whereabouts” rules, calling for stricter compliance. This policy would give back to the athlete some of the individual freedoms of which they have been deprived of, while still maintaining a stringent drug testing policy, which recognizes the need to eliminate doping in sports.

VII. CONCLUSION

Under the new code, WADA has tightened its testing standards for doping violations. Drug testers are permitted to administer out-of-competition, no-notice tests anytime and anywhere. The “whereabouts” rule impinges on athletes’ privacy rights, hampers their ability to move around freely, and subjects them to constant surveillance. However, the need to apply strict standards to out-of-competition testing is deemed by WADA as essential to prevent doping in sports and maintain the integrity and honor of international and Olympic competition. The prevalence of doping violations and steroid incidents has left a profound negative effect on the world of sports and WADA has taken a tough stance against further wrongdoing.

Because of the compelling interests furthered by an effective anti-doping policy, it is likely that any challenge to the “whereabouts” rule under EU law would be fought vigorously by WADA in the ECJ. Though there is a real possibility for the “whereabouts” rule to be deemed illegal under EU law,

174. IAAF, supra note 94.
175. Id.
176. Id.
177. INTERNATIONAL STANDARD FOR TESTING, supra note 1, § 11.4.2.
178. David, supra note 6, at 40.
litigation will likely be very costly and time-consuming. Ultimately, the best way for these athletes to contest the “whereabouts” rule and regain their privacy rights might be in the court of public opinion. The highly publicized criticisms of the new rule by world-class athletes have already caused WADA to hold a special meeting to defend the rule. A persistent movement in protest of the intrusive nature of the “whereabouts” rule may lead WADA to reconsider its stance on out-of-competition testing and lessen the overly strict requirements of its “whereabouts” rule.

James Halt*

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179. Doping Notes: WADA Seeks Special Meeting, supra note 80.

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