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## Fight Against Doping: Experience of Ukraine and European States

### Боротьба з допінгом: досвід України та європейських держав

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#### Abstract

The article deals with the study of the anti-doping experience of Ukraine and European countries. It considers a number of doctrinal and regulatory approaches to the understanding of doping and anti-doping rule violations and, accordingly, the importance of combating such phenomena. The article examines the provisions of international acts regulating the list of prohibited substances, doping testing, the application of sanctions for anti-doping rule violations, and formulates the conclusion on the need to improve the list of prohibited substances, which currently hinders the effectiveness of anti-doping measures. It focuses on the criminal law of Ukraine, Hungary, Estonia, Finland, Germany, Poland, Italy, and Spain, which provides for the criminal liability for doping, including its illegal production, trade, appointment, use, and forcing other persons to use it. The article describes the peculiarities of a unique approach to legal liability for doping in Austria and France, where the specified actions are regarded as fraud. The article establishes the necessity of introducing changes to Article 323 of the Criminal Code of Ukraine to improve the fight against doping in Ukraine and the expediency of harmonizing the provisions of the national legislation of Ukraine and European states with

#### Анотація

Стаття присвячена вивченню досвіду боротьби з допінгом в Україні та Європейських державах. В статті розглянуто низку доктринальних та нормативних підходів до розуміння допінгу та антидопінгового правопорушення і відповідно важливості боротьби із такими явищами. Досліджено положення міжнародних актів, які регламентують перелік речовин, які є допінгом, перевірку на допінг, застосування санкцій за антидопінгові правопорушення та сформульовано висновок про необхідність удосконалення переліку заборонених речовин, що на сьогодні стримує ефективність заходів у напрямку боротьби з допінгом. Акцентовано увагу на кримінально-правових нормах України, Угорщини, Естонії, Фінляндії, Німеччини, Польщі, Італії, Іспанії що встановлюють кримінальну відповідальність за допінг, у тому числі його незаконне виробництво, торгівлю, призначення, застосування та примушування до застосування інших осіб. Розкрито особливості унікального підходу до юридичної відповідальності за допінг в Австрії та Франції, де зазначені діяння

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the international rules in terms of the definition of doping and the list of prohibited substances.

**Key Words:** anti-doping rule violation, doping, doping use, criminal liability, prohibited substances.

## Introduction

Analysis of the provisions of the scientific doctrine, international treaties and national legislation shows that the use of doping is the most common and prosecuted offense in the field of sports, as it lies in the plane of several branches of law, since this offense simultaneously implies several types of legal liability—disciplinary, civil, administrative and criminal.

In addition to legal research, the issue of doping in sports has recently become the center of medical, physiological, and sociological research. In particular, medicine and physiology investigate areas for improving methods for detecting prohibited substances, while sociological studies focus mainly on the psychological characteristics of persons who used doping and contributing social factors in order to take anti-doping measures.

The relevance of doping in sport is confirmed both by a large number of cross-sectoral studies devoted to this issue and by the actual state of counteraction and the fight against doping. Thus, it is worthwhile to note that the International Federation of Athletics continued the sanctions against associations that systematically violate the doping rules. Accordingly, at the 2020 Olympics to be held in Tokyo, any state with 20 or more doping violations in the period from 2008 to 2020 will be able to send only two athletes to the Olympics (Russia, Kazakhstan, Azerbaijan, Armenia, and Belarus). In turn, countries with 10 to 19 doping rule violations can send only four athletes. Such rules apply to Ukraine as well. Although, it is the smallest number of weightlifters from Ukraine participating in the Olympic Games. For comparison, seven Ukrainian weightlifters in

підпадають під диспозицію статті «Шахрайство». Встановлено необхідність внесення змін до статті 323 Кримінального кодексу України з метою покращення боротьби з допінгом в Україні та доцільність уніфікації положень національного законодавства України та Європейських держав з нормами міжнародних актів в аспекті розуміння та назви допінгових речовин.

**Ключові слова:** допінг, заборонені речовини, антидопінгове правопорушення, застосування допінгу, кримінальна відповідальність.

2016 and nine in 2012 participated at the Olympiad in Rio de Janeiro. (Brian Oliver, 2018).

The above information is a clear indication that Ukraine urgently requires anti-doping measures, and therefore finding ways to minimize doping among athletes is relevant, considering the expediency of studying mechanisms for preventing doping rule violations and prosecuting perpetrators.

## Theoretical framework

The theoretical framework contains a number of scientific works devoted to the study of the “doping” concept. Thus, Lippi G., Guidi G. emphasize that doping is an English word derived from the verb “dope”, which has many meanings: to give drugs, to mix, to intoxicate, to falsify, to dilute. Although, according to another version, the word doping comes from the Dutch “doop”, which means “to immerse”, and this term was used in cases of the use of illegal means to improve the results of competitions of horses and hound dogs (Lippi G., Guidi G., 1999). Moreover, it should be noted that the history of doping, as David E. Newton notes, begins in the first millennium when people in Greece began to record the methods of unfair competition, through which athletes won sports competitions and among which a separate place belongs to the use of substances that increase productivity (David E. Newton, 2018).

According to Dr. Janwillem Soek, doping is the use of prohibited substances and methods for a specific purpose or the presence of prohibited substances in an athlete’s body (Dr. Janwillem Soek, 2006). The prohibition of the use of

substances that enhance physical abilities, according to Anderson J., is caused by the desire to protect the health of an athlete and long-term integration of the concept of the “spirit of sport” (Anderson J., 2016). The category “spirit of sport” is associated with the concept of doping, since the use of doping substances by athletes eliminates the first. Thus, it is necessary to pay attention to the definition of this category by M. Holowchak—in the case when some athletes use a substance that increases their physical endurance, other athletes experience considerable pressure, which induces them to use such substances—otherwise, they will not be competitive. Thus, the use of doping leads to an unfair game (M. Holowchak, 2004).

Some studies were devoted to sanctions for doping rule violations. Thus, O.I. Petrenko concludes that the main sanction for an athlete who used doping is the cancellation of the result and the disqualification in future sports competitions for a certain period (O.I. Petrenko, 2006). In addition, J. Exner notes that the elimination of athletes from competitions for the use of doping is questionable sanctions, since, as the statistics show, this does not lead to a reduction of anti-doping rule violations (Exner J., 2018).

In connection with the ineffectiveness of the sanctions for doping rule violations, scientists investigated the advantages of criminalizing doping in sport. Sumner Claire is convinced that the criminalization of doping would have a deterrent effect in combination with other sanctions that are currently used by sports federations than using the latter alone, and therefore criminalizing doping would restrict the use of doping by athletes and punish athletes for using doping within criminal justice. At the same time, the athlete’s psychology, the problem of counteracting doping through anti-doping measures and the impact of such problems on the “spirit of sport”, in general, testify to the criminalization of doping in sport as one of the types of fraud (Sumner Claire, 2017).

### Methodology

The methodological framework of the study includes a set of general and special methods of scientific knowledge. The system approach as a general scientific method allowed identifying the issues of combating doping in Ukraine and European countries. The logical and semantic method within the limits of this research disclosed the essence of the categorical apparatus, in particular, considered the concept

of “doping” and “anti-doping rule violation”. The method of documentary analysis was used to formulate suggestions and recommendations for the improvement of the fight against doping. Comparison of the legislative provisions on combating doping in Ukraine, Hungary and other European states was carried out using a comparative legal method.

### Results and discussion

Given the long history of doping, a range of international acts was devoted to the issue of preventing and combating the use of substances that increase the performance of athletes. A significant role in clarifying and enshrining the essence of the concept of “doping” belongs to the 1989 Anti-Doping Convention, which gives grounds to assert that doping means the administration to sportsmen or sportswomen, or the use by them, of pharmacological classes of doping agents or doping methods (Anti-Doping Convention, 1989). Thus, this international act focuses both on prohibited substances for athletes and prohibited methods.

The International Convention against Doping in Sport (2005) provides a more extensive definition of doping, according to which doping in sports is an anti-doping rule violation, which includes: 1) the presence of a prohibited substance or its metabolites or markers in an athlete’s bodily specimen; 2) use or attempted use of a prohibited substance or a prohibited method; 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; 5) 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; 6) tampering, or attempting to tamper, with any part of doping control; 7) possession of prohibited substances or methods; 8) trafficking in any prohibited substance or prohibited method; 9) administration or attempted administration of a prohibited substance or prohibited method to any athlete (International Convention against Doping in Sport, 2005).

Obviously, an anti-doping rule violation is not just the use of prohibited substances and/or methods, but also a wide range of actions or inactivity, including attempts to use doping and even possession of substances and methods that are prohibited. On the one hand, such an

interpretation of the concept of “doping” is appropriate, since it contains an exhaustive list of acts, which entail sanctions determined by anti-doping legislation, and on the other hand, each of these violations of the doping rules has its own specifics, which should be specified each time before imposing appropriate sanctions. Moreover, the question arises about the subjects of such offenses, in particular, whether the responsibility is borne only by the athlete or may also be borne by athlete support personnel in the case of possession of prohibited substances and methods, etc. In other words, the broad interpretation of the concept of “doping” under the 2005 Convention raises many controversial issues.

Another international act containing the definition of doping is the World Anti-Doping Code of 2009, according to which doping is, above all, the presence of a prohibited substance, its metabolites (intermediate products of metabolism) or markers in an athlete’s specimen, and the refusal of the athlete provide such a specimen (World Anti-Doping Code, 2009). In addition, the subjects to whom sanctions for the doping rule violation apply are exclusively athletes. Therefore, it can be argued that this definition of doping is rather narrow as compared to the previous one.

The provisions on doping are also enshrined in the Code of Sport Ethics, which refers to the principle of “fair play”, which excludes fraud, the use of doping, violence, image, exploitation, unequal opportunities, commercialization and corruption. Thus, in accordance with the declaration made by the ministers of the European states responsible for sports, the waiver of doping is an important principle of sporting competitions, which has been given special emphasis given the 1989 Convention against Doping and the International Convention against Doping in Sport, 2005. At the same time, it is necessary to take into account that the Code of Sport Ethics, unlike the previous international acts, has not been ratified by Ukraine, which cannot be considered positive, and in our opinion, it has affected the state of legal regulation of anti-doping activity in Ukraine

Summing up the rules of the current international law, as well as the provisions of the scientific doctrine, it is necessary to emphasize the fact that, despite the long history of doping in sport, the availability of a number of international instruments aimed at developing a unified approach to understanding the concept of “doping” to facilitate the fight against this

negative sport phenomenon within the states and internationally, the general lack of a clear interpretation of the “doping” category is evident.

An analysis of approaches to the definition of doping suggests that in any case, the central categories of such definitions are prohibited substances and methods listed in the annexes to the 2009 World Anti-Doping Convention. Particularly, prohibited substances include substances that meet one of the following criteria: increase efficiency; create a real or potential health risk for athletes who use them; contradict the spirit of sport.

However, not all scientists support the internationally defined list of prohibited substances, which are doping. Thus, V. Platonov points out that the list of prohibited substances developed and approved by the World Anti-Doping Organization is irrational since many substances are considered prohibited given only the definition of “doping” and the rather broad idea of the “spirit of sport” (Platonov V., 2016). In turn, Gepdiremen A. states that the list of prohibited substances identified by the World Anti-Doping Organization is imperfect since most of the prohibited substances are considered as doping only if they are used in small doses. In addition, the scientist notes that some compounds that can seriously increase physical endurance are similar to amphetamines, which not prohibited by the World Anti-Doping Organization (Gepdiremen A., 2018). However, Milot L. emphasizes that almost all prohibited substances are popular for recreational use, are addictive, and most of them are drugs, depressants, stimulants, psychotropic drugs (Milot L., 2014). This indicates the need to revise the list of substances considered to be doping, given that their definition makes it difficult to apply sanctions for doping offenses.

In some countries, the problem of doping is solved through the sports sanctions, as well as the prosecution of perpetrators both for the use and for the production, distribution, and coercion. Thus, the development of illegal production and trade of doping has led to the recognition of such acts as a criminal offense in the Criminal Codes of such countries of the European Union as Cyprus, the Czech Republic, Finland, Hungary, Lithuania, the Netherlands, Slovenia, and Italy, in the anti-drug laws—Austria, Belgium, Germany, Denmark, Ireland, Netherlands, Portugal, Romania, Sweden, and United Kingdom, in regulations on sports—France, Greece, Luxembourg, and Spain (Michael

McCann, 2017). The criminalization of illicit trade involves the fact that the control of prohibited substances within the state and internationally leads to the absence of open access to prohibited substances that are doping, and in accordance with the functioning of the “black” market of production and trade of doping. Thus, the state receives new challenges in the field of countering and combating doping in sport (Bertrand Fincoeur, Katinka van de Ven, Kyle J. D. Mulrooney, 2015).

Thus, Article 185 Criminal Offenses Related to Increasing Productivity of the Criminal Code of Hungary states that any person who manufactures, offers, places on the market or appoints as a medical or veterinary preparation that increases the productivity in sports is found guilty and, accordingly, is punished by imprisonment for a term not exceeding 3 years (Criminal Code of Hungary, 2012). Taking into account the above, we propose to agree with the disposition of Article 185 of the Criminal Code of Hungary, which is quite logical. First, the emphasis is placed on the production, supply, placing on the market, and appointment as a medicinal or veterinary drug, which increases productivity in sports, which significantly reduces the range of social relations that are subject to the rule.

Instead, Article 323 of the Criminal Code of Ukraine provides for criminal liability only for inducing minors to use doping, putting it in line with such crimes in the sphere of circulation of narcotic drugs, psychotropic substances, their analogs or precursors and other crimes against public health, as 1) illegal administration of narcotic drugs, psychotropic substances or their analogs; 2) the inclination to the use of narcotic drugs, psychotropic substances or their analogs; 3) the organization or maintenance of places for the illegal use, production of narcotic drugs, psychotropic substances or their analogs; 4) inducing minors to use intoxicants; 5) other crimes against public health (Criminal Code of Ukraine, 2001).

At the same time, the Bill On Amendments to Article 323 of the Criminal Code of Ukraine on Combatting Doping registered in the Parliament proposes to present the above-mentioned article of the Criminal Code of Ukraine in the following wording: “The inclination to use doping”, which disposition implies inducing or forcing a person to use doping, the appointment or attempts to appoint a doping, the distribution of doping, subject to the following sanctions: a fine of 3 to 50 thousand non-taxable incomes of citizens or a

deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years. In this case, qualifying signs of the specified crime are the commission of the above-mentioned actions concerning a minor person; committing such actions repeatedly; committing such actions against two or more persons or in case of harm to the victim; committing such actions if they have caused significant harm to the victim (Draft Law of Ukraine On Amendments to Article 323 of the Criminal Code of Ukraine on Combating Doping, 2018).

At the same time, it should be noted that the party liable under this Article of the Criminal Code of Ukraine is any person, although the explanatory note to the Draft Law of Ukraine On Amendments to Article 323 of the Criminal Code of Ukraine on Combating Doping as of January 9, 2018 states that the purpose of the specified bill is to harmonize the current legislation of Ukraine with the provisions of the 1989 Anti-Doping Convention and the International Convention against Doping in Sport 2005. Therefore, the absence of an indication of liability for the precautionary measures specified in Article 323 of the socially dangerous acts in the field of sport somewhat reduces the significance of this rule as a legal basis for combating doping in sport.

However, the rules of Hungarian criminal law on combating doping in sport cannot be considered perfect. In particular, it should be noted that in the disposition of Article 185 of the Criminal Code of Hungary it is a medical or veterinary drug that increases the productivity in sports, which immediately raises the question whether the person can be responsible under the article if a veterinary drug that increases productivity in sports was used in animals as participants in sporting events, because researchers differentiate the use of doping in humans and the administration of doping substances to animals to enhance their physical fitness while participating in sports competitions (Carolyn P. Arolyn P. Heuhaus, Brendan Parent, 2019).

However, if we consider the criminal procedural rules of other states that establish the basis of responsibility for doping in sports, then we can conclude that they include criminal liability for the production, distribution, and use of doping substances that have different names, in particular:

- the appointment of medical products for use as doping in sports, including the direct use by individuals of medicinal

- preparations as doping, the delivery of medical products as doping (Article 185 of the Estonian Criminal Code);
- production, import, distribution, possession with the intention of distributing steroids and hormones (Chapter 44 of the Criminal Code of Finland);
  - possession or acquisition of a small amount of certain pharmaceutical products (including steroids and hormones) for the purpose of use as doping in sports (Article 6a of the German Drug Act and the German Criminal Code provides for the responsibility for placing on the market, the appointment, administration of doping to athletes (Article 95);
  - use, encouraging to use or administration of drugs or biologically, pharmacologically active substances that are considered doping, as well as trade of such substances outside the official distribution channels (Italian Law No. 376/2000);
  - prescribing a prohibited substance or method to a minor or an athlete without his or her knowledge (Article 50 of the Polish Sports Act);
  - appointment, delivery and supply of substances to athletes to increase their physical abilities or change the results of the competition (Article 361 of the Criminal Code of the Kingdom of Spain).

Thus, the criminal law of each state focuses on various substances that are proposed to be regarded as doping, although the World Anti-Doping Organization does not limit the list of doping substances only to steroids, hormones, etc., due to the inconsistency of the criminal law rules of the states, which refer to doping substances as “medical products”, “medicines and veterinary drugs”, “steroids and hormones”, “certain pharmaceutical products”, “drugs”, “biologically, pharmacologically active substances”, with the provisions of international acts, which they give the general name. This does not indicate the need to indicate an exhaustive list of prohibited substances that are considered doping in the disposition of the criminal law rules, but indicates the expediency of unifying the understanding of doping substances under the national laws of the states with international rules and naming them exclusively as “substances prohibited by anti-doping legislation”. This will eliminate the contradiction between national and international anti-doping legislation, which is

especially important in the context of enhanced cooperation between states in the area of countering and combating doping. International acts on prohibited substances include a broad list, and national legislation criminalizes the production, trade, prescription, use of steroids and hormones, which are only one of the prohibited substances, which leads to a lack of a ban on the production, the use of other doping substances.

The expansion of the list of actions related to prohibited substances, in particular, production, trade, the appointment of doping substances raises the issue of the party liable. Thus, it is necessary to agree with Christopher McKenzie who believes that the introduction of criminal justice mechanisms and an attempt to expose unfair behavior in sports through criminal liability should be based on the fact that its subjects were both athletes and athlete support personnel, more effective than limiting the range of party liable only to athletes (Christopher McKenzie, 2007). In general, we agree with this position, as athletes often decide to use doping based on advice or encouragement of support personnel. Therefore, the legislation of Ukraine and Hungary should take into account the above in determining the party liable under articles 323 and 185 of the Criminal Code.

As for the need to criminalize the use of doping, as well as the production, trade, the appointment of substances subject to doping, it is necessary to focus on the experience of Austria, where criminal liability for the use of doping and the production, trade, the appointment of doping is subject to article 147 Fraud of the Criminal Code of Austria. This provision states that anyone who has committed fraud and caused significant harm using a substance or method prohibited by the 1989 International Convention against Doping shall be liable to imprisonment for a term of up to 3 years, and imprisonment from 1 to 10 years if the size of the damage caused exceeds 30 thousand euros (Strafgesetzbuch).

At the same time, Jaan Murphy states that the Austrian legal rule is not formal, in particular, in 2010, Stefan Matschiner, an Austrian cyclist manager, was sentenced to 15 months in prison for promoting doping among cyclists and selling doping; Austrian skier Mikhail Botvinow was sentenced for 4 months imprisonment for false testimony as a witness in the doping case against the ex-trainer on biathlon Walter Mayer who was summoned in 2012 for criminal liability for doping trade for 15 months (Jaan Murphy, 2013).

The position of the French legislator is similar. In particular, in France, the professional activity of an athlete can be financed at the expense of public funds. Accordingly, an athlete who receives doping and at the same time receives public funding is a potential criminal offender for fraud, as provided for in Article 313-1 of the French Criminal Code. The disposition of the specified rule provides for fraud committed through the use of a false name or false status, abuse of a valid status, the use of fraudulent techniques, misleading any physical or legal person and inclining them in such a way that they would transfer to the detriment of themselves or third parties monetary funds, securities, tangible assets or any other property, rendered services or made transactions, causing the emergence of duties or exemptions from them, whereas sanction is punishment in the form of five years imprisonment and a fine of 2.5 million francs (Criminal Code of France, 2005).

At the same time, if we pay attention to bonuses in the Olympic Games in Ukraine, they are among the highest in the world: the gold medal usually costs at least USD 100,000, silver medal – about USD 70,000, bronze medal – USD 50,000). In this case, victories at the championships of the world and Europe guarantee monthly state scholarships in the amount of UAH 10,000-15,000. This suggests that Ukrainian athletes may resort to doping fraud to receive financial payments from the state, which once again confirms the expediency of studying the positive experience of foreign countries in the field of fight against doping and against the production, trade, appointment, inclination to use doping.

Considering the above, it is recommended that Ukraine and the countries of Europe focus their efforts on developing a unified approach to understanding doping, which in the future will contribute to the consolidation of the policies of states and their measures to combat doping. Resolving the issue of the criminalization of doping in sport at the European Union level remains equally important. It should have a positive effect on the fight against this negative phenomenon in sports in all countries of the region.

## Conclusions

Thus, the introduction of amendments to Article 323 of the Criminal Code of Ukraine is a sufficiently substantiated step by the Ukrainian legislature against doping, although the issue of ratification by Ukraine of the Code of Sport

Ethics, which also lays down the principles of anti-doping policy, remains open today. At the same time, the proposed amendments to Article 323 of the Criminal Code of Ukraine should be supplemented, in particular, there is no indication that the criminal liability is provided for the specified legal rules in the field of sports. Moreover, we consider it appropriate to provide the criminal liability for the production of doping, Article 185 of the Criminal Code of Hungary is indicative because the issue of counteracting the “black” doping market, which is both national and international in nature, is particularly relevant.

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