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THE DEFINITION OF DOPING AND THE PROOF OF A DOPING OFFENSE (AN ANTI-DOPING RULE VIOLATION) UNDER SPECIAL CONSIDERATION OF THE GERMAN LEGAL POSITION

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INTRODUCTION

Disputes in athletics, and in sport generally, were still relatively rare a few decades ago, especially disputes involving the athletes themselves. However the control of doping and commercialization and professionalization have altered the situation. The earnings of professional athletes have become so considerable that in each case the sanction for an anti-doping rule violation can have a major impact on the athlete's career and profession and his economic losses can amount to a very large sum of money. Moreover the sanction may make commercial contracts void and in this way extend its impact outside of sport.¹ This illustrates the need for a legally acceptable definition of doping and the importance of questions of proof, as in many cases the career of an athlete depends on these findings.

THE DEFINITION OF DOPING

There is neither a common legal definition of the term "doping" for all sports, nor are there any binding legal criteria for such a definition. Rather the content of a "doping" offense is defined by the sports organizations in their own individual manner. Therefore, the definition of doping generally varies between the international sport organizations.² As a consequence of the hierarchical structure of the sports organizations, these definitions of doping are transferred from the international to the national sports organizations, which

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1. LAURI TARASTI, LEGAL SOLUTIONS IN INTERNATIONAL DOPING CASES 35 (2001).

2. GEORGE ENGELBRECHT, ADOPTION, RECOGNITION AND HARMONIZATION OF DOPING SANCTIONS BETWEEN WORLD SPORT ORGANISATIONS 3ff (2000); C. Prokop, DIE GRENZEN DER DOPINGVERBOTE 93 (2000).

are obliged to incorporate these definitions in their own system of rules and regulations.

Nevertheless, the World Anti-Doping Code (WADC)³ of the World Anti-Doping Agency (WADA) has nearly become a standard for doping rules and regulations and the definition of doping. On the one hand, the International Olympic Committee (IOC) has put considerable pressure on the international sports organizations to adopt its standard of doping rules (Olympic Movement Anti-Doping Code) as a condition for being allowed to take part in the Olympic Games.⁴ On the other hand, the need for harmonization for doping rules and regulations has become obvious.

The WADC demonstrates the two principle ways in which doping can be legally defined: a) an abstract definition or b) the so-called "pragmatic" definition, characterized in particular by a list of prohibited substances and methods. In the WADC, both approaches are used in Article 1 and 2 which read as follows:

Article 1

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.

Article 2

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.

2.1.1 It is the Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited list, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

3. World Anti-Doping Code (WADC), at http://www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf (last visited Dec. 3, 2004).

4. Thomas Bach, *Lausanner Erklärung zum Doping und ihre Folgen*, in *DOPING-FORUM* 75 (V. Röhricht & K. Vieweg eds., 2000).

2.1.3 As an exception to the general rule of Article 2.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

2.2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

2.3. Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection.

2.4 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.

2.5 Tampering, or Attempting to tamper, with any part of Doping Control.

2.6 Possession of Prohibited Substances and Methods:

2.6.1 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 the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

2.6.2 Possession of a substance that is prohibited in Out-of-Competition Testing or a 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 granted to an Athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

2.7 Trafficking in any Prohibited Substance or Prohibited Method.

2.8 Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation.⁵

5. WADC, art. 1-2.8, at <http://www.wada-ama.org/docs/web/standards>

However, an abstract definition of doping leaves the question open as to where doping begins. Without any further criteria, this question is considered almost insolvable as the technical approach of Article 1 of the Code demonstrates. Therefore, such an abstract definition must be regarded as not being precise and well-defined enough, and therefore not legally binding.⁶ In this respect, the aims of the fight against doping are to be taken into account. The Introduction to the WADC defines the purposes of the World Anti-Doping Program as follows: It aims on protecting the Athlete's fundamental right to participate in doping-free sport, and thus promote health, fairness, and equality for Athletes worldwide and the ensuring harmonized, coordinated, and effective anti-doping programs at the international and national level with regard to detection, deterrence, and prevention of doping. Predominant and legally acceptable is the more pragmatic definition of doping based on a list of prohibited substances and methods.

Judges then have to rely upon the list of forbidden substances set up by the sports organizations, for example the IAAF or, in most cases, the IOC. The lists of forbidden substances include only examples of substances in the prohibited classes. It has been calculated how many substances the lists would have to contain if not only examples, but rather the whole list of known substances would be included. Such an enumerative list would include for narcotics, anabolic agents and diuretics about 130 to 170 substances; the number of forbidden stimulants would increase from around 43 to at least 290, perhaps even to 526 substances.⁷

For this reason, and in order to take into account the rapid development of medicine, the last point in this list of prohibited substances is an open definition of doping with the term "and related substances."⁸ The term is defined in Chapter I Article 1 of the Olympic Movement Anti-Doping Code: "Related substance means any substance having pharmacological action and/or chemical structure similar to a Prohibited Substance or any other substance referred to in this code." However, without the help of a specialist, an athlete cannot know these substances. Therefore, this wide addition to the otherwise enumerative list of forbidden substances is in conflict with the principle of certainty. Accordingly, an athlete always has to be able to differentiate between allowed and forbidden behavior. This is obviously not the case if such a judg-

_harmonization/code/code_v3.pdf (last visited Dec. 3, 2004)

6. U. Haas, *Aktuelle Entwicklungen in der Dopingbekämpfung*, SPURT at 6.

7. R. K. Müller et al, *Banned Agents and Related Compounds - How Many?*, in 7 RECENT ADVANCES IN DOPING ANALYSIS 14 (W. Schaezner et al. eds., 1999).

8. K. Vieweg, *Grundinformationen zur Dopingproblematik*, in DOPING: REALITÄT UND RECHT 24 (K. Vieweg ed., 1998).

ment can only be made by a highly skilled expert. It is therefore questionable as to whether this definition of doping is precise enough to withstand legal challenge; its validity is increasingly being questioned. The list of the prohibited substances should therefore be as complete as possible to avoid legal problems.

THE PROOF OF AN ANTI-DOPING RULE VIOLATION (DOPING OFFENSE)

Strict Liability

The sanction for an anti-doping rule violation within sport is not a criminal punishment in the sense of criminal law.⁹ It is a disciplinary sanction within sport, normally under private law. The principles of criminal law, especially the principle of "in dubio pro reo" and "nulla poena sine culpa," are not applicable.¹⁰ Therefore, the burden of proof, that is, the risk of not succeeding before court when the facts are not proved, is very important.

The burden of proof in a doping case lies in sport with the sport organization – the accusing party. It has to provide proof of the anti-doping rule violation and, if necessary, of culpability. Normally, there is no evidence other than the finding of the prohibited substance or its metabolites or markers in the sample of the athlete. This is strong evidence for an anti-doping rule violation and is, except for the few cases where a confession or witness evidence is available, the only possibility for efficient doping control.

The approach that the objective finding of a forbidden substance or its metabolites or markers in the body fluids of an athlete is grounds for a sanction for an anti-doping rule violation has been – somewhat misleading – labeled "strict liability." In law, the term "strict liability" is usually understood as liability without intent or negligence. It implies no intentional element; there is no tie between the sanction and intent. In doping, "strict liability" means that the sanction is an *inevitable* consequence if an anti-doping rule violation has been established, irrespective of culpability.

The World Anti-Doping Code mentions the rule of strict liability in five places:

9. WADC, *Doping Control* (comment to introduction, part 1) at http://www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf (last visited Dec. 3, 2004).

10. TARASTI, *supra* note 1, at 65; Christian Krähe, *Beweislastprobleme bei Doping im internationalen Sport - am Beispiel des Olympic Movement Anti-Doping-Codes*, in *DOPING: SANKTIONEN, BEWEISE, ANSPRUCHE, SPORT* 42 (J. Fritzsche ed., 2000); *see also* Aanes v. FILA, CAS 2001/A/317.

(1) Article 2, WADA-Code, specifies the circumstances and conduct that constitute violations of anti-doping rules. According to Article 2.1, in particular, it is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Article 2.1.1 states accordingly that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation. The added comment lays out that the code adopts the rule of strict liability which is found in the Olympic Movement Anti-Doping Code and the vast majority of existing anti-doping rules. Referring to Article 9 (automatic disqualification of individual results) and Art. 10.5 (elimination or reduction of period of ineligibility based on exceptional circumstances) it is stated that the code provides a reasonable balance between effective anti-doping enforcement for the benefit of all "clean" athletes and fairness in the exceptional circumstance where a prohibited substance entered an athlete's system through no fault or negligence on the athlete's part. The concept of the WADC is to base the violation of anti-doping rules on strict liability, but not to impose automatically a fixed period of ineligibility. To support this concept, the Code refers to the jurisdiction of the Court of Arbitration for Sport (CAS), in particular the case *Quigley v. UIT*. As a general reference, this is not correct. First, this case dealt just with disqualification and not with ineligibility. Secondly, other decisions of CAS can be interpreted in a different way.¹¹

(2) Article 3.1, WADA-Code (burdens and standards of proof) points out that the anti-doping organization has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof is prescribed with the words "comfortable satisfaction of the hearing body" which shall be greater than a mere balance of probability, but less than proof beyond a reasonable doubt. However, the standard of proof shall be made a balance of probability where the Code places the burden of proof on the athlete. The comment states that this standard is comparable to that which is applied in most countries to cases involving professional misconduct and that this standard has also been widely applied by courts and tribunals in doping cases.¹²

(3) Article 9, WADA-Code (automatic disqualification of individual results) states that an anti-doping rule violation in connection with an in-competition test automatically leads to disqualification of the individual result obtained in that competition (with all resulting consequences, including forfeiture of any

11. Personal communication with F. Oschütz.

12. See, e.g., N., J., Y., W. v. Federation Internationale de Natation Amateur (FINA), CAS 1998/208 (1998) in DIGEST OF CAS AWARDS II, at 234 (Matthieu Reeb ed., 2002).

medals, points and prizes). The comment says that this principle has already been laid down in the OMADC. Furthermore, the comment makes clear that the principle of fairness requires the disqualification of the athlete violating the anti-doping rules regardless whether he or she was at fault in any way.

(4) Article 10.1, WADA-Code (disqualification of results in event during which an anti-doping rule violation occurs) rules that an anti-doping rule violation occurring during or in connection with an event may, upon the decision of the ruling body of the event, lead to disqualification of all of the athlete's individual results in that event with all consequences, except (Article 10.1.1 WADA-Code) the athlete establishes that he or she bears no fault or negligence for the violation (presumption of fault). However, this exception is not applied if the athlete's results in other competitions were likely to have been affected by the athlete's anti-doping rule violation (e.g. cases Mühlegg, White).

(5) Article 10.5, WADA-Code (elimination or reduction of period of ineligibility based on exceptional circumstances) is based on the presumption of the athlete's fault or negligence. Consequently, the athlete is usually ineligible for the determined period. However, if in an individual case he or she is able to rebut this presumption, the otherwise applicable period of ineligibility shall be eliminated. Accordingly, this period may be reduced, if an athlete establishes that he or she bears no significant fault or negligence. The comment states that this principle was accepted at the World Conference on Doping in Sport and was incorporated into the Olympic Movement Anti-Doping Code (OMADC) according to the basic principle of human rights. This approach reflects a pragmatic compromise between those anti-doping organizations applying the strict liability doctrine without exemptions and those anti-doping organizations attaching great importance to the principle of fault and the principle of proportionality (the comment illustrates the operation of Article 10.5 with some examples).

Unlike the first and the second drafts of the Anti-Doping Code, the most critical points concerning the compatibility of the code with German law that have been stated by the Federal Republic of Germany¹³ have been taken into consideration. Particularly, from the German point of view, due to the basic constitutional principles of fault and proportionality, it was necessary to incor-

13. Comments Regarding the Draft World Anti-Doping-Code (Federal Republic of Germany, December 10, 2002); Comment by the Federal Republic of Germany on the WADA Draft of the World Anti-Doping Code of September 2002.

porate an exemption of the rule of strict liability as in Article 10.5 WADA-Code. Therefore, there is a chance that the regulation will now be accepted by the German courts as according with German law.

This is generally accepted for the disqualification of the athlete. For example, Article 3.3 of the OMADC states that "any case of doping during a competition automatically leads to invalidation of the result obtained, with all its consequences, including forfeit of any medals and prizes." This is deemed necessary to protect the "clean" athletes who take part in the competition; disqualification is therefore considered as nothing more than the removal of illegally acquired advantages in the competition.¹⁴ The CAS has consequently stated that

the system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt. . . . The result of the event has indeed been objectively influenced and, consequently, the intention of the author is irrelevant.¹⁵

If further sanctions like a fine or a ban are to be imposed, the principle of strict liability is, from a legal point of view, no longer applicable.¹⁶ Such further sanctions can only be imposed in the case of culpability (intention or negligence) and have to take into account the individual extent of fault in order to be in accordance with generally accepted principles of law.¹⁷ An automatic sanction would be disproportionate, and at least under German law, unconstitutional. Sanctions can therefore only be imposed if the athlete is found liable, that is in the case of intent or negligence. This is the prevailing opinion and that of CAS.¹⁸

This intentional element is proven by using the so-called principle of "prima-facie" proof (in German: Anscheinsbeweis),¹⁹ which, due to the fact

14. Bach, *supra* note 4, at 73.

15. TARASTI, *supra* note 1, at 85; *see also*, MATTHIEU REEB, DIE CAS-RECHTSPRECHUNG IN DOPING-FÄLLEN 64 (2000).

16. Aanes v. FILA, CAS 2001/A/317. This is the position under Swiss law (see for example, MARGARETA BADDELEY, L'ASSOCIATION SPORTIVE FACE AU DROIT 243 (1993)), and in accordance with the Council of Europe's Anti-Doping Convention. A German Court of Appeal in the *Baumann* case also held that liability without fault was incompatible with the rights of the athlete and German law. *See* OLG Frankfurt/Main, 13W29/00 (judgment from May 18, 2000).

17. Krähe, *supra* note 9, at 51.

18. Reeb, *supra* note 13, at 65.

19. The basic principle of the prima facie proof is used by both the IAAF arbitration panel and the CAS, although the terminology used is often slightly different, for example, "shifting the burden

that it is proportionate, is constitutional. With respect to the principle of proportionality, it is necessary to weigh the interests of the athlete, in particular his right of personality, against those of the federation.²⁰

Prima Facie Proof of Doping

Prima facie proof allows culpable behavior or a cause of a finding to be proved in an indirect manner by using presumptions based on experience. For this, a typical cause of action must exist. In other words, facts must exist which can be regarded as the *typical result* of a certain behavior.

In doping, this can be phrased as follows: an athlete in whose body fluids a forbidden substance has been found has, according to experience, administered or used the substance, and has done this in a culpable way, in other words with intent or due to negligence. By proving the existence of the fact, the behavior that may have caused it is therefore also proven. The prima facie proof therefore consists of a double presumption: first, of the use or application of the substance, and second, of a culpable element.²¹

Nevertheless, the prima facie proof is only a *presumption*. The athlete can defend himself and rebut the presumption by providing evidence that the finding of the substance may have other causes than the application of the substance. He may for example state that the substance has entered his body as a contamination of a nutritional supplement, or was due to contaminated food, for example, meat. However, the rules for rebutting the presumption of the prima facie proof are very strict. The mere *claim or assertion* of another possible cause of the finding of the substance is not enough; rather, facts have to be presented and proved that support the thesis that not the typical, but an alternative cause of action has credibly taken place.²²

As it is very difficult for the athlete to present such credible facts, the rebuttal of the presumption has seldom succeeded. Therefore, the liability of the

of proof to the athlete after a positive finding," this giving the presumption of negligence of the athlete. Cf. TARASTI, *supra* note 1, at 96. The IOC also follows this principle of a rebuttable presumption. See T. HAUG & C. PAUL, DISKUSSIONSBERICHT ZUM DOPING-FORUM 144, 150 (2000); see also W. Walker, in: DOPING: REALITÄT UND RECHT 144 (K. Vieweg ed., 1998), and Margareta Baddeley, *Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht*, in DOPING: SANKTIONEN, BEWEISE, ANSPRUCHE, SPORT 22 (J. Fritzweiler ed. 2000); Meca-Medina v. Federation Internationale de Natation Amateur (FINA), CAS 1999/A/234 (2000). For a slightly different use see, U. Steiner, *Doping aus verfassungsrechtlicher Sicht*, in DOPING-FORUM 125, 135-37 (V. Röhrich & K. Vieweg eds., 2000).

20. BADDELEY, *supra* note 14, at 239.

21. Cf. Krähe, *supra* note 9, at 45; Bernhard v. Int'l Triathlon Union, CAS 1998/222 (1998) in DIGEST OF CAS AWARDS II, at 330 (Matthieu Reeb ed., 2002).

22. Meca-Medina, CAS 1999/A/234.

athlete is not a "total" liability, but once a positive doping sample has been produced, the strict rules for the defense will make it very difficult for the athlete to exonerate himself or herself.

Contamination with Forbidden Substances and the Question of Cut-off Limits

The finding of a forbidden substance, even in very low concentrations, is taken as grounds for a prima facie proof of its culpable application. Its presence in the athlete's body is, on a basis of experience, typically caused by such an application. Nowadays it is also known that, for example, nutritional supplements may contain traces of forbidden, but not declared, substances. As a consequence, the use of such supplements is itself considered as negligent behavior, as the athlete has the duty to be very careful with what substances he or she consumes. Therefore, even if only traces of a forbidden substance are found, the athlete is treated in the same way as if he or she had applied large doses of the forbidden substance, which had already left the body by the time the sample was taken. Only by proving that it was indeed a contamination and not leftover traces of an anti-doping rule violation, can the athlete exonerate himself. This strict treatment is often explained with the so-called "floodgate argument," which states that if an easier excuse was possible, it would be impossible to fight doping efficiently. However, such strict rules on behavior can only be imposed if the athlete is indeed able to avoid the sources of contamination, which is true for nutritional supplements as there is no absolute need to consume these substances.

The situation is only different, however, when a forbidden substance is known to be present in *everyday food* or the *natural environment* of an athlete, or even produced by the body of the athlete itself.²³ In such cases, it is not easily possible for the athlete to avoid such substances; their presence is therefore no proof of negligent behavior. Moreover, regardless of questions of culpability, the finding of a substance in such a low concentration is in many cases not even enough proof that an anti-doping rule violation has occurred at all. Such concentrations are not the "typical" result of an anti-doping rule violation, because it is equally possible that they result from natural sources, such as everyday food, the environment, or the body.²⁴

Such a doping sample must not be declared positive. For this reason cut-off limits have to be established on a sound scientific basis.²⁵ Only when a

23. Consequently, nutritional supplements are not included in the definition of the natural environment or everyday food.

24. *Bernhard*, CAS 1998/222.

25. The doping rules have to be interpreted restrictively (teleologically) in this respect, as their aim is to prevent illegal manipulation, but not to punish an athlete for a low random concentration of

concentration of a forbidden substance above such "normal" concentrations is found, is it sufficient proof that it is not merely a random presence, but allows the presumption that it was caused by illegal drug use.

As a consequence, cut-off limits that take into account such "normal" values of the forbidden substances have to be determined. Especially when substances produced naturally by the human body are concerned, this may be problematic due to biological variability, and leaves the athlete a certain gap to evade doping control.

Therefore, *direct* methods of identifying forbidden substances like the isotope mass spectrometry for anabolic agents seem preferable, as they provide conclusive proof that the substance must have been taken artificially, without the problem of proving that it is not inside the concentration range that may be reached normally.

"Undetectable" Doping and Medical Monitoring

As we may see in the following oral presentations concerning gene doping and doping with hormones, it may well be that in the not too far away future some highly sophisticated methods for doping may develop which are, with the current analytical techniques, indeed undetectable.

As no trace of a forbidden substance will be detectable, it may become increasingly important to identify "indirect" sources of proof, for example, typical changes in certain body values as a consequence of doping. The approach in the steroid profile²⁶ may be taken as an example.

If such indirect indicators cannot supply sufficient proof for an anti-doping rule violation, another approach could be to impose "health rules" in combination with a medical monitoring. This was done by the UCI until March 2001. Another example is the upper limit of hemoglobin in blood used by some international federations.²⁷

Concentrations of body values above such limits are not sufficient to prove an anti-doping rule violation. They are not typically reached only by doping, but can also likely be due to intense training or, for example, hyperbaric chambers.

Therefore, if an athlete has a higher value, this is not considered an anti-doping rule violation. However as a consequence, the athlete is still not al-

a substance. Cf. *Meca-Medina*, CAS 1999/A/234.

26. M. Donike, *Longterm influence of anabolic steroid misuse on the steroid profile*, in PROCEEDINGS OF THE 11TH WORKSHOP ON DOPE ANALYSIS, 108 (M. Donike, et al. eds., 1993).

27. International Cycling Union (UCI), International Union for Modern Pentathlon (UIPM), International Biathlon Union (IBU).

lowed to compete; the athlete is prohibited from taking part in the competition for medical reasons because of a possible dangerous body condition. This may primarily safeguard the health of the athlete, but it also ensures equal competition between the athletes.

Medical Monitoring may provide at least an indirect method to combat doping in sport. Until better detection methods have been found, this approach may be an adequate and legally acceptable way to fight against doping in addition to the current doping control system.

CONCLUSIONS

As has been previously explained, there is no common legal definition of the term doping. Doping can either be defined in an abstract manner or in a pragmatic way, of which the latter is more predominant. According to this pragmatic definition, the mere presence of a forbidden substance in an athlete's body constitutes an anti-doping rule violation and could lead to the disqualification of the athlete. On the other hand, in relation to sanctions, in particular bans, proof of culpability is necessary. The burden of proof of the offense lies with the accusing party, that is, the sport organization, which is made easier due to the principle of "prima facie" proof. Nevertheless the athlete can defend himself by providing evidence that the finding of the substance was caused by something other than the application of the substance. This is relevant with regard to substances that are produced naturally by the human body. For these substances, cut-off limits have to be established to separate the allowed natural state of the body from the forbidden manipulation. In relation to sanctions, the athlete has to rebut the presumption that the finding of the substance in the body was due to intention or negligence on the part of the athlete. However, it is very difficult to present credible facts against negligence, and for this reason the rebuttal of the presumption has seldom succeeded.