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LEGAL NATURE OF THE WORLD ANTI-DOPING AGENCY (WADA)

Introduction. *The task of the World Anti-Doping Agency, which is the most important organisation for combating doping in sports, is to set standards against doping, including legal standards, and to monitor them. At the same time, this is an organisation that has continually stirred up a great deal of controversy in the doctrine of international law regarding its legal nature since its inception.*

Problem. *There's an obvious research gap in legal nature and specific features of WADA. This paper would address this gap based on the analysis of the specific construction of WADA, as the latter is internationally recognised as an original and unique piece of international legislation that reflects the intentions of the private and public sectors in sports.*

The aim of this paper to provide a well-founded conclusion on legal nature of WADA.

Methods. *Doctrinal legal research to evaluate the genesis of academic thinking on the legal nature of WADA, public and private legal entities, empirical*

ПРАВОВА ПРИРОДА ВСЕСВІТНЬОГО АНТИДОПІНГОВОГО АГЕНТСТВА (ВАДА)

Вступ. *Завдання Всесвітнього антидопінгового агентства, яке є найважливішою організацією з боротьби з допінгом у спорті, полягає в тому, щоб встановити стандарти проти допінгу, в тому числі юридичні стандарти, і контролювати їх дотримання. Водночас це організація, яка з моменту заснування постійно викликає чимало суперечок щодо її правової природи у доктрині міжнародного права.*

Постановка проблеми. *Існує очевидна дослідницька прогалина щодо правової природи та особливостей ВАДА. Метою цього дослідження є усунення цієї прогалини на основі аналізу специфічної структури ВАДА, оскільки ця Агенція визнана на міжнародному рівні у якості унікальної інституції, норми якої відображають наміри приватного та державного секторів у спорті.*

Метою статті є надання обґрунтованого висновку щодо правової природи ВАДА.

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research of international legal framework of WADA, methods of analysis to evaluate specific construction of WADA.

Results. World Anti-Doping Agency was established in response to a massive increase in doping cases in the world of sports. It is an independent international private law organisation, whose purpose is primarily to harmonise, monitor and update all legally available methods of combating doping. However, as shown at least by the structure of the Agency itself and its influence on the anti-doping policies of individual States and international organisations and sports federations, which after all represent States, it can be considered as an institution of a hybrid form.

Conclusion. Due to the special structure and role of WADA, its regulations are formally situated in the realm of private law. But at the same time they are legitimised through provisions of the rank of international law acts, which provide a legal framework for them. Thus, the norms of a public-legal nature concerning doping, anti-doping and disciplinary responsibility for doping are de facto secondary to norms of a private-legal nature. WADA itself can be considered a global model for setting standards for other entities operating in sports.

Keywords: doping, sports law, WADA, private law organisation, hybrid

Методи. Доктринальне правове дослідження для оцінки генези наукового мислення щодо правової природи ВАДА публічних і приватних юридичних осіб, емпіричні дослідження міжнародно-правової основи ВАДА, метод аналізу для оцінки специфічної структури ВАДА.

Результати. Всесвітнє антидопінгове агентство було створено у відповідь на масове зростання випадків допінгу у світі спорту. Це незалежна міжнародна організація приватного права, головною метою якої є гармонізація, моніторинг та оновлення всіх законних методів боротьби з допінгом. Однак, як показує принаймні структура самого Агентства та його вплив на антидопінгову політику окремих держав і міжнародних організацій і спортивних федерацій, які зрештою представляють держави, його можна розглядати як інституцію гібридної форми.

Висновок. Через особливу структуру та роль ВАДА, його нормативні акти формально знаходяться у сфері приватного права. Але, водночас вони легітимовані через положення ряду міжнародно-правових актів, які забезпечують їх правову основу. Таким чином, норми публічно-правового характеру щодо допінгу, антидопінгової та дисциплінарної відповідальності за допінг є де-факто вторинними щодо норм приватно-правового характеру. Саме ВАДА можна вважати глобальною моделлю інституції, яка встановлює стандарти для інших організацій, що працюють у спорті.

Ключові слова: допінг, спортивне право, WADA, приватна юридична організація, гібрид

JEL Classification: K30.

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Introduction. As of today, the World Anti-Doping Agency (herein-after – WADA) is the most important organisation for combating doping in sports. The task of WADA is to set standards against doping, including legal standards, and to monitor them. These two statements are quoted and repeated like a mantra in any discussion or debate regarding the fight against doping in sports. However, it is worth remembering that this is an organisation that has continually stirred up a great deal of controversy in the doctrine of international law regarding its legal nature since its inception.

Problem. There's an obvious research gap in legal nature and specific features of WADA. This paper would address this gap based on the analysis of the specific construction of WADA, as the latter is internationally recognised as an original and unique piece of international legislation that reflects the intentions of the private and public sectors in sports.

Analysis of recent researches and publications. WADA has been in focus of international researchers from the very beginning of its activities [1], covering the essence of the World Anti-Doping Code [2; 3], problems of doping [4; 5]. However, the legal nature of WADA remained partly addressed by L. Cassini [6], so that creates a research gap to be filled in with this paper.

The aim of this paper to provide a well-founded conclusion on legal nature of WADA.

Methods. Doctrinal legal research to evaluate the genesis of academic thinking on the legal nature of WADA, public and private legal entities, empirical research of international legal framework of WADA, methods of analysis to evaluate specific construction of WADA.

Research results. *World Anti-Doping Agency*¹.

Numerous doping scandals of the 1990s prompted the international community to engage in a vigorous dialogue on doping in sports and the issue of anti-doping policies in the broadest sense. It resulted in the initiation of co-operation between sports and international intergovernmental organisations and national governments, which culminated in the involvement of the latter in the process of fighting doping in sports [7]. The establishment of the World Anti-Doping Agency was important in the context of the attempt to harmonise the anti-doping policy. Its legal status is more complicated than that of international sports federations [8]. The imperfection of the anti-doping control system, as well as the prevalence of illicit drugs in sports, have pushed the international community to take decisive action on this issue [7]. WADA was established in response to a massive increase in doping cases in the world of sports², and the impetus for action came from an anti-doping scandal that affected one of the world's more renowned cycling races, the 1998 Tour de France³. Its original purpose was to establish uniform standards for anti-doping activities and co-ordinate the efforts of sports organisations and public authorities. The idea of a global organisation was presented at the World Conference on Doping in Sport in Lausanne, February 1999. At its conclusion, representatives of public authorities and sports organizations signed the so-called Lausanne

¹ As the considerations in this article are closely related to the issues raised in the publication: *Konwencja Antydopingowa Rady Europy oraz Światowy Kodeks Antydopingowy w systemie prawa UE* and the issue concerning WADA as an organisation in principle of private law is extremely important, authors directly quote excerpts from the indicated book, see. R. Kopczyk, *Konwencja Antydopingowa Rady Europy oraz Światowy Kodeks Antydopingowy w systemie prawa UE*, Oficyna Prawnicza, Wrocław 2020.

² It is worth mentioning that the history of sports of the 1980s and 1990s is marked by numerous doping scandals, more on this topic: D. L. Coleman, J.E. Coleman, *The problem of doping*, Duke law journal, 1744,

³ The French police found numerous doping substances in Tour de France participants during their operational activities. As it turned out later, for example, the Festina team ran a meticulously organized doping that was financed by themselves. Significantly, and showing the scale of the events at that time, only 98 athletes out of 189 competing made it to the French capital and the Champs Elysees.

Declaration. It provided for the establishment of an independent international anti-doping agency, ready to take action as early as the XXVII Olympic Games in Sydney [9]. A few months later, on November 10, 1999, it was established at WADA as a private foundation under Swiss law subject to the regulations set forth in its statutes and Article 80 of the Swiss Civil Code. It was created at the initiative of the International Olympic Committee with the participation of national governments, international organisations, as well as other private entities involved in the anti-doping combat. Lausanne was considered the headquarters of the World Anti-Doping Agency, but in 2002, by decision of the Agency's Founding Council, it was moved to Montreal [7]. Regional headquarters were also established in 2002 – Lausanne for Europe, Tokyo for Asia and Oceania, Cape Town for Africa and Montevideo for South America [6].

Its goal is to promote and coordinate the fight against doping in sports worldwide. It is an organisation that brings together all parties involved in the fight against doping, including world governments, the sports movement and, most importantly, athletes. WADA unites them around one idea – doping-free competition.

From a legal perspective, WADA is a private law organisation⁴. This does not create *de facto* any difficulties in the relationship between it and sports organisations, while problems and difficulties arise only in the relationship between WADA and governments of countries [7], WADA international law organisations (GO). The literature also indicates that the legal form of WADA may be a source of many obstacles and problems in the unification of the anti-doping system [2], which, after all, was at the heart of its establishment.

WADA has a typical structure with most foundations headed by the Council. WADA's organisational structure includes the Founding Council, which is the highest decision-making body, the Executive Committee, which handles the day-to-day operations of the Agency, and the Agency's President. The equal partnership between the Olympic movement and governments is reflected in the composition of the Founding Council. The Council is made up of representatives of the Olympic movement, namely the International Olympic Committee, National Olympic Committees, International Sports Federations and athletes, and also includes government representatives from all five continents. The Council is composed of 38 members:

- 18 are elected by the Olympic Movement, or IOC, national Olympic committees, international and national sports federations;

⁴ It is worth mentioning that at the stage of negotiations, many representatives of the governments of the countries participating in the establishment of WADA preferred a different organisational and legal form. Taking the form of an international organisation was seriously considered. See, *inter alia*, R.C.R Siekmann, *Introduction to International and European Sports Law*, Hague 2012.

- 18 are designated by public authorities from five continents, with members coming from the European region designated jointly by the Council of Europe and the European Union;
- 2 members are chosen jointly by them [10].

According to the WADA Charter, the Executive Committee consists of the President, Vice President, 5 members each elected by the Olympic Movement and governments.

WADA's charter in Article 4(8) stipulates that the agency will be authorised to prepare plans and proposals, which can be structured «based on public international law» if necessary. WADA can and does invite international organisations to co-operate for advisory purposes. Such organisations currently include the World Health Organisation and Interpol, among others.

Significantly, for the first two years of its operation, WADA was funded by the IOC. On the other hand, since January 1, 2002⁵ it has been financed equally through funds from national governments and through funds from the IOC.

Thus, in principle, the World Anti-Doping Agency is an independent international private law organisation, whose purpose is primarily to harmonise, monitor and update all legally available methods of combating doping. However, as shown at least by the structure of the Agency itself⁶ and its influence on the anti-doping policies of individual States and international organisations and sports federations, which after all represent States, we can speak of a hybrid form.

WADA is responsible for harmonisation, dissemination of unified anti-doping standards. The Agency is also responsible for promulgating and updating the list of prohibited substances and methods, technical documents for laboratories and guidelines. In addition, acting in co-operation with international federations and national anti-doping agencies, it exercises the role of global administrator to monitor the standards of anti-doping activities performed. Moreover, it promotes the development of scientific research in the fight against doping in sports and is responsible for developing and implementing international educational programs based on ethical values in sports.⁷

WADA's activities have the support of most countries in the world, the IOC and the majority of both international and national sports federations, while representatives of FIFA and UEFA describe WADA's methods as inquisitorial [11] and call for changes in doping control and investigation procedures.

⁵ As agreed at the appointment of WADA.

⁶ The IOC and States each have 50% of the seats.

⁷ Which, by the way, is consistent with the UNESCO Convention (International Convention for the Suppression of Doping in Sport (UNESCO Convention), O.J. of 2007 no. 142 pos. 999.) with reference to education and training activities.

WADA coordinates the World Anti-Doping Program, the most important element of which is the World Anti-Doping Code, as well as accompanying international standards. Parties to the Code that create their own anti-doping regulations are International Federations, organisers of major sports events and National Anti-Doping Organisations.

Features of a public entity. When we look globally at sports law,⁸ we can unequivocally state that it is not only international, but also non-governmental, and this undoubtedly places it in a completely different place from other areas of law⁹. At this point, please pay attention to the political and legal potential that WADA has. The literature accepts that the basic dominant feature of any power is the size of the territory over which the laws it issues are effective [5]. For WADA, as of today, this includes almost every country in the world, which also indicates its public-legal nature and its power of influence. As indicated above, there is no doubt that WADA is not an international organisation. Thus, it is a *de facto* organisation of a private nature, to the activities of which the UNESCO International Convention for the Suppression of Doping in Sport refers, which undoubtedly affects its public-legal nature¹⁰ as the ratification of the Convention by individual countries, in principle, triggers the mechanism for the implementation of acts created under the activities of WADA [12]. On this basis, countries also take action in the sphere of combating doping in sports and creating appropriate conditions – including legal and financial – for the implementation of anti-doping programs.

The public nature of WADA originates from a number of factors. As indicated earlier, WADA is funded in equal parts by the IOC and the governments of countries that are parties to the aforementioned Convention. Moreover, despite its formally private nature, WADA performs functions that carry out the public activities of individual states and international organisations¹¹. These include promoting and coordinating the combat at the international level against doping in sports in all its forms, including through pre-competition and non-competition testing; helping to protect the health of athletes; promoting widespread awareness of what doping entails; and coordinating doping-related research in sports. Thus, we can see how WADA, through its standards, influences international standards on doping and at the same time creates soft law in the form of recommendations and good practices.

⁸ Without a doubt, this is the way to look at them. Sports regulations cover both national and international levels. They directly affect private entities as well as public law.

⁹ Authors that also commented in a similar vein: M. Beloff, T. Kerr M. Demetriou, *Sports Law*, Hart, Oxford, 1999, p. 5.

¹⁰ See Article 3 and Article 4 (1) of the International Convention... «In order to coordinate the fight against doping in sports at the national and international levels, States-Parties undertake to adhere to the principles of the Code as the basis for the actions provided for in Article 5 of this Convention».

¹¹ Here we can talk about WADA's full cooperation with international, intergovernmental, governmental organisations.

The role played by WADA as a global standard setter seems also important in this context. This primarily involves the promulgation and updating of the list of banned substances and methods, technical documents for laboratories and guidelines, as well as the harmonization of disciplinary rules for individuals associated with doping violations, already mentioned in this work [6].

One of the more significant consequences of WADA's activities and influence on public-legal norms is that it has led to a situation where the same anti-doping violation may be subject to adjudication by sports tribunals and criminal courts today. This is undoubtedly a consequence of individual countries taking into account the crime of administering, distributing, using doping in their criminal laws. The *ratio legis* countries' introduction of criminal laws as to doping-related violations and the expansion of oversight of these offences was to bring anti-doping regulations in line with the requirements of WADA and the UNESCO Convention.

Important for WADA itself, but also for the interpretation of the Council of Europe Convention, is its Additional Protocol [13], adopted on July 3, 2002 by the Committee of Ministers of the Council of Europe. It contains provisions, adapting the content of the Convention to the new international situation in the fight against doping in sports. According to its wording «... under the provisions of the Additional Protocol, the competence of the World Anti-Doping Agency and other doping control organizations acting on its behalf and conducting checks on athletes outside of competitions is recognised».

In addition, it should also be noted that the vast majority of national anti-doping organizations (NADOs) that are party to the WADA and operate under WADA guidelines and are controlled by WADA are publicly funded.

Features of a private entity. When assessing the status of WADA, it is important to point out that the IOC (a private entity) played an extremely important role in the creation of WADA and fully funded it for its first 2 years of operation. Moreover, if we look at the jurisprudence of the CJEU, it follows unequivocally that the activities of international sports federations, including the IOC, are an area of economic activity, and both sports federations and the IOC should be considered an enterprise or association of enterprises [14; 15]. Therefore, taking also into account the governance structure of WADA, the anti-doping agency can be regarded as an emanation of the IOC and thus considered an enterprise or business association. There is also no doubt that the relationship between WADA and sports federations, is strictly of a civil law nature, which makes it a subject relevant to issues of private law. It does not derive from any national or international normative act, but only from a statement of intent by such an entity to commit to applying regulations created by WADA.

Conclusions. Concluding the discussion above, it is safe to say that WADA's activities have, from the beginning of its existence, aroused much controversy and opposition from some circles, who have accused it of being primarily private-legal in nature. WADA has been at the turning point for some time, involving the issue of sanctioning the regulations it creates, as well as with the difficulties associated with the limited ability to detect and combat doping in some areas of the world. Despite these difficulties, WADA's position on the international stage is important. The subtle and complex relationships that subsist between WADA and international organisations such as UNESCO and INTERPOL, for example, situate it, despite its private background, in a major position in the field of anti-doping standard setting. Its activities are recognised and taken into account by numerous countries and international organizations, which undoubtedly influences the creation of legal frameworks on doping in individual countries. An important moment in sanctioning WADA's role was the adoption of the UNESCO Convention. Formal binding of countries to the provisions of the World Anti-Doping Code has not taken place, but the UNESCO Convention has nevertheless introduced a qualitative change in the applicability of the WADA in national legal orders, as its provisions oblige signatory countries to conduct policies in accordance with the provisions of the WADA Code.

Although WADA and its regulations are formally situated in the realm of private law, due to the special structure and role of WADA, they are legitimised through provisions of the rank of international law acts, which provide a legal framework for them. Thus, we can conclude that norms of a public-legal nature concerning doping, anti-doping and disciplinary responsibility for doping are *de facto* secondary to norms of a private-legal nature. WADA itself can be considered a global model for setting standards for other entities operating in sports.

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