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**ATHLETE'S WHEREABOUTS RULE IN THE LIGHT OF  
PRINCIPLE OF PROPORTIONALITY – ILLEGAL SURVEILLANCE  
OR LEGALLY JUSTIFIED INTERFERENCE WITH ARTICLE 8  
ECHR**

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I hereby declare that I have compiled the paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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## **ABSTRACT**

This thesis concentrates on examining whether the World Anti-Doping Agency's whereabouts rule that restricts the athlete's right to privacy is a proportionate measure in order to protect doping-free sport. The thesis uses Article 8 of the European Convention on Human Rights as a legal ground to protect the athlete's privacy.

This thesis will go through the current doping control system to evaluate the proportionality of it. It is necessary to determine the importance of doping control and the whereabouts rule to examine whether the interference with Article 8 ECHR is an essential and proportionate measure to achieve doping-free sport.

The hypothesis is that "The current whereabouts rule restricts disproportionately athlete's right to privacy to be legally justified." This thesis aims to indicate the privacy problems of the whereabouts rule and whether the restrictions of athlete's right to privacy are proportionate. Moreover, this thesis aims to evaluate whether the whereabouts rule could be efficiently replaced.

Qualitative methodology is used as a methodology. This thesis bases on the European Convention on Human Rights, Council of Europe's Anti-Doping Convention and its additional protocol, UNESCO's International Convention against Doping in Sport and case law. Additionally, the argumentation is based on scientific articles by legal scholars.

Keywords: whereabouts rule, principle of proportionality, right to privacy, anti-doping

## INTRODUCTION

Every athlete wants to be the best of their kind, and the victory may also bring financial benefits for them. Consequently, this may sometimes lead to the use of performance-enhancing substances among athletes. It is problematic that substances are usually a step ahead of testing, and many substances disappear from the body within 24 hours.<sup>1</sup> World Anti-Doping Agency (WADA) aims to prevent the use of doping by no-notice out-of-competition testing that has achieved its place in the heart of the anti-doping work. Certain elite athletes belong to the Registered Testing Pool (RTP), enabling locating and testing athletes for no notice because they have to provide detailed whereabouts information for anti-doping organisations in advance. This is called the whereabouts rule.

WADA created the RTP where athletes are required to give very detailed information about their whereabouts for each day in every quarter.<sup>2</sup> However, athletes can still be tested anytime without belonging to the RTP.<sup>3</sup> Whereabouts information is used for locating the athlete or planning for future testing. The purpose is to protect athlete's right to doping-free sport.<sup>4</sup> The decision of the athletes belonging to the RTP at the international level is made by the International Federation and by the National Anti-Doping Organisations at the national level.<sup>5</sup> The whereabouts rule restricts athlete's right to privacy significantly. However, the European Court of Human Rights still argued in its judgement *FNASS and Others v. France* concluded that the whereabouts rule does not violate the ECHR Article 8.

This is the year of the Tokyo Summer Olympics that brings up the discussion of doping too. Five years ago, in the Rio Summer Olympics, eyes were on the Russian Olympic team. The Russian doping scandal was extensive because the doping violation was state-sponsored when the Russian

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<sup>1</sup> Halt, J. (2009). Where is the Privacy in WADA's "Whereabouts" Rule. *Marquette Sports Law Review*, 20 (1), p 277

<sup>2</sup> *International Standard for Testing and Investigations*. (2021b). World Anti-Doping Agency. Article 4.8.6.2. Retrieved from [https://www.wada-ama.org/sites/default/files/resources/files/international\\_standard\\_isti\\_-\\_2020.pdf](https://www.wada-ama.org/sites/default/files/resources/files/international_standard_isti_-_2020.pdf)

<sup>3</sup> *Athlete Whereabouts*. (2015) World Anti-Doping Agency. Retrieved from [https://www.wada-ama.org/sites/default/files/wada\\_whereabouts\\_aag\\_eng\\_web.pdf](https://www.wada-ama.org/sites/default/files/wada_whereabouts_aag_eng_web.pdf), 7 March 2021

<sup>4</sup> *Ibid.*

<sup>5</sup> World Anti-Doping Agency. (2021b). *supra nota* 2, p 11

national anti-doping agency manipulated the samples.<sup>6</sup> CAS (Court of Arbitration for Sport) cut the Russian ban to two years in December 2020, but Russia is still banned, for example, from the Tokyo Olympics and Paralympics.<sup>7</sup> However, several Russian athletes can compete as neutral athletes.<sup>8</sup> Among all other doping scandals, this indicates the essential need for WADA and its measures to protect the use of prohibited substances.

Problems of performance-enhancing substances in sports have appeared as long as sports has been a phenomenon since ancient Greeks.<sup>9</sup> Although there are such strict rules created, the use of doping has not disappeared in the world. The thesis aims to analyse the proportionality of these strict rules in order to eliminate doping. Analysing the whereabouts rule in the light of proportionality suits for its nature because the rule balances between protecting doping-free sport and athlete's right to privacy.

The right to privacy has acquired its place as one of the fundamental rights in Europe. Usually, people may take it even for granted because they have used to their privacy is firmly protected. Privacy is protected within Europe by the European Convention of Human Rights Article 8. Besides private and family life, it protects home and correspondence too. The whereabouts rule restricts these rights of the athlete. Additionally, the scope of the ECHR Article 8 is extensive.<sup>10</sup>

The hypothesis of this thesis is that “The current whereabouts rule restricts disproportionately athlete's right to privacy in order to be legally justified.” The research aims to indicate the whereabouts rule's privacy problems and evaluate whether the restrictions of athlete's right to privacy are proportionate. The research problem is that the whereabouts rule restricts athlete's right to privacy but on the other hand, the whereabouts rule protects doping-free sport. This thesis presents analysis of the current whereabouts rule in the light of proportionality and possible alternatives for the whereabouts rule and whether it could be replaced. This thesis is limited to Europe instead of the European Union because it relies on the Anti-Doping Convention of the

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<sup>6</sup> Court of Arbitration for Sport, 17.12.2020, World Anti-Doping Agency v. Russian Anti-Doping Agency, CAS 2020/O/6689, point 33

<sup>7</sup> BBC. (2020, December 17). *Russia banned from Tokyo Olympics and 2022 World Cup after Cas ruling*. BBC Sport. <https://www.bbc.com/sport/olympics/55349156>, 24 April 2021

<sup>8</sup> *Ibid.*

<sup>9</sup> Goldstein, R. R. (2007). An American in Paris: The legal framework of international sport and the implications of the world anti-doping code on accused athletes. *Virginia Sports and Entertainment Law Journal*, 7 (1), p 160

<sup>10</sup> *Article 8 ECHR - Right to private life, family life, correspondence and home*. (2018). Hembach Legal.

Council of Europe, which plays a vital role in anti-doping work. Therefore the area of Europe was natural. Moreover, the problem is global, but an international view to this would be too broad.

This thesis consists of six chapters beginning from *lex sportiva* and the autonomy of sport. Exposing how the sport is regulated in Europe is crucial as well as proving that sports law is a legal order. This makes more definite the unique nature of the sports law. After presenting the legal background of sports law, the thesis goes through the most crucial doping regulations regarding this topic and the institutional players behind them. This clarifies the actors behind the anti-doping rules as well as the whereabouts rule. Moreover, the regulations are the core of the anti-doping work. The third chapter concentrates on the current whereabouts rule, related case, whereabouts requirements and the strict liability of the whereabouts rule. Analysing the whereabouts rule is the core of this thesis, and hence, exposing its background and case law is essential in order to present the privacy problem justifiably and on the other hand, the importance of effective anti-doping work. The fourth chapter presents Article 8 ECHR in the light of the whereabouts rule by analysing the ECtHR judgement of the *FNASS v. France*. The judgement is crucial regarding this thesis concerning whether the whereabouts rule breached Article 8 ECHR. The focus is to analyse the grounds how the right to privacy is justified to interfere. Finally, the thesis examines the proportionality and possible alternatives for the whereabouts rule and analyse their efficiency. By analysing the alternatives, it is possible to conclude whether the whereabouts rule can be replaced. Afterwards, proving the hypothesis true or false is possible in the conclusion.



# 1. SPORTS LAW

First, it is necessary to expose what is actually sports law and how it is regulated within Europe because it has an autonomous role in most countries. However, it is more and more professionalised and commercialised, and it has a considerable effect on societies. Consequently, it is necessary to regulate sport.

## 1.1 Lex Sportiva

Lex sportiva describes the autonomous law of sport. This statement is confirmed by the fact that international sports law is governed by private institutions such as the International Olympic Committee (IOC), WADA, International Federations, and national organisations. CAS is the only institutional party.<sup>11</sup> Currently, international sports law is described as “an autonomous transnational legal order”.<sup>12</sup> The states or their legal orders do not monitor international sports law, and hence they do not have jurisdiction over it. The legislative element is based on international sports federations’ competence to codify the transnationally used rules in specific sports. WADC is an example of this kind of legislation.<sup>13</sup> Regardless of the public bodies that have participated in the formulating process of WADC rules, the regulatory force is usually given to the sports federations. However, France transposed WADC into the national law “Code du Sport”.<sup>14</sup>

The IOC determines the autonomy of sports as essential for the Olympic and sports movement. According to the IOC, “...autonomy guarantees the preservation of the values of sport, the integrity of competitions, the motivation and participation of volunteers, the education of adolescents and their contribution to the well-being of all, women, men and children, thereby contributing to its credibility and legitimacy.”<sup>15</sup>

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<sup>11</sup> Duval, A. (2013) Lex Sportiva: A Playground for Transnational Law. *European Law Journal*, 19 (6), p 828

<sup>12</sup> Foster, K. (2019). Global Sports Law Revisited. *The Entertainment and Sports Law Journal*, 17 (4), p 2

<sup>13</sup> *Ibid.*, p 3

<sup>14</sup> *Ibid.*

<sup>15</sup> Chappelet, J. L. (2010). *Autonomy of Sport in Europe*. Council of Europe, p 14

Sport's autonomy has enabled international sports organisations to be immune from national courts, and hence they have a self-governance status.<sup>16</sup> However, when the nature of the sport has evolved more professional and commercial nowadays, that undermines sports autonomy. Furthermore, other areas of law have also started to affect sport like labour law, competition law and human rights law.

Several international sports federations and national anti-doping organisations have their own tribunals, and most enable appealing to CAS. In most cases, athletes have no other choice than to use these arbitration tribunals.<sup>17</sup> CAS determines the rules of the Olympic charter or International sports federations applicable *lex sportiva*. Consequently, the regulations recognised as part of a legal system do not have to be stipulated by a legislator but consist of principles determined by courts.<sup>18</sup> What comes to the sanctions of sports law, financial penalties, disqualifications and suspensions are widely used.<sup>19</sup> The doping violations and their sanctions are determined in the WADC. Later in this thesis analyses the efficiency of the sanctions in order to prevent doping violations.

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<sup>16</sup> Foster, K. *supra nota* 12, p 2

<sup>17</sup> *Ibid.*

<sup>18</sup> Duval, A. *supra nota* 11, p 9

<sup>19</sup> Foster, K. *supra nota* 12, p 3

## 2. ANTI-DOPING IN EUROPE

The first doping controls were conducted in the 1960s, and they were justified in the manner of protecting the health of the athletes.<sup>20</sup> Doping control is regulated in Europe by worldwide provisions. The World Anti-Doping Code (WADC) is one of the most significant measures in order to fight against doping. WADC is based on the UNESCO International Convention against Doping in Sport and the Anti-Doping Convention of the Council of Europe.<sup>21</sup> The Anti-Doping Division of the Court for Sport (CAS ADD) is a first-instance authority to hear and decide anti-doping cases.<sup>22</sup>

### 2.1 Definition of doping

There is not a general legal definition for doping.<sup>23</sup> According to the Council of Europe's Anti-Doping Convention, doping is defined as using pharmacological doping or doping methods and administering them to the athletes.<sup>24</sup> According to WADC, athletes are responsible for the prohibited substances or metabolites or markers found in their samples.<sup>25</sup> WADA must publish the Prohibited List at least annually that includes currently prohibited substances and prohibited methods.<sup>26</sup> There are substances and methods prohibited all the time and substances prohibited only in competitions. However, not all prohibited substances and methods are named on the list; a substance or method can still be prohibited under certain conditions.<sup>27</sup> Hence, an athlete must be

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<sup>20</sup> Hanstad, D. V., & Loland, S. (2009). Elite athletes' duty to provide information on their whereabouts: Justifiable anti-doping work or an indefensible surveillance regime? *European Journal of Sport Science*, 9 (1), p 3-4

<sup>21</sup> *Euroopan neuvosto*. (2020). Suek. Retrieved from <https://suek.fi/antidopingtoiminta/yhteistyossa/euroopan-neuvosto/>, 7 March 2021

<sup>22</sup> *List of Hearings*. (2021). Court of Arbitration for Sport. Retrieved from: <https://www.tas-cas.org/en/add/arbitration-rules-cas-add.html>, 2 May 2021

<sup>23</sup> Stevens, G. (2013). The winner takes it all! Reflections on the world anti-doping code and the possible criminalisation of doping in sport, *Notes*. 46 (2), p 593

<sup>24</sup> Council of Europe. Anti-Doping Convention, Strasbourg, 16.11.1989, Article 2

<sup>25</sup> *World Anti-Doping Code*. (2021a) World Anti-Doping Agency., Article 2.1.1. Retrieved from [https://www.wada-ama.org/sites/default/files/resources/files/2021\\_wada\\_code.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf), 28 February 2021

<sup>26</sup> *Ibid.*, Article 4.1

<sup>27</sup> *Understand the Prohibited List*. (2021). Athletics Integrity Unit. Retrieved from <https://www.athleticsintegrity.org/know-the-rules/understand-the-prohibited-list>, 10 March 2021

very careful when using, for example, supplements because the athlete is always responsible for the found prohibited substance in their samples.<sup>28</sup>

## 2.2 Olympic Movement

To clarify the complexity of the variety of the anti-doping parties, I begin the introduction from the Olympic Movement. The Olympic movement consists of the International Olympic Committee, International Sports Federations and the National Olympic Committees.<sup>29</sup> According to the Olympic Charter, “Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.”<sup>30</sup> Consequently, international federations and their athletes are bound by the requirements of the IOC. Further, it has listed Anti-Doping Rules that are applicable for the Tokyo Olympics.

## 2.3 World Anti-Doping Agency

WADA is an independent not-for-profit agency and funded by the sport movement and governments.<sup>31</sup> It is a private law foundation and governed by Swiss law.<sup>32</sup> WADA consists of representatives of public authorities as well as the Olympic movement.<sup>33</sup> WADA’s highest policy-making body is a 38-member Foundation Board, including representatives from the Olympic Movement and Governments worldwide.<sup>34</sup> WADA works together with eight International Standards to increase consistency between anti-doping organisations worldwide. International Olympic Committee established WADA after The First World Conference on Doping in Sport in 1999.<sup>35</sup> The doping scandal during Tour de France in 1998 was the last push in establishing

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<sup>28</sup> World Anti-Doping Agency (2021a). *supra nota* 25, Article 2.1.1

<sup>29</sup> *The Olympic Charter*. (2020) International Olympic Committee. p 15. Retrieved from <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> , 6 April 2021

<sup>30</sup> *Ibid.*, p 16

<sup>31</sup> *Governance*. (2021c). World Anti-Doping Agency. Retrieved from <https://www.wada-ama.org/en/governance> , 7 March 2021

<sup>32</sup> Goldstein, R. R. *supra nota* 9, p 155

<sup>33</sup> Serby, T. (2017). Sports Corruption: Sporting Autonomy, Lex Sportiva and the Rule of Law. *Entertainment and Sports Law Journal*, 15 (1), p 4

<sup>34</sup> World Anti-Doping Agency. (2021c). *supra nota* 31

<sup>35</sup> *Who We Are*. (2020). World Anti-Doping Agency. Retrieved from <https://www.wada-ama.org/en/who-we-are> , 7 March 2021

WADA.<sup>36</sup> WADA invests in transparency, and for example, their Foundation Board meetings are public.<sup>37</sup>

### 2.3.1 World Anti-Doping Code

WADC has legal force because it has been transposed into anti-doping legislation through the sports organisations. However, France has exceptionally transposed it into the national legislation. The burden of proof does not correspond with the public criminal courts. Consequently, anti-doping movements are described as “privatised analogue to the criminal justice” operating within or outside the national legislative and judicial control.<sup>38</sup> WADC applies to all sports the IOC has recognised, and it is transposed and enforced by an overwhelming majority of countries worldwide.<sup>39</sup>

WADC is modified regularly. Current WADC took effect on 1 January 2021.<sup>40</sup> According to the WADC, WADA’s purpose is “...to protect the Athlete’s fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide and to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to the prevention of doping...”<sup>41</sup>

Athletes always want to improve previous results and win. Additionally, every athlete must have the right to participate in doping-free sport. The WADC must be followed by all the Anti-Doping Organisations, athletes, and other persons.<sup>42</sup> Furthermore, the aim is not to limit national requirements or legal standards in anti-doping proceedings, and it is separately stated that they respect human rights.<sup>43</sup> Despite the fact that the WADC is an international instrument, the provisions must follow European Union law, national law, and ECHR.<sup>44</sup> Hence, the WADC is required to respect the athlete’s privacy rights too.

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<sup>36</sup> Kamber, M. (2011). Development of the role of National Anti-Doping Organisations in the fight against doping: From past to future. *Forensic Science International*, 213 (1–3), p 5

<sup>37</sup> World Anti-Doping Agency. (2021c). *supra nota* 31

<sup>38</sup> Serby, T. *supra nota* 33, p 4

<sup>39</sup> Duval, A. *supra nota* 11, p 8

<sup>40</sup> World Anti-Doping Agency. (2021a). *supra nota* 25, p 9

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, p 16

<sup>43</sup> *Ibid.*, p 17

<sup>44</sup> MacGregor, O., Griffith, R., Ruggiu, D., & McNamee, M. (2013). Anti-doping, purported rights to privacy and WADA’s whereabouts requirements: A legal analysis. *Fair Play*, 1 (2), p 36

### 2.3.2 International Standard for Testing and Investigations

International Standard for Testing and Investigations (ISTI) is one of the International Standards that work together with the WADC. ISTI was developed jointly with signatories of the WADC, public authorities and relevant stakeholders.<sup>45</sup> The first ISTI was adopted in 2003 at the same time as the first whereabouts rule, and it is modified six times after. The current ISTI came into force this year.

The aim of ISTI is to organise effective testing in competitions and out-of-competition and take care of the process of collecting samples and delivering them to the laboratory. ISTI establishes standards for collection and the whereabouts information, notification of athletes, sample collection, administration of samples and documentation and transporting samples to laboratories.<sup>46</sup> ISTI has an vital role in order to ensure proportionate testing standards.

### 2.4 Role of the Council of Europe in anti-doping

The Council of Europe's Anti-Doping Convention is an interstate that aims to harmonise anti-doping at the international and national levels.<sup>47</sup> Furthermore, doping was the first concern of the Council of Europe in sports, and its anti-doping work started already in 1967.<sup>48</sup> The Council of Europe administers certain conventions concerning sport-related questions. The system includes as well binding Conventions as soft law.<sup>49</sup>

The Anti-Doping Convention has a vital role with the WADC to reduce and eliminate doping in sport for good. The Convention requires parties to undertake methods that are essential for efficient anti-doping work.<sup>50</sup> The Convention was adopted in 1989 and is ratified by 52 states.<sup>51</sup> Furthermore, it is open to non-Member States of the Council of Europe as well. The Convention offers common standards and requires the member states to adopt specific legal, economic,

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<sup>45</sup> World Anti-Doping Agency. (2021b). *supra nota* 2, p 2

<sup>46</sup> *Ibid.*, point 1

<sup>47</sup> Suek. *supra nota* 21

<sup>48</sup> Council of Europe. (2020). *Anti-doping*. Sport. Retrieved from: <https://www.coe.int/en/web/sport/anti-doping-convention> , 10 March 2021

<sup>49</sup> Czepek, J. (2019). Sports in the Case-Law of the European Court of Human Rights. *Espaço Jurídico Journal of Law*, 20 (2), p 253

<sup>50</sup> Anti-Doping Convention. 16.11.1989. *supra nota* 24, Article 1

<sup>51</sup> Council of Europe. (2020). *About the Convention*. Sport. Retrieved from: <https://www.coe.int/en/web/sport/about-the-convention> , 7 March 2021

financial, technical and educational measures.<sup>52</sup> The Monitoring Group ensures that the treaty is respected by the parties. Furthermore, it co-operates with WADA and international sports federations.<sup>53</sup>

According to the Convention “...sport should play an important role in the protection of health, in moral and physical education and in promoting international understanding.”<sup>54</sup> The Convention urges parties to adopt legislative measures to restrict the availability and the use of doping.<sup>55</sup> Additionally, the parties shall encourage their national sports organisations to accomplish in and out-of-competition testing required by competing international sports organisations.<sup>56</sup> Consequently, the Convention encourages States to apply necessary methods through their national anti-doping organisations.

Article 7 of the Convention requires parties to encourage their sports organisations and international organisations to design and implement appropriate anti-doping measures within their areas of competence. Moreover, the disciplinary procedures shall apply accepted principles of natural justice internationally and guarantee respect for the suspected athletes’ fundamental rights. The Convention ensures the fundamental rights of the suspected athletes in the disciplinary procedures but not in testings. However, the Convention does not specify the rules for doping testing at all. Hence WADA has an autonomous role in setting the anti-doping rules that parties of this Convention shall comply with. Despite the fact that the Council of Europe co-operates with WADA, Additional Protocol to the Anti-Doping Convention requires parties to recognise the competence of the WADA and other doping control organisations operate under its authority to conduct out-of-competition controls.<sup>57</sup>

Indeed, the Council of Europe aims to take measures to achieve practical anti-doping work. This is important because it is a crucial factor, and by its actions, it can monitor anti-doping work. The more these factors take part in the anti-doping work the more people are aware of the disadvantages of doping that could prevent doping. Consequently, the Council of Europe would be the factor that

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<sup>52</sup> *Ibid.*

<sup>53</sup> Council of Europe. (2021). *The Monitoring Group of the Anti-Doping Convention*. Sport. Retrieved from <https://www.coe.int/en/web/sport/the-monitoring-group-of-the-anti-doping-convention> , 24 April 2021

<sup>54</sup> Anti-Doping Convention, 16.11.1989, *supra nota* 24

<sup>55</sup> *Ibid.*, Article 4(1)

<sup>56</sup> *Ibid.*, Article 4(3c)

<sup>57</sup> Council of Europe Additional Protocol to the Anti-Doping Convention, Warsaw, 12.10.2002, Article 1(3)

gives recommendations to develop the current whereabouts rule to be less restrictive in the light of the right to privacy.

## 2.5 Role of the UNESCO in anti-doping

UNESCO is the United Nations' leading agency for sport. According to UNESCO, "The fight against doping in sport is based on two fundamental principles: the physical and mental health of athletes, both amateurs and professional, and the preservation of sports ethics and values."<sup>58</sup> Further, UNESCO participates actively in anti-doping work through its normative work such International Convention against Doping In Sport, international cooperation, education and capacity building.<sup>59</sup>

International Convention against Doping in Sport was created on the concern about the erosion of ethics and inequity. According to UNESCO, doping harms the ethics and integrity of sport, and consequently, it is a public health issue. The Convention is ratified by 191 states, and therefore it is much broader than Anti-Doping Convention of the Council of Europe. The UNESCO Convention aims to ensure the effectiveness of the WADC because it applies only to sports organisations when the Convention contributes a legal framework that the national governments can address to specific areas.<sup>60</sup>

This Convention gives effect to the WADC under public international law under. Further, the states are obliged to promote the establishment of national anti-doping agencies.<sup>61</sup> UNESCO Convention enabled the WADC to be incorporated into the national legislation of the States that have ratified it.<sup>62</sup> As well as the Council of Europe, it is important that UNESCO has taken measures in the anti-doping work because it enables a legal framework that can be addressed to the parties.

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<sup>58</sup> *Sport and Anti-doping*. (2020). UNESCO. Retrieved from: <https://en.unesco.org/themes/sport-and-anti-doping> , 7 April 2021

<sup>59</sup> *Ibid.*

<sup>60</sup> UNESCO. International Convention against Doping in Sport. Paris, 19.10.2005

<sup>61</sup> Serby, T. *supra nota* 33, p 4

<sup>62</sup> Fédération Nationale des Syndicats Sportifs (FNASS) & Others v. France, nos. 48151/11 and 77769/13, point 178, ECHR 2018.



### **3. WHEREABOUTS RULE**

An essential part of the anti-doping work is out-of-competition testing. The whereabouts rule enables that an athlete can be located for no-notice out-of-competition testing.<sup>63</sup> The whereabouts rule concerns elite athletes who belong to the RTP. This chapter analyses the heart and development of the whereabouts rule in order to expose the system.

#### **3.1 Development of the whereabouts rule**

##### **3.1.1 The whereabouts rule in 2003**

The whereabouts rule appeared first time in the WADA Code 2003. Testing was organised by international federations and national anti-doping organisations. The testing concentrated on the out-of-competition testing, and the effect depended on the operating organisations' ability to collect and maintain information.<sup>64</sup> Violation of failing to provide the required information was already declared, but the requirements for whereabouts information were not very strict. Athletes that belonged to the out-of-competition testing provided and updated information for no advance notice out-of-competition testing. The more stringent requirements were set by the international federations and national anti-doping organisations. The information was declared three months in advance, a specific location for one hour for five days a week when they were available for testing. The time range to testing was between 5 a.m and 11 p.m. Missing information from an athlete was a doping violation despite the intentional or negligent conduct. Disciplinary procedures were freely set by the international federations and national anti-doping organisations.<sup>65</sup> Consequently, this led to the situation where other States had stricter anti-doping programs than the others.<sup>66</sup>

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<sup>63</sup> Sloot, V. B., Paun, M., & Leenes, R. (2020). *Athletes' Human Rights and the Fight Against Doping: A Study of the European Legal Framework (ASSER International Sports Law Series)* (1st ed. 2020 ed.). T.M.C. Asser Press. p 58

<sup>64</sup> Halt, J. *supra nota* 1, p 269

<sup>65</sup> *Ibid.*, p 270.

<sup>66</sup> Hanstad, D. V., & Loland, S. (2009). *supra nota* 20, p 6

### 3.1.2 Ohuruogu v. UK

A British athlete Christine Ohuruogu failed three times to be present at out-of-competition testing and consequently committed a doping violation.<sup>67</sup> During this case, the old whereabouts rule from 2003 was effective. According to IAAF, three missed tests within five years occur an anti-doping rule violation.<sup>68</sup> Ohuruogu gave schedules to the UK Athletics Limited, but afterwards, she changed the schedule but did not notify them.<sup>69</sup> Ohuruogu argued that the rules should have been interpreted in favour of the athlete. Additionally, before a doping violation, there should have been a notice of evaluation. Furthermore, Ohuruogu argued that a one-year suspension of the violation was a “disproportionate penalty”.

Ohuruogu appealed to the CAS, but CAS agreed with UKA’s decision arguing that out-of-competition testing is crucial for effective anti-doping. CAS continued that the suspension was within the range of WADA’s rules.<sup>70</sup> CAS stated that following the instructions is demanding for an athlete. However, CAS still finds that anti-doping rule prevent the use of performance-enhancing substances effectively. CAS continued that these rules can be considered unfair, and this decision can be a warning that athletes must take the anti-doping provisions seriously. Furthermore, CAS stated that Ohuruogu might not have acted intentionally but more forgetfully.<sup>71</sup>

Ohuruogu is a professional athlete in 400-metre, hence a certain degree of diligence is reasonable to expect to form her. The anti-doping organisations education program for athletes shall include the principle of Strict Liability, consequences of doping for health, sanctions, the prohibited substances and possible risks of using supplements, requirements of the whereabouts rule and ADAMS.<sup>72</sup> Ohuruogu tested negative on 16 July and 28 July in competition but missed the third test time on 25 July. Consequently, it is farfetched that she has taken any performance-enhancing substances. However, there is still the possibility because, for example, blood-doping is challenging to trace.

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<sup>67</sup> Court of Arbitration for Sport, 3.4.2007, Christine Ohuruogu v. UK Athletics Limited & International Association of Athletics Federations, CAS 2006/A/1165

<sup>68</sup> *Ibid.*

<sup>69</sup> Halt, J. *supra nota* 1, p 271.

<sup>70</sup> CAS 2006/A/1165. *supra nota* 65, point 16

<sup>71</sup> *Ibid.*, point 21

<sup>72</sup> World Anti-Doping Agency (2021a). *supra nota* 2, Article 18.2

### 3.2 The current whereabouts rule

In 2009 WADC updated the whereabouts rule.<sup>73</sup> WADA changed the whereabouts rule in order to prevent inconsistencies between international federations and national anti-doping organisations. The new regulation is stricter and better in harmonising procedures and sanctions no-notice out-of-competition testing. Now international federations and national anti-doping organisations are required to conduct these common standards.

The state's government funds national anti-doping organisation and has contributed suspicion in order to work in favour of their athletes.<sup>74</sup> The Russian doping scandal is an excellent example of how the national anti-doping agency can misuse its power. Despite the common standards, national anti-doping organisations can act this way because the Russian doping scandal administered by RUSADA was possible.<sup>75</sup> Of course, this is a single case and very uncommon at the national level, but there is a chance, as we have seen. WADA is not excited to take testing fully to the international level. The lack of resources would have caused problems because international testing would be such expensive.<sup>76</sup>

According to International standards for testing and investigations (ISTI), all athletes who are part of the testing pool must file information every three months. New rules are a bit stricter because instead of five days a week, the athlete must provide information for every day. This rule strongly limits athlete self-determination. If the athlete stays at the one-hour location for less than an hour, it runs a risk that the test can be missed. However, most athletes train every day, and they also plan the exercises beforehand and mostly more than one hour.

As mentioned, the athlete has specific requirements in providing whereabouts information. The required information includes home address, training information, and locations, competition schedules, regular personal activities, including work and school. Additionally, the athlete is required to provide one 60-minute time period each day when the athlete is available for testing between 6 a.m. to 11 p.m. In practice, testing is organized by the International Federations and National Anti-Doping Organisations.<sup>77</sup> The whereabouts rule is legally justified on the ground of

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<sup>73</sup> Halt, J. *supra nota* 1, p 272

<sup>74</sup> Kamber, M. *supra nota* 36, p 6

<sup>75</sup> Gandert, D. (2019). The WADA code: the maximum extent of enforcement. *International Journal of Sport Policy and Politics*, 11 (2), p 278

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

protecting the rights and freedoms of others.<sup>78</sup> Even short-noticed testing may leave room for the organised and determined cheat to manipulate samples.<sup>79</sup>

If testers cannot reach the athlete in the 60-minute time slot without an acceptable reason, this means a missed test. If an athlete fails to provide whereabouts information or the provided information is inaccurate, a filing failure arises. Further, both of these failures occur neglect of the whereabouts rule. If an athlete in the RTP fails three times any combination of filing failures or missed tests in 12 months, it is a doping violation.<sup>80</sup> The consequences for these violations shall be 12-24 months ineligibility, depending on the athlete's degree of fault.<sup>81</sup> To compare, trafficking or administrating prohibited substances or methods might occur lifetime ineligibility.<sup>82</sup>

It is important to remember that this rule concerns only elite athletes. The life of elite athletes is somewhat scheduled and strict itself. They know prior most of their whereabouts already. Hence, providing whereabouts information would not require too much extra planning from elite athletes. A study on British athletes' attitudes on WADA's whereabouts system indicated that most athletes defend the necessity for doping control, but the whereabouts rule occurs dissatisfaction. This study was already made before 2009, when the whereabouts rule became even stricter.<sup>83</sup> A 2013 study on Danish athletes' attitudes demonstrated that they accept its necessity, but it negatively affects their everyday lives.<sup>84</sup> The attitudes of the athletes' are essential because when anti-doping work is supported, it works more efficiently.<sup>85</sup> Athletes feel that the requirement to provide whereabouts information causes stress because there is a fear of the whereabouts failure.<sup>86</sup> All in all, the Whereabouts rule cannot be criticised in a way planning the next quarter causes undue stress for athletes.

However, if a regular public authority required the same information from citizens, it would be considered a significant restriction of the right to privacy. Restriction to one's right to privacy is

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<sup>78</sup> Pendlebury, A., & McGarry, J. (2009). Location, Location, Location: The Whereabouts Rule and the Right to Privacy. *Cambrian Law Review*, 40, p 72

<sup>79</sup> *Ibid.*, p 74

<sup>80</sup> World Anti-Doping Agency. (2021a). *supra nota* 2, Article 2.4

<sup>81</sup> *Ibid.*, Article 10.3.2

<sup>82</sup> *Ibid.*, Article 10.3.3

<sup>83</sup> Valkenburg, D., de Hon, O., & van Hilvoorde, I. (2014). Doping control, providing whereabouts and the importance of privacy for elite athletes. *International Journal of Drug Policy*, 25 (2), p 213

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Gleaves, J., & Christiansen, A. V. (2019). Athletes' perspectives on WADA and the code: a review and analysis. *International Journal of Sport Policy and Politics*, 11 (2), p 346-347

legally justified in the case of protecting other people's rights, or it is in the interest of society. However, no one is forced to be an elite athlete and comply with the whereabouts requirements. WADA's former director has argued that elite athletes have a choice whether to engage with the rules or quit.<sup>87</sup> The burden of proof of establishing a violation of doping lies on the Anti-Doping Organisation.<sup>88</sup>

### 3.3 The Strict Liability Principle in the whereabouts rule

Doping regulations are engaged with the strict liability principle instead of the requirement of intent. The athlete is liable even in that situation when a third party causes the ingestion.<sup>89</sup> CAS has regularly referred to strict liability in its decisions when the doping rule violation is without the athlete's fault.<sup>90</sup> Among certain athletes, the strict liability principle is not supported when the origin of the doping is unknown, and therefore, the intent is missing.<sup>91</sup> However, the rule is considered a starting point, and consequently, it is possible to view the circumstances in the sanctioning process.<sup>92</sup> Regarding the whereabouts rule, when the RTP's athlete misses the 60 minutes time slot three times, it means automatically doping violation after the third failure. On the other hand, elite athletes are well-educated in anti-doping rules, and consequently, a certain degree of diligence is reasonable to expect from them. The rule still enables few failures without an immediate sanction which makes it fair and forgives sincere negligence. Moreover, the strict liability principle in the whereabouts rule is essential because most athletes do not grant the use of doping. This can be seen in the doping violation related cases in which the athletes do everything in order to prove they were clean. Consequently, taking into account the negligence might cause more abuses. Further, WADA defends the strict liability principle by underlining that it is the best way in order to ensure the spirit of sport for clean athletes.<sup>93</sup> Consequently, it seems that eliminating doping requires a strict liability principle.

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<sup>87</sup> Kreft, L. (2009). The Elite Athlete – In a State of Exception? *Sport, Ethics and Philosophy*, 3 (1), p 12

<sup>88</sup> World Anti-Doping Agency. (2021a). *supra nota* 13, Article 3.1

<sup>89</sup> Goldstein, R. R, *supra nota* 9, p 160

<sup>90</sup> World Anti-Doping Agency. (2021a). *supra nota* 13, Comment to Article 2.1.1

<sup>91</sup> Gleaves, J. & Christiansen, A. V. *supra nota* 86, p 348

<sup>92</sup> *Strict Liability in Anti-Doping*. (2015). World Anti-Doping Agency. Retrieved from <https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping> , 19 March 2021

<sup>93</sup> Anderson, J. (2013). Doping, sport and the law: time for repeal of prohibition? *International Journal of Law in Context*, 9 (2), p 137

## 4. ARTICLE 8 ECHR – RIGHT TO PRIVACY

European Convention on Human Rights is an instrument of the Council of Europe. It was adopted in 1950, and 47 Member States of the Council of Europe have ratified it. European Court of Human Rights (ECtHR) works alongside the Council of Europe and controls the Convention parties' contractual obligations. The ECtHR cannot change or annul the national court's judgements. If the Member State breached one's human right, it could be imposed to pay for the appellant.<sup>94</sup> The complaints can be brought only against states, not against private individuals or legal persons. Consequently, athletes cannot take WADA to the ECtHR, but athletes can take the State that has adopted the whereabouts rule regulations.

### 4.1 Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France

This case was announced in the ECtHR's factsheet 2020, which expresses its importance for the ECtHR.<sup>95</sup> In this case, the French Government adopted in 2010 the principles of the WADC into its national Sports Code (Code du Sport). These principles enabled RTP testing to be carried out as out-of-competition testing at any location in accordance with the athlete's agreement.<sup>96</sup> This involved two applications from different applicants. The first applicants were sports unions and professional athletes. They argued that RTP designed by the national anti-doping agency infringed their right to privacy according to Article 8 ECHR.<sup>97</sup> The second applicant was a cycling champion Jeannie Longo who was part of the RTP but for an unlimited time, which was possible at that time.<sup>98</sup> Longo argued that the whereabouts rules and no-notice testing of athletes were contrary to Article 8 of the ECHR.<sup>99</sup>

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<sup>94</sup> Eduskunta. Euroopan ihmisoikeustuomioistuim – European Court of Human Rights (ECHR). Retrieved from <https://www.eduskunta.fi/FI/naineduskuntatoimii/kirjasto/aineistot/kv-jarjestot/euroopanneuvosto/Sivut/Euroopan-ihmisoikeustuomioistuim.aspx>, 25 February 2021

<sup>95</sup> European Court of Human Rights (2020) Factsheet – Sport and the ECHR. Retrieved from [https://www.echr.coe.int/Documents/FS\\_Sport\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Sport_ENG.pdf), 21 March 2021

<sup>96</sup> ECHR 2018 nos. 48151/11 and 77769/13. *supra nota* 62, point 9

<sup>97</sup> *Ibid.*, points 1–3

<sup>98</sup> *Ibid.*, point 19

<sup>99</sup> *Ibid.*, point 23

To indicate that the interference with Article 8 was justified, the ECtHR had to examine the case from three different aspects; whether the interference was in accordance with the law, whether it had a legitimate aim and whether it was necessary for a democratic society.<sup>100</sup> First, the ECtHR argued the expression “in accordance with the law” requires that the challenged measures should be somehow based on domestic law. Further, it refers to the quality of law in a way it shall be accessible to the person concerned and able to foresee the consequences and be compatible in the rule of law.<sup>101</sup> The ECtHR stated that the interference was in accordance with the law.<sup>102</sup> The ECtHR argued that the whereabouts rule is protecting health in the way it is mentioned in Article 8(2) regarding professional and amateur athletes and especially adolescents.<sup>103</sup> According to the ECtHR, when the French Government argued that the adopted principles protected morals, it means ensuring equal and meaningful competition associated with the protection of the rights and freedoms of others.<sup>104</sup> In order to consider whether the whereabouts requirement is necessary in a democratic society, it must be proved that it corresponded with “pressing social need”. This ensures national authorities’ reasons for justification are relevant as well as sufficient and proportionate in the light of the pursued legitimate aim.<sup>105</sup>

However, the ECtHR acknowledges also the privacy problem. ECtHR agrees that the requirements facing the athletes are onerous and exceptional. For example, renewed RTPs causes daily interference, and this over a lengthy proposal gives cause to concern. The current RTP system sets only a one-year term of validity for RTP, but it does not exclude the possibility of renewal.<sup>106</sup> Additionally, athlete’s requirement to declare their home address or holiday home during their “free-time” interferes with the peaceful enjoyment of their home and hence affects their private and family life. ECtHR argued that testing could not be equated to the checks conducted under the supervision of courts.<sup>107</sup> However, the ECtHR held that the French athletes had adequate remedies to protect themselves from abuse.<sup>108</sup>

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<sup>100</sup> *Ibid.*, points 160–170

<sup>101</sup> *Ibid.*, point 160

<sup>102</sup> *Ibid.*, point 163

<sup>103</sup> *Ibid.*, point 165

<sup>104</sup> *Ibid.*, point 166

<sup>105</sup> *Ibid.*, point 167

<sup>106</sup> *Ibid.*, Point 185

<sup>107</sup> *Ibid.*, point 186

<sup>108</sup> *Ibid.*, point 187

The applicant contested the necessity of the interference by arguing that committed tests were ineffective. The number of positive tests has been low but according to the ECtHR and French Government these figures result from successful anti-doping work. The ECtHR continues that because they are part of the world of top-level sports, they must accept fair play without combatting that scourge.<sup>109</sup> Furthermore, the ECtHR does not underestimate the impact of the whereabouts rule on the applicants' private lives, but the "general-interest considerations" justify the restriction on the right to privacy under Article 8. According to the ECtHR, France has acquired a fair-balance to the situation.

## 4.2 Analysing the judgement

According to Article 8, "Everyone has the right to respect for his private and family life, his home and his correspondence. 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 a democratic society in the interests of national security, public safety or the economic wellbeing 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."<sup>110</sup>

Compared to the above regulation, the impacts of the athlete's private life's interference are somewhat underestimated by the ECtHR. In the RTP system, the clean athletes' right to privacy has faced interference continually. The ECtHR defended the whereabouts rules that elite athletes shall accept these rules in this level of sports. Where is the right to self-determination in this argument? According to the Council of Europe's Guide, Article 8 includes the protection of personal development, meaning personality or personal autonomy.<sup>111</sup> Everyone should have the right to choose a profession. For example, the celebrities' lives are public, but they still have the same rights as "normal" people to protect their privacy. The ECtHR should have required more reasoning for the interference. However, it seems that the ECtHR had no other choice in this case, even though it acknowledged the continuous privacy problems. The other protected rights were considered more important than the athlete's right to privacy.

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<sup>109</sup> *Ibid.*, point 188

<sup>110</sup> European Convention on Human Rights, Rome, 4.11.1950, Article 8

<sup>111</sup> *Guide on Article 8 of the European Convention on Human Rights*. (2020). Council of Europe, point 68. Retrieved from [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf), 8 April 2021



Understandably, the ECtHR protects this anti-doping measure because it has created the Anti-Doping Convention. Otherwise, the judgement would have been morally inconsistent. Nevertheless, Article 8 shall be interpreted in a wide context. Hence, the ECtHR's argument that the testing cannot be equated to the checks conducted under the Court's is somewhat surprising. This cannot be seen as a comprehensive interpretation of Article 8. Additionally, it is problematic that athletes who are not in doubt about doping must still comply with the requirements. For example, persons who are suspected of a crime will not be imprisoned "just in case", and the use of doping is not even criminalised.

In conclusion, this case was controversial for the ECtHR also, because they had to admit the negative effects to the right to privacy. However, as the ECtHR stated, some of the prohibited substances have such a short time frame to be detected. The problem is how the whereabouts rule could be efficiently replaced.<sup>112</sup> Hence, reducing or removing such requirements would increase the dangers of doping to their health and the entire community.<sup>113</sup> It seems that the lack of other reliable methods than the current whereabouts rule was a key to this judgement. But whether this can be seen as justified reasoning to enable continuous infringements to the athlete's right to privacy? For now, it seems that it is, and consequently, the judgement is understandable. For example, the Council of Europe could improve its Anti-Doping Convention in a way anti-doping measures privacy problems would be taken better into account and encourage the member states together with the WADA to take necessary measures to achieve this.

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<sup>112</sup> *Ibid.*, point 190

<sup>113</sup> *Ibid.*, point 191

## **5. ANALYSING THE WHEREABOUTS RULE IN THE LIGHT OF PRINCIPLE OF PROPORTIONALITY**

### **5.1 The principle of proportionality in Europe**

“The principle of proportionality is a central provision of European Convention on Human Rights. It applies particularly to the qualified rights and where expression is necessary in a democratic society. Thus even if a policy that interferes with a Convention right might be aimed at securing a legitimate purpose, this will not in itself justify the violation of the means adopted to secure the purpose are excessive in the circumstances.”<sup>114</sup> The proportionality can be seen as a general principle of law that governs impositions of sanctions of any disciplinary body.<sup>115</sup>

### **5.2 The whereabouts rule in the light of principle of proportionality**

The question is whether the whereabouts rule is a proportionate measure to achieve doping-free sport by interfering with the athlete’s right to privacy. In the RTP system, an elite athlete can be tested anytime in the time frame they have provided. However, it would be more proportionate if athletes that are suspected of the doping violation are invited to the RTP. The implementation of the system could be somewhat problematic. Who reports the suspicions, and what are the grounds that make athlete suspected. Nevertheless, the most disproportionate issue in the whereabouts rule is that “innocent” athletes privacy rights are restricted just to be sure they will not cheat.

Despite the fact that providing whereabouts information is necessary for out-of-competition testing, it does not make the rule proportionate itself. Additionally, the restriction of the right to privacy does not make the rule disproportionate.<sup>116</sup> The missed test does not immediately occur a doping violation, but the third violation within one year. This confirms that the elite athlete’s

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<sup>114</sup> Law, J. (2018). *A Dictionary of Law*. Oxford University Press. p 537

<sup>115</sup> Trainor, N. (2010). The 2009 WADA Code: A More Proportionate Deal for Athletes? *The Entertainment and Sports Law Journal*, 8 (1), 6. point 13

<sup>116</sup> Pendlebury, A., & McGarry, J. *supra nota* 76, p 73–74

human negligence has been taken into account in the whereabouts rule, and the occurred doping violation after the third miss is not disproportionate.

An interesting question is whether the whereabouts rule is proportionate because doping issues still happen and the regulation interferes with the athletes' right to privacy. However, none of any systems or regulations is seamless. It seems that the whereabouts rule reduces doping even though it has not disappeared for good. But what happens if when the whereabouts rule is not sufficient anymore or not strong enough to prevent doping in sports? Hopefully, it does not mean harsher interferences with the right to privacy. A study from 2017 indicates worrying numbers. In the 2011 World Athletics Championships prevalence of doping was 30 %, and in Pan-Arab Games 45 %.<sup>117</sup> It seems that the biological tests to detect performance-enhancing leaves still room for "cutting-edge doping techniques" and enables the use of doping despite the no-notice out-of-competition testing. WADA monitors a hundred thousand tests annually, and only 1-2% of the tests are positive.<sup>118</sup> Of course, these are individual competitions, and the overall picture of the doping prevalence is missing, but these numbers must be taken seriously.

The whereabouts rule is justified by WADA that out-of-competition testing is one of the most effective ways to prevent and detect doping. Usually, the use of doping does not occur in the competition but instead out-of-competition.<sup>119</sup> It is proved that doping is a remarkable health risk for professional athletes and for amateurs and adolescents. Consequently, it is justified to argue that the whereabouts rule protects the health of others. Additionally, the whereabouts rule protects other athletes' rights because it enables other athletes' participating in doping-free sport. At the first sight, it seems that according to Article 8, the whereabouts rule completes the requirements of the justified interference. Examining a substantial lack of compliance with the WADC, recent research suggests that WADA's data on the level of doping in sport seriously underestimate the scale of the problem.<sup>120</sup>

The most disproportionate issue with this whereabouts rule is the following. If it is said that athletes can quit if they are not ready to comply with the requirements of elite sport, why the doping

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<sup>117</sup> Ulrich, R., Pope, H. G., Cléret, L., Petróczi, A., Nepusz, T., Schaffer, J., Kanayama, G., Comstock, R. D., & Simon, P. (2017). Doping in Two Elite Athletics Competitions Assessed by Randomized-Response Surveys. *Sports Medicine*, 48 (1), p 212

<sup>118</sup> *Ibid.*, p 211

<sup>119</sup> Sloot, V. B., Paun, M., & Leenes, R. (2020). *supra nota* 63, p 58

<sup>120</sup> Houlihan, B., Vidar Hanstad, D., Loland, S., & Waddington, I. (2019). The World Anti-Doping Agency at 20: progress and challenges. *International Journal of Sport Policy and Politics*, 11 (2), p 194

violation does not occur a harsher sanction? WADA aims to catch the dopers by interfering with one's privacy, but then the actual dopers are able to participate in sports again after a 12-24 months ban. Moreover, the whereabouts rule affects only to the certain group of elite athletes.<sup>121</sup> Therefore all athletes are not part of the continuous surveillance which puts the athletes unequal situation.

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<sup>121</sup> Møller, V. (2011). One step too far - about WADA's whereabouts rule. *International Journal of Sport Policy and Politics*, 3 (2), 177-190, p 180

## 6. ANALYSING THE ALTERNATIVES FOR THE WHEREABOUTS RULE

### 6.1 Analysing the alternative to legalise doping in sports

Doping is criticised because it puts athletes in an unequal situation and harms the spirit of sport. It is necessary to illustrate whether doping could be allowed in sports because denying the use of doping restricts athlete's right to self-determination. In this case, all athletes would have access to performance-enhancing products, and the rules would be the same for everyone. This approach is suggested because certain athletes, especially when they have enough resources, will always find a way to be a step ahead of anti-doping testing regimes.<sup>122</sup> When athletes do not have the right to choose whether to use performance-enhancing substances or not, it violates their personal autonomy that is protected by the ECHR Article 8.<sup>123</sup> Nevertheless, it is clear that if athletes are allowed to compete by the advantage of performance-enhancing substances, the competition will be between the producers of performance-enhancing substances, not between athletes. Furthermore, denying athlete's right to use performance-enhancing products is totally contrary to liberalism in the light of personal autonomy.<sup>124</sup> The use of doping does not directly cause harm to others, but indirectly it does. It distorts competition when certain athletes make the decision to take performance-enhancing substances and others want to compete as doping-free.

The health argument is remarkable in analysing the possibility of legalising doping. The use of doping might cause serious health issues, and consequently, the health arguments are plausible. Erythropoietin (EPO) is used in blood-doping to increase the numbers of red blood cells and enhance athlete's oxygen transportation and endurance.<sup>125</sup> A similar method used in "hyperbaric chambers" corresponding to altitude training. Hyperbaric chambers increases blood cells like EPO,

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<sup>122</sup> Anderson, J. *supra nota* 93, p 141

<sup>123</sup> *Ibid.*, p 138

<sup>124</sup> *Ibid.*, p 138

<sup>125</sup> Hanstad, D. V. (2009) *supra nota* 20, p 4

but they are permitted.<sup>126</sup> Athletes have the alternative to go altitude training camp when this method brings the altitude training camp everywhere. The distinction between these two methods is not clear, but the health argument is vital for distinguishing right and wrong. The problem of EPO is that even if it can be helpful to the treatment of anaemia related kidney diseases, EPO might cause heart diseases and strokes because of its blood thickening effect. Consequently, the misuse of EPO might cause remarkable health risks for athletes who wish to gain the only competitive edge of it.<sup>127</sup> The health risk of EPO is obvious and consequently, not legalising the use of doping protects the spirit of sports and athlete's health.

Furthermore, legalising doping would easier expose youth to doping. Most athletes have begun their careers as minors, and if doping were legalised, the use would increase among the youth. Previously described health risks indicate the danger of doping, and consequently, adolescents have to be protected from the misuses. There is a related experience from Norway. The director of the Norwegian Anti-Doping Organisation, Anders Solheim, is worried because Norwegian law denies minors' testing without their parents' permission. According to Solheim, there is no doubt that young Norwegian athletes are dealing with performance-enhancing substances. Solheim hopes that the law will be modified soon.<sup>128</sup> This confirms that if legislation provides is a gap for doping, it will be utilised.

In conclusion, it seems that denying the use of doping might restrict athletes' personal autonomy but legalising it could exacerbate the situation. Legalising doping would distort the competition the way it loses the spirit of sport. Additionally, it is not only that doping distorts the competition, but it has remarkably health risks, and that shall be taken more into account when talking about doping.

## 6.2 Analysing the alternative to criminalise doping

Many factors in Europe support anti-doping work, but the criminalisation of the use of doping is not widely supported. Interpol describes doping substances as “low risk – high profit”, so they

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<sup>126</sup> Anderson, J. *supra nota* 93, p 143

<sup>127</sup> *Questions & Answers*. (2021). World Anti-Doping Agency. Retrieved from: <https://www.wada-ama.org/en/questions-answers/blood-dopinghttps://www.wada-ama.org/en/questions-answers/blood-doping> , 24 March 2021

<sup>128</sup> Hoel, Y. S., & Lie, S. L. *Tror norsk idrettsungdom doper seg – får ikke teste dem*. NRK. Retrieved from [https://www.nrk.no/sport/tror-norsk-idrettsungdom-doper-seg-\\_far-ikke-teste-dem-1.15468741](https://www.nrk.no/sport/tror-norsk-idrettsungdom-doper-seg-_far-ikke-teste-dem-1.15468741) , 25 April 2021

favour organised crime groups worldwide.<sup>129</sup> Consequently, it is necessary to examine whether criminalisation would improve the anti-doping work and reduce doping in sport instead of using strict whereabouts requirements for elite athletes. The deterrence of committing a criminal offence would prevent the use of doping.<sup>130</sup> Criminalisation would not affect the clean athletes who must currently comply with the whereabouts rule requirements. The stigma of a criminal offence is worse than the stigma of an athlete banned because of doping.<sup>131</sup> Of course, the doping violation has already its consequences for athlete such losing sponsors which affect them financially. However, after the ban, the athlete can continue the career normally. Typically athletes want to be role models, and criminal offence and the deterrent of the stigma would be more assertive than the 12-24 months suspension. Consequently, if the dopers were treated like criminals and their access denied to competitions longer, this might reduce doping violations.

According to criminal law professor Geert Philip Stevens, doping should be criminalised under legislation that explicitly regulates doping in sport and penalises various offences. Furthermore, the drafting should be made together with WADA.<sup>132</sup> This could be a relevant improvement to anti-doping work. However, I do not see that only criminalisation itself would decrease doping violations. Athletes want to be able to compete, and if this could be taken from them by longer suspensions, it would reduce doping violations. The jurisprudential and philosophical analysis suggests that only when the basis of why doping is dangerous and contrary to sporting ethics has been established, a coercive response can be justified.<sup>133</sup> It is submitted that the invocation of such powerful machinery, such as the criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport.<sup>134</sup>

The autonomy of sports might prevent doping violations from being heard in the national courts, and consequently, criminalisation is not taken into consideration. As long as the sport has its autonomy, including disciplinary rules and tribunals, criminalisation would not be considered. Maybe it does not even have to. Criminalisation is used mainly to prevent crimes and to hold

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<sup>129</sup> *Anti-doping*. (2021). INTERPOL. Retrieved from: <https://www.interpol.int/Crimes/Corruption/Anti-doping> , 21 March 2021

<sup>130</sup> Sumner, C. (2017). The spirit of sport: the case for criminalisation of doping in the UK. *The International Sports Law Journal*, 16 (3–4), p 218

<sup>131</sup> *Ibid.*, p 223

<sup>132</sup> Stevens, G. *supra nota* 23, p 599

<sup>133</sup> Ioannidis, G. (2010). The application of criminal law on doping infractions and the ‘Whereabouts Information’ Rule: state regulation v self-regulation. *Int. Sports Law*, 1, p 20

<sup>134</sup> Stevens, G. *supra nota* 23, p 593

people accountable for committed crimes in societies. Currently, athletes can be held accountable for their doping violations by suspensions.

### 6.3 Analysing the alternative to extend the suspension

It seems that instead of criminalisation or legalising doping, the more effective alternative for replacing the whereabouts rule would be an extension of the time of suspension. The career and ability to compete is everything for the athlete. If the whole career was in danger after a doping violation, it could prevent doping more efficiently than the current 12-24 months ban. After 12-24 months, most elite athletes can still continue their career, and many have continued it successfully, like Norwegian ski-star Therese Johaug. She was suspended in 2016 for 18 months because of a doping violation.<sup>135</sup> After the comeback, Johaug has won gold in all individual races in the World Championships. It might feel unequal of the clean athletes that are competing with previous dopers. However, a similar situation is when releasing a criminal from prison. A prisoner will be part of society again, which is even desirable. The difference is that a prisoner has usually harmed others. A doper does not harm other athletes directly, but indirectly they harm the other athletes' right to participate in fair competition. Furthermore, the clean athletes are put in a suspicious situation in public view if they perform as well as the previous doper.<sup>136</sup> Consequently, a lifetime suspension from sport might be disproportionate, but on the other hand, the whereabouts rule restricts athlete's fundamental rights.

Because doping-free sport is wanted to be strongly protected that the fundamental rights of the athlete are interfered with, why not take a lifetime suspension into consideration? Of course, this is a strict measure, but as well the restriction of the athlete's right to privacy is strict. The advantage in the competitions or the end of the career would be too high risk for athletes and strong enough deterrence. The problem is still that how the doping testing itself should be then organised. I support out-of-competition testing, but athletes should not be required to inform their whereabouts as they are currently required. On the other hand, WADA should create more effective testing methods, how the substances could be detected after a long time. Currently, the problem with

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<sup>135</sup> Jahns, M. (2020, November 12). *Therese Johaug: Back at the Top After the Doping Ban*. Ispo.Com. Retrieved from <https://www.ispo.com/en/people/therese-johaug-back-top-after-doping-ban> , 27 April 2021

<sup>136</sup> *Ibid.*



blood-doping is that it disappears quickly from the body. Consequently, WADA uses the whereabouts rule to locate the athletes easier for quicker out-of-competition testing.

Even if the use of doping is not criminal law issue, the deterrent effect of doping could be compared to the criminal law. The Australian UNSW Law Emeritus Professor David Brown has argued that the harshness of punishment does not have a real deterrent effect or reducing recidivism.<sup>137</sup> It seems that the deterrence of 12-24 months suspension is not an adequate deterrence in sports. Consequently, elite athletes know that they can be suspended for a maximum of two years and afterwards, they can continue their career normally. The ability to compete is crucial to athletes, and after a long time in suspension, the comeback might not be possible anymore because of physical reasons. This would affect athletes to think twice before using performance-enhancing products.

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<sup>137</sup> *Do harsher punishments deter crime?* (2020). UNSW Newsroom. Retrieved from <https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime> , 10 April 2021

## CONCLUSION

The whereabouts rule is not unambiguous, it has good and bad sides. Moreover, the purpose of the whereabouts rule is essential. Pure legalising doping would falsify competition and the heart of the sport. Therefore doping-free sport must be ensured. Furthermore, criminalisation itself might not solve the problem. Examining the alternatives reveals the challenge of the doping regulation. Efficient alternatives for the whereabouts rule are hard to find. Moreover, as this thesis has introduced the whereabouts rule and the doping control overall, even though the whereabouts rule breaches the athlete's fundamental right, it does not perfectly prevent doping violations. But can it ever be perfect? There are regulations in every state but there will always be people who cannot comply with the rules. Consequently, the balance between interfering athlete's right to privacy in order to prevent doping violation shall be carefully evaluated.

The aim of this thesis was to indicate the privacy problems of the whereabouts rule and whether the restrictions on privacy are proportionate. The most disproportionate of the whereabouts rule turned out to be the restrictive effect on the "innocent" athletes too. The elite athletes are put into the RTP to be sure they will not cheat without any suspicion they could or have previously used doping. Athletes are not forced to be elite athletes, they have voluntarily chosen the profession and this kind of lifestyle. Nevertheless, "accept the rules or quit" is a brutal expression because everyone has the right to self-determination in choosing the profession. Additionally, ECHR Article 8 includes the right to personal autonomy, and consequently, right to self-determination.<sup>138</sup> If the athlete feels stressed about the whereabouts notification's continuous requirement, the rule still enables negligence because the doping violation occurs after the third missed test within a year. Demarcation after the third test is proportionate because a certain kind of carefulness can be expected from an athlete.

The hypothesis assumed, "The current whereabouts rule restricts disproportionately athlete's right to privacy in order to be legally justified". On the grounds of the analysis, the findings do not support the hypothesis and therefore it must be proved false. The whereabouts rule cannot be

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<sup>138</sup> Council of Europe. (2020) *supra nota* 109, point 68

claimed purely disproportionate. As presented in this paper, the whereabouts rule has disproportionate impacts, but through a larger scale, it is legally justified because it protects other important rights such as health and equality in sports. The whereabouts rule restricts athlete's right to privacy, but currently, there are no appropriate alternatives to replace it. However, this argument alone does not legally justify the interference athlete's right to privacy. Consequently, WADA shall protect athlete's right to privacy more carefully or create alternative measures for the whereabouts rule. When evaluating whether the whereabouts rule is legally justified, it is important to remember that reducing doping in sports and protecting the heart of the sport, protects the health of the athletes and especially adolescents from prohibited substances. Moreover, the health issues shall be emphasised more in the discussion of doping. Even though doping enhances athlete's performance, the health risks are real. This message is important to target in adolescents. Protecting the health and other people is necessary arguments to enable the whereabouts rule. WADA shall also take measures that the situation currently in Norway would not happen in any other states.

Honestly, the best way to prevent the use of doping is extending the suspensions. This affects only the athlete who is guilty of doping violation. The deterrence of a long break from competitions might let the athlete think twice before relying on performance-enhancing substance's advantage. The elite athlete focuses on important competitions such as world championships and Olympics, and consequently, a long break takes the possibility to compete away. However, a longer suspension needs still the doping testing process. It is impossible to say what is the one and only way the testing should be organised. I support out-of-competition testing, but the athlete should not have to inform their whereabouts continuously. Additionally, WADA shall actively take measures to make testing less interfering with the right to privacy. WADA cannot put their hands in the air that there are no other ways to do effective doping testing than using the whereabouts rule. On the other hand, WADA has obviously a huge pressure to eliminate doping in sport and consequently tries to prevent doping by any means necessary. However, the system has to admit that maybe it will never be complete. There will always be stepping ahead substances and ways to bend the doping rules, but anti-doping work cannot go much deeper in restricting athletes right to privacy. Of course, anti-doping work could create better measures to detect substances for a longer time in the athlete's body that I also find a relevant possibility. All in all, WADA does important work, but doping in sports should not be prevented at any cost despite the fact how fundamental doping-free and equal sport is.

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