

# A Revolution in French Doping Legislation

By François Berbinou and Mathilde Dulize

*Citius, Altius, Fortius:* 100 years later, Paris will once again host the summer Olympic Games.

In five years, France will pay a tribute to the creator of the modern Olympic games, Baron Pierre de Coubertin, by being the center of the world for sport. This event is a wonderful opportunity to shine a light on the city of Paris and on the entire country of France, as it shows its deeply rooted culture and sense of hospitality as host to thousands of tourists and sport fans.

Needless to say, hosting such an event requires the country to comply with several compulsory international regulations. Among other things, France needs to bring existing installations, like stadiums, into compliance with the Olympics criteria. In addition, the Olympic Games also have an impact on French anti-doping legislation. Even though an anti-doping platform has always been a central priority of the French government when dealing with sports, France has refused to implement in its legislation the World Anti-Doping Code (the Code) itself. Indeed, while some of the obligations stated in the Code were transposed in the French legislation, others were not.

However, with the 2024 Olympics now in sight, these outstanding issues caught up with the growing international pressure and eventually defeated the French long-lasting reluctance to abide by the World Anti-Doping Agency (WADA) rules. This prompted significant changes in rules governing the prevention and the sanction of doping.

## Prevention—The Tracking Obligation

The fight against doping is organized through several complementary mechanisms and adapted to each population of athletes or their athletes' entourages. A particularly important measure in this fight lies in the possibility of subjecting certain athletes to unannounced checks. In France, this checking process is provided in article L. 232-15 of the French sport code,<sup>1</sup> but this measure only applies to a limited list of athletes named the "target group." This list is set every year by the French Anti-Doping Agency (AFLD), an independent public authority created in 2006 and charged with ensuring that sports participants do not violate rules regarding doping.<sup>2</sup> The target group includes:



- Athletes who are or were registered at least for one year during the last three years on the lists of high-level athletes and promising athletes within the meaning of the sport code,

- athletes who are or were licensed professionals of an affiliated federation at least for one year during the last three years, and

- athletes who have already been the subject of disciplinary sanctions during the last three years.

As part of this scheme, athletes of the "target group" are required to provide specific information on their whereabouts for the conduct of doping controls. Pursuant to Article L.232-9-3 of the French sports code,<sup>3</sup> the combination of three failures by an athlete to his, her, or their tracking obligations constitutes a violation of the anti-doping rules and is punishable by disciplinary sanctions. On the basis of these provisions, the French boxing Olympic champion, Tony Yoka, has been suspended for one year from practicing his sport.<sup>4</sup>

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The "target group" was created by an Order of April 14, 2010<sup>5</sup> (the Order). Its existence was challenged before the French national courts and before the European Court of Human Rights (ECHR), the latter of which delivered a ruling on January 18, 2018.<sup>6</sup> The claimants, led by the famous French cyclist Jeannie Longo, an athlete holding several Olympic and world titles, argued that as a consequence of belonging to the "target group," the athlete was subject to possible tracking outside his, her, or their place of training and competition, at home, and during rest time or vacations. To this end, the target athletes are indeed subject to a strong and up-to-date localization obligation. For certain athletes and their trade unions, such constraints are deemed detrimental to their freedom to

come and go, their right of privacy and family life, and to their right to peaceful enjoyment of their home. They also claim that these constraints are a violation of competition law.

Before the ECHR was seized, the French Council of State dismissed in its decision of February 24, 2011<sup>7</sup> the motions of several French sport federations seeking the annulment of all or part of the Order. The French Council of State, when seized by targeted athletes, had also refused to refer a priority question of constitutionality on these same issues to the French Constitutional Council.<sup>8</sup>

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In its January 18, 2018 ruling, the ECHR considers that the tracking obligation effectively constitutes an intrusion into the private life of the “target athletes.” However, it also considers that the interference is “prescribed by law” within the meaning of Article 8 § 2 of the European Convention on Human Rights,<sup>9</sup> that the constraints imposed pursue a legitimate aim and that they are proportionate. The tracking obligation is justified since it is part of the fight against doping, a scourge that threatens the fairness of competitions and constitutes a public health issue.

So that France will be in compliance with the WADA rules, its government has recently proposed a bill to the French National Assembly in order to amend the list of athletes who can be part of the “target group,” by adding the athletes enlisted on the national collective list—i.e., those who are playing for their national teams.

### **Sanction—The Disciplinary Process**

In France, the main disciplinary body in the fight against doping previously was each sporting discipline’s Federation. The AFLD, although not part of the federal system, also used to play a significant role in this now obsolete disciplinary process.

In order to be able to receive subsidies from the French government, organize national competitions or deliver national titles, a Federation needs to be affiliated by the Ministry of Sports, and there can be only one affiliated Federation per sport. In each discipline, each affiliated Federation used to have exclusive jurisdiction over doping litigation, as part of its disciplinary powers. However, if a Federation failed to act swiftly, it was considered as relinquishing its exclusive jurisdiction. In case

of an alleged disciplinary offense, the first instance federal commission had a 10-week delay from the moment this offense was identified to issue a ruling. Otherwise, the file was automatically referred to the federal appeal commission. If this appeal commission did not issue a ruling within four months from the time the offense was identified, the case was automatically referred to the AFLD.<sup>10</sup> The AFLD was also entitled to take the initiative to appeal the ruling of first instance or the appeal commission’s ruling.<sup>11</sup>

Even before the legal changes prompted by the perspective of the 2024 Olympic Games kicked in, which significantly impacted the AFLD’s role and powers, the AFLD had been challenged throughout certain important decisions, which had forced it to initiate its reorganization. This started with a decision of the French Constitutional Council of February 2, 2018,<sup>12</sup> in which its members declared Article L232-22 3° of the-then applicable version of the French Sports Code (mentioned hereinabove) unconstitutional for the following reasons:

8. *The challenged provisions thus entrust the French anti-doping agency with the power to take action on decisions issued by the sports federations it wishes to reform. This power is not assigned to a specific person or body within the agency, while it belongs to the latter to judge on the violation that was the subject of the federation decision.*
9. *The challenged provisions do not create any separation within the French anti-doping agency between, on the one hand, the prosecution of the potential violations which have been the subject of a decision by a sports federation pursuant to Article L232-21 and, on the other hand, the judging functions of these same violations. They thus violate the principle of impartiality.*

At the time, the AFLD immediately reacted to this decision and announced that the bill on the organization of the 2024 Olympic and Paralympic Games, then under discussion before the French Parliament, would include a provision creating an independent commission within the AFLD, distinct from its prosecuting body. The independent commission was called the College, and it would be in charge of imposing disciplinary sanctions against athletes guilty of anti-doping rule violations.<sup>13</sup> This new piece of legislation was enacted on March 26, 2018,<sup>14</sup> followed by an Order of July 11, 2018,<sup>15</sup> thereby creating a Sanction Commission within the AFLD. Since then, the College has been responsible for deciding whether to bring disciplinary proceedings against athletes who have allegedly violated anti-doping rules. The Sanction Commission has jurisdiction to decide hear the cases and, if necessary, to pronounce disciplinary sanctions against athletes.

Since this first step was achieved and placed under WADA’s influence, the AFLD’s role in the fight against

doping has expanded. An Order was issued on December 19, 2018,<sup>16</sup> entirely entrusting the disciplinary procedure to the AFLD, which has new prerogatives, while the Federations have completely forfeited their disciplinary monopoly. This is a significant change for the athletes charged with anti-doping violations, since they no longer appear before their own Federations, nor are they judged by familiar faces. Now, their only recourse against the decisions of the College or of the Sanction Commission is an appeal before either national courts for matters involving French athletes and national events, or the Court of Arbitration for Sport for proceedings involving offenses allegedly committed by international athletes or during international events.

This arbitral jurisdiction was already accepted by the other States Parties to the International Convention against Doping in Sport of 2005<sup>17</sup> and by all international sports federations. The acknowledgment by the French Parliament of the jurisdiction of the Lausanne Court of Arbitration for Sport over appeals against the decisions of the AFLD involving international athletes or events shows France's dedication towards harmonizing anti-doping rules applied to high-level sport. Until now, France had always refused to transpose the Code into its internal legislation and such stance might have ruined France's chances to host the Olympics. On the above-mentioned procedural issues, as well as on others, the provisions of the December 19, 2018 Order that have come into force on March 1, 2019 ensure compliance of French law with the Code, which has been a recurring demand from WADA. This will trigger numerous new obligations and especially the implementation of new provisions every six years for full compliance.

This revolution of its anti-doping regulations should assert the credibility of France internationally in view of the 2024 Olympic Games. The question now is, how will the sports stakeholders (i.e., athletes, Federations, and agents) adapt to this new set of legislation and will it serve its purpose: a faster, stronger, and thus more effective anti-doping policy?

## Endnotes

1. Article L 232-15 of the French Sport Code.
2. Law no. 2006-405 of April 5, 2006, on the fight against doping and the protection of the health of athletes, published in JORF no. 0082, (April 6, 2006), p. 5193, text no. 2.
3. Article L 232-9-3 of the French Sport Code.
4. L'Equipe—July 5, 2018: "Tony Yoka suspended for one year for violations of anti-doping rules," available at <https://www.lequipe.fr/Boxe/Actualites/Tony-yoka-suspendu-un-an-ferme-pour-infractions-aux-regles-antidopage/919484>.
5. Order no. 2010-379 of April 14, 2010 on the health of athletes and the compliance of the sport code with the principles of the world anti-doping code, published in JORF no. 0089 (April 16, 2010), page 7157, text no. 26.
6. European Court of Human Rights (ECHR) – Judgment of January 18, 2018 (Final version of April 18, 2018), Case of *National*

*Federation of sportspersons' association and unions (FNASS) and others v. France* (Applications nos. 48151/11 and 77769/13) available at <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%2248151%2F11%22%22documentcollectionid%22%3A%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22%3A%22001-180442%22%7D>].

7. CE 2ème et 7ème section réunies, (Feb. 24, 2011), no. 340122, available at <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000023632413>.
8. CE, 2ème et 7ème sections réunies, (Dec. 18, 2013), no. 364839 and no. 368890, available at <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-18-decembre-2013-Mme-Longo-Ciprelli>.
9. European Convention on Human Rights – Art. 8 § 2.
10. Art. L 232-21 of the then applicable French Sport Code.
11. Art. L 232-22 § 3 of the then applicable French Sport Code.
12. Conseil constitutionnel, 2017-688 QPC, (Feb. 2, 2018).
13. "L'AFLD prend acte de la decision QPC no. 2017-688 du Conseil Constitutionnel du 2 février 2018," available at <https://www.afld.fr/lagence-francaise-de-lutte-contre-dopage-afld-prend-acte-de-decision-qpc-n-2017-688-conseil-constitutionnel-2-fevrier-2018/>.
14. Law no. 2018-202 of March 26, 2018 on the organization of the 2024 Olympic and Paralympic Games, available at <https://www.legifrance.gouv.fr/eli/loi/2018/3/26/SPOV1729269L/jo/texte>.
15. Order no. 2018-603 of July 11, 2018 on the disciplinary procedure before the AFLD, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEX000037182032&categorieLien=id>.
16. Order no. 2018-1178 of December 19, 2018 on the legal measures necessary to perfect the transposition of the principles of world anti-doping code into French law, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEX000037833532&categorieLien=id>.
17. International convention against doping in sport, (Oct. 19, 2005), available at [https://bdoc.ofdt.fr/doc\\_num.php?explnum\\_id=19138](https://bdoc.ofdt.fr/doc_num.php?explnum_id=19138).

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