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THE ECtHR'S RULING IN THE *SEMENYA V. SWITZERLAND* CASE WHAT IS NEXT FOR INTERNATIONAL SPORTS ARBITRATION AND ATHLETES' HUMAN RIGHTS?

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ABSTRACT: The paper aims at offering a first reading of the recent ruling by the European Court of Human Rights (ECtHR) in the Semenya v. Switzerland case. The Author's effort is mainly focused on the analysis of the different outcomes of this case before the Court of Arbitration for Sport (CAS), the Swiss Federal Tribunal (SFT) and the ECtHR as well as on the potential implication of the ruling in the wider context of international sports arbitration.

Il contributo si propone di offrire una prima lettura della recente sentenza della Corte Europea dei Diritti dell'Uomo (Corte EDU) nel caso Semenya c. Svizzera. L'Autore si concentra principalmente sull'analisi dei diversi esiti di questa vicenda davanti al Tribunale Arbitrale dello Sport (TAS), al Tribunale Federale Svizzero (TFS) e alla Corte EDU, nonché sulla potenziale implicazione della sentenza nel più ampio contesto dell'arbitrato sportivo internazionale.

Keywords: *Athletes' human rights – Sex discrimination – International sports arbitration – Court of Arbitration for Sport (CAS) – Swiss Federal Tribunal.*

Diritti umani degli atleti – Discriminazione sessuale – Arbitrato sportivo internazionale – Tribunale arbitrale per lo sport (TAS) – Tribunale federale svizzero.

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1. Introduction

On 11 July 2023, in the case *Semenya v. Switzerland* the European Court of Human Rights (ECtHR) held, by a majority (4 votes to 3), that there had been a violation of Art. 14 (prohibition of discrimination) taken together with Art. 8 (right to respect for private life) of the European Convention on Human Rights (the Convention), and a violation of Art. 13 (right to an effective remedy) in relation to Art. 14 taken together with Art. 8 of the Convention.[1]

The ECtHR found, in particular, that the athlete had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination as a result of her increased testosterone level caused by differences of sex development (DSD). To substantiate its finding, the ECtHR observed that:

(a) the CAS's analysis does not refer in any way to Art. 14 of the Convention, nor to the ECtHR's case law;
(b) the very limited control exercised by the SFT cannot be justified in the field of arbitration in sport, where individuals are confronted with sports organizations that are often very powerful;
(c) the CAS did not suspend the DSD Regulations, as it had done in the *Dutee Chand* case, despite the serious concerns clearly expressed by the CAS panel;
(d) the SFT did not attempt to dispel the doubts expressed by the CAS regarding the practical application and the scientific basis of the DSD Regulations;
(e) the SFT did not carry out a full examination of the complaint based on the discriminatory treatment, nor an appropriate balancing of all the relevant interests at stake, as required by the Convention.

[1] Available at https://hudoc.echr.coe.int/eng?i=001-225768.

In light of the above, the relevance of the ECtHR's ruling is twofold: on one hand, the ruling undoubtedly represents a new, fundamental step in the context of international sports arbitration and, in particular, of the relationship between the CAS and the SFT's power to review CAS awards; on the other hand, the ruling, although without invalidating the DSD Regulations, contributes to fuelling the debate regarding the difficulty of reconciling the traditional binary division between men and women in sport and real world where "*not all individuals' bodies fit neatly and unambiguously into a single binary male/female classification*".[2]

2. Who is Caster Semenya

Caster Semenya is a South African athlete (middle distance runner). She is undoubtedly famous for her sporting victories and successes. She first won gold at the World Championships in 2009 and went on to win at the 2016 Olympics and the 2017 World Championships, where she also won a bronze medal in the 1500 metres. After the doping disqualification of Mariya Savinova, she was also awarded gold medals for the 2011 World Championships and the 2012 Olympics.

She is also unwillingly famous because of her long legal dispute against the International Association of Athletics Federations (IAAF), now World Athletics (WA) in defence of her right to participate in women's sports competitions.[3]

3. One step back: who are 46XY DSD individuals?

By way of introduction, there are 23 pairs of chromosomes in the human body. This includes 22 pairs of autosomal (or somatic) chromosomes that are common to both men and women and one chromosome that differs according to what gender (male/female) a person is (sex chromosomes).

The sex chromosomes are the X chromosome and the Y chromosome. Typically, in a man, both an X and a Y chromosome are present, giving an XY configuration. In a woman, there are two X chromosomes, giving an XX configuration. The X chromosome is therefore one of the two sex chromosomes that determines the individual's genetic (biological) sex.

In some cases, because of Differences of Sex Development (DSD), some individuals show a male genetic sex (*i.e.*, 46XY) and a female gonadal sex (*i.e.*, external genitalia developed along female lines). In particular, this may happen when, due to a genetic mutation (fox example, in individuals with 5 Alpha-reductase Deficiency (5ARD)), the body of an individual 46XY does not respond to testosterone (the sex hormone) fully or at all.

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[2] CAS 2018/O/5794 & CAS 2018/O5798, para. 461.

[3] E.E. Buzuvis, *Caster Semenya and the Myth of a Level Playing Field*, 6 Modern American 36 (2011). https://digitalcommons.law.wne.edu/facschol/168; L. Holzer, *What Does it Mean to be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport*, *Human Rights Law Review*, Volume 20, Issue 3, September 2020, 387–411, https://doi.org/10.1093/hrlr/ngaa020.

Accordingly, it may happen that at birth such an individual will not have a penis (or will have a very underdeveloped penis similar to a clitoris), the testicles are usually located in the inguinal canal and there is a blind vaginal opening (because there is no uterus).[4]

In such cases, the decision concerning the baby's sex tends to be a shared decision between the doctors and the baby's family.

As regard Caster Semenya, in its award the CAS panel has affirmed that she "*is a woman. At birth, it was determined that she was female, so she was born a woman. She has been raised as a woman. She has lived as a woman. She has run as a woman. She is – and always has been – recognised in law as a woman and has always identified as a woman*".[5]

4. The DSD Regulations

On 5 and 6 October 2018, the IAAF (now WA) Council approved the DSD Regulations "*to address the eligibility of athletes with differences of sex development to compete in the female category of competition in certain track events*".[6]

The rationale behind the DSD Regulations can be summarized as follows:

(i) "*because of the significant advantages in size, strength and power enjoyed (on average) by men over women from puberty onwards, due in large part to men's much higher levels of circulating testosterone, and the impact that such advantages can have on sporting performance, it is generally accepted that competition between male and female athletes would not be fair and meaningful, and would risk discouraging women from participation in the sport. Therefore, in addition to separate competition categories based on age, the IAAF has also created separate competition categories for male and female athletes*";

(ii) "*biological sex is an umbrella term that includes distinct aspects of chromosomal, gonadal, hormonal and phenotypic sex, each of which is fixed and all of which are usually aligned into the conventional male and female binary*";

(iii) "*however, some individuals have congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex (known as differences of sex development, or DSDs, and sometimes referred to as 'intersex')*";

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[4] 5 Alpha-reductase Deficiency type 2, https://www.iss.it/en/-/deficit-di-5-alfa-reduttasi-di-tipo-2-en.

[5] CAS 2018/O/5794 & CAS 2018/O5798, para. 454.

[6] IAAF, *Eligibility regulations for the female classification (athletes with differences of sex development)*, published on 23 April 2018, coming into effect as from 1 November 2018, https://worldathletics.org/news/press-release/eligibility-regulations-for-female-classification.

(iv) "*there is a broad medical and scientific consensus, supported by peer reviewed data and evidence from the field, that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance. These Regulations accordingly permit such athletes to compete in the female classification in the events that currently appear to be most clearly affected only if they meet the Eligibility Conditions defined below*".

In essence, the DSD Regulations provide as follows:

Article 2.1: "*The special eligibility requirements set out in clause 2.3, below, apply only to participation by a Relevant Athlete in the female classification in a Restricted Event at an International Competition*".

Article 2.2: *"(a) A Relevant Athlete is an athlete who meets each of the following three criteria:*

(i) she has one of the following DSDs:

(A) 5α-reductase type 2 deficiency;

(B) partial androgen insensitivity syndrome (PAIS);

(C) 17β-hydroxysteroid dehydrogenase type 3 (17β- HSD3) deficiency;

(D) congenital adrenal hyperplasia;

(E) 3β-hydroxysteroid dehydrogenase deficiency;

(F) ovotesticular DSD; or

(G) any other genetic disorder involving disordered gonadal steroidogenesis; and

(ii) as a result, she has circulating testosterone levels in blood of five (5) nmol/L or above; and

(iii) she has sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.

(b) Restricted Events are 400m races, 400m hurdles races, 800m races, 1500m races, one-mile races, and all other Track Events over distances between 400m and one-mile (inclusive), whether run alone or as part of a relay event or a Combined Event".

Article 2.3: "*To be eligible to compete in the female classification in a Restricted Event at an International Competition, or to set a World Record in a competition that is not an International Competition, a Relevant Athlete must meet each of the following conditions (the Eligibility Conditions):*

(a) she must be recognised at law either as female or as intersex (or equivalent);

(b) she must reduce her blood testosterone level to below five (5) nmol/L8 for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and

(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to maintain eligibility to compete in the female classification in Restricted Events at International Competitions (or to set a World Record in a Restricted Event at a competition that is not an International Competition)".

In the CAS panel's opinion, the DSD Regulations are the latest iteration of IAAF's struggle to enact an effective and legally defensible means of reconciling the binary male/female classification in competitive athletics with the variegated spectrum of biological sex characteristics that exist in nature and the increasingly complex and diverse national laws governing legal sex.[7]

5. *The proceedings before the CAS*

On 18 June 2018, Caster Semenya and Athletics South Africa (ASA) challenged the DSD Regulations before the CAS. To support their requests for arbitration, the athlete and ASA relied, *inter alia*, on the following main arguments:

(a) the DSD Regulations are discriminatory as:
   (i) they discriminate on the basis of birth or natural, physical, genetic or biological traits and restrict the ability of some female athletes to compete based solely on a natural or genetic trait which they have possessed since birth and over which they have no control;
   (ii) they discriminate against female athletes on the basis of sex because they impose thresholds and burdens on female athletes, while no equivalent requirements are applied to male athletes;
   (iii) they discriminate on the basis of gender, as a social term, by classifying Relevant Athletes as intersex or as having a male "sport sex" regardless of how the athlete self-identifies and irrespective of how they were born and raised;
   (iv) they discriminate on the basis of physical appearance since the testing of female athletes is based on a subjective assessment of their phenotype and their virilisation characteristics;
   (v) they discriminate against female athletes who compete in specific events (namely 400m to 1 mile), with female athletes who compete in shorter or longer events are not subjected to scrutiny under the DSD Regulations;

(b) the DSD Regulations are not necessary to preserve fair competition within the female category, as success in elite sport is the product of both genetic and environmental factors. Indeed, the significant role that genetics plays in determining sporting performances means that sport is inherently not fair;

(c) there is no scientific basis for distinguishing between DSD and other genetic variations and mutations that improve athletic performance. To the extent that athletes with DSD enjoy any performance advantage by virtue of their elevated testosterone levels, there is no qualitative difference between DSD and other genetic variations that make athletes particularly tall or strong, or which provide unusual haemoglobin concentration, unusually large skeletal muscles etc;

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[7] Para 459. See also, T. Vann, *Caster Semenya and the Policing of Competitive Athletic Advantage, Connecticut Law Review*, 2022, 539. https://opencommons.uconn.edu/law_review/539.

(d) there is no scientific consensus on the relationship between the level of testosterone and athletic performance;

(e) the DSD Regulations are arbitrary and irrational as:
(i) their application is limited to a few selected events whereas it is not disputed that similar or greater testosterone-based performance differences exist for many other events and sports disciplines;
(ii) there is no empirical data suggesting that women with testosterone above the threshold of 5nmol/L have any greater advantage than women with testosterone under this threshold;
(iii) women with conditions other than DSD (for example, Polycystic Ovarian Syndrome, PCOS) who may have testosterone over 5 nmol/L are not covered by the DSD Regulations;

(f) the DSD Regulations are not proportionate as they will cause prolonged and severe harms to women. In particular, the athlete alleged that:
(i) the DSD Regulations will inevitably result in Relevant Athletes being excluded from competing in the female category in the Restricted Events. This exclusion is not ameliorated by the fact that women with DSD can compete as men, if one considers that such women cannot compete against men because their athletic performance is inevitably significantly below that of men at the same level of competition. Moreover, a female athlete competing in the male category would effectively be making a public declaration that she has a DSD, which will cause public scrutiny, loss of privacy and personal harm;
(ii) the DSD Regulations provide for intrusive medical assessment that involve examination of female athletes' most intimate body parts;
(iii) the DSD Regulations will result in Relevant Athletes undergoing medical treatments with adverse health risks.

On 30 April 2019, the CAS rejected the requests for arbitration underlining that, although the DSD Regulations presented a discriminatory nature, it constituted a necessary, reasonable and proportionate tool with respect to the objective pursued, namely the fairness of sporting competitions.[8]

In reaching this conclusion the CAS panel relied on the following points:

(a) the vast majority of experts' view is that testosterone is the primary driver of the physical advantages and therefore, of the sex difference in sports performance, between male and female;

[8] S. Chanda, K. Saha, *An analytical study of the human rights concerns before the CAS with reference to Caster Semenya*, *The International Sports Law Journal*, available at https://doi.org/10.1007/s40318-022-00214-5; M. Krech, *The Misplaced Burdens of 'Gender Equality' in Caster Semenya v IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication*, *International Sports Law Review 66* (2019). Available at SSRN: https://ssrn.com/abstract=3611413; D.L. Coleman, *Semenya and ASA v IAAF: Affirming the Lawfulness of a Sex-Based Eligibility Rule for the Women's Category in Elite Sport*, 2019 Sweet & Maxwell's International Sports Law Review, Issue 4.

(b) it is not disputed that a 46 XY DSD individual is a person with a male chromosomal sex (XY and not XX), male gonads (testes not ovaries) and levels of circulating testosterone in the male range which are significantly higher than the female range;

(c) the preponderance of evidence submitted by the parties shows that female athletes with 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sport performance ability, for example, by action in the body to increase muscle mass and size and levels of circulating haemoglobin.

Based on these assumptions, the CAS panel has concluded that:

(a) the DSD Regulations are discriminatory, given that:
   (i) they establish conditions and restrictions that are targeted at a subset of the female athlete population, and do not impose any equivalent conditions or restrictions on male athletes (discrimination on grounds of legal sex); and
   (ii) they create conditions and restrictions that are targeted at a group of individuals who have certain immutable biological characteristics (46 XY DSD) and which do not apply to individuals who do not have those characteristics (discrimination on grounds of innate biological characteristics);

(b) the DSD Regulations are necessary to maintain fair competition in female athletics by ensuring that female athletes who do not enjoy the significant performance advantage caused by exposure to levels of circulating testosterone in the adult male range do not have to compete against female athletes who do enjoy that performance advantage. In particular, the CAS panel relied on the following arguments:
   (i) once it is recognised that it is legitimate to have separate categories of male and female competition, it inevitably follows that it is necessary to devise an objective, fair and effective means of determining which individuals may, and which individuals may not, participate in those categories;
   (ii) the reference to a person's legal sex alone may not always constitute a fair and effective means of making that determination, since the reason for the separation between male and female categories in competitive athletics is ultimately founded on biology rather than legal status;
   (iii) the purpose of having separate categorise is to protect a class of individuals who lack certain insuperable performance advantages from having to compete against individuals who possess those insuperable advantages. In this regard, the fact that a person is recognised in law as a woman and identifies as a woman does not necessarily mean that they lack those insuperable performance advantages associated with certain biological traits that predominate in individuals who are

generally (but not always) recognised in law as males and self-identify as males;

(iv) accordingly, the purpose of the male/female divide in competitive athletics is not to protect athletes with a female legal sex or a female gender identity from having to compete against athletes with a male legal sex or a male gender identity. Rather, the purpose is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible;

(v) it follows from the forgoing that it may be legitimate to regulate the right to participate in the female category by reference to those biological factors rather than legal status alone, provided that the biological factors which is the subject of the regulation confers a substantial performance advantage in each athletic discipline that is covered by the regulations;

(vi) the athlete's argument that a 46 XY DSD is a form of genetic mutation that is not qualitatively different from other genetic differences that are accepted in sport is not relevant, since what matters is that the performance advantage that 46 XY DSD female athletes enjoy by virtue of their elevated endogenous testosterone is the same as the performance advantage that the hormone confers on all male athletes;

(c) the DSD Regulations are proportionate, given that:

(i) the alleged side effects caused by the use of oral contraceptives to reduce testosterone levels are not different in nature to those experienced by the many millions of other XX women who take oral contraceptive;

(ii) although it is true that being subjected to an examination of virilisation may be unwelcome and distressing, all athletes are tested for testosterone for doping control purposes, which includes identifying whether athletes have taken exogenous testosterone. If the result of those tests shows a high level of testosterone in a sample provided by a female athlete with a 46 XY DSD who is unaware of that condition, further investigation to establish that the athlete had a DSD is likely to be necessary in order to exonerate her from doping.

6. The proceedings before the Swiss Federal Tribunal

On 28 May 2019, the athlete challenged the arbitration award before the Swiss Federal Tribunal (SFT) arguing that the DSD Regulation introduced a form of discrimination based on sex and sexual characteristics, undermined human dignity

and personality rights and for these reasons were to be considered in conflict with public order.

In its ruling, before analysing the merits of the appeal, the SFT recalled the specific rules governing appeals directed against an international arbitral award (namely, (i) the limitation of admissible grounds (pursuant to the exhaustive list of Art. 190.2 of the Private International Law Act (PILA), (ii) a material review of the award solely from the angle of restrictive notion of public order (Art. 190.2 e) PILA), (iii) strict requirements in terms of the allegation and motivation of grounds and (iv) a limited power of review by the SFT) and their compatibility with the guarantees of the Convention.

Moreover, and by way of introduction, the SFT focused on three main points:

(a) the notion of public order under Swiss law;
(b) the extent of the SFT's review under Art. 190.2 e) PILA; and
(c) the vertical/horizontal effect of the Convention.

6.1 The notion of public order under Swiss law

According to the SFT's case law, an arbitral award is incompatible with public order if it disregards the essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should constitute the foundation of any legal order. Such is the case when the arbitral award violates fundamental principles of substantive law to the point of no longer being reconcilable with the determining legal order and system of values. Accordingly, the incompatibility of a ruling with public order, referred to in Art. 190.2 e) PILA, is a more restrictive concept than that of arbitrariness. According to the SFT's case law, a decision is arbitrary when it is manifestly untenable, seriously disregards a clear and undisputed legal standard or principle or shocks the feeling of justice and fairness. By contrast, for there to be incompatibility with public order, it is not enough that the evidence has been poorly assessed, that a finding of fact is manifestly false or even that a rule of law has been clearly violated.

It follows from the forgoing that the annulment of an international arbitral award for being in conflict with public order is extremely rare.

6.2 The extent of the SFT's review under Art. 190.2 e) PILA

In order to judge whether the award is compatible with public order, the SFT is not entitled to fully review the legal assessment made by the arbitral tribunal on the basis of the facts found in its award. All that matters, in fact, for the decision to be rendered from the point of view of Art. 190.2 e PILA, is whether the result of the legal assessment made by the arbitrators is compatible with the jurisprudential definition of material public order.

To this regard, it should not be forgotten that, even when the SFT is called upon to rule on an appeal directed against an award rendered by an arbitral

tribunal having its seat in Switzerland and authorized to apply Swiss law on a supplementary basis, it is bound to observe, as to the manner in which this right has been implemented, the same distance as that which it would impose *vis-à-vis* the application made of any other right and that it must not give in to the temptation to examine with full knowledge whether the relevant rules of Swiss law have been interpreted and/or applied correctly, as it would if it were seized of a civil law appeal against a State judgment. This principle applies, *a fortiori*, when, as in the Semenya case, Swiss law was not even applicable as supplementary law within the framework of the arbitration procedure.[9]

In this context, the violation of the provisions of the Convention or the Swiss Constitution does not count among the grounds listed by Art. 190.2 e PILA. It is therefore not possible to invoke such a violation directly. However, the principles underlying the provisions of the Convention, or the Constitution can be taken into account in the context of public order in order to give concrete expression to this notion.

Therefore, the argument alleging a violation of public order is not admissible insofar as it simply seeks to establish that the award would be contrary to the various guarantees, drawn from the Convention and the Swiss Constitution, referred to by the Appellant, especially since Swiss law was not applicable to the arbitration proceedings conducted by the CAS.

6.3 The vertical/horizontal effect of the European Convention on Human Rights

The SFT acknowledges that, according to its settled case law, the prohibition of discrimination is part of public order. However, the rationale behind this principle is represented by the idea of primarily protecting the person *vis-à-vis* the State.

In this regard, the SFT notes that, from the perspective of Swiss constitutional law, the case law considers that the guarantee of the prohibition of discrimination is addressed to the State and in principle has no direct horizontal effect on relations between private persons. It is therefore far from obvious to retain that the prohibition of discrimination emanating from a subject of private law is one of the essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should constitute the foundation of any legal order.

However, since the athlete argued that the relationship between an athlete and a world sports federation has certain similarities to that between an individual and the State, the SFT admits that competitive sport is characterized by a highly hierarchical structure, both at international and national level and that the relations

[9] CAS 2018/O/5794 & CAS 2018/O/5798 para. 424: "Accordingly, in deciding this dispute and unless otherwise specifically mentioned, the Panel finds no reason to deviate from the law agreed upon by the parties and will apply the IAAF's Constitution and Rules in conjunction with the Olympic Charter and in subsidiary, where necessary, Monegasque law".

between the athletes and the organizations which deal with the various sporting disciplines are distinguished in this from the horizontal relations which tie the parties to a contractual relationship. However, according to the SFT this circumstance, as such, is not sufficient to allow an athlete to rely on the prohibition of discrimination in the context of a civil law appeal against an arbitration award for violation of the public order. In any case, the SFT considers irrelevant to deal with this issue any further since the award under appeal in no way enshrines a discrimination that would be contrary to the public order.

7. The ruling of the SFT

Based on these premises, the SFT shared the analysis carried out by the CAS panel and, while deeming the DSD Regulations discriminatory, considered it a necessary, reasonable and proportionate tool with respect to the objective pursued, excluding any opposition of the award to the public order.[10]

It is worthy to note that in her appeal the athlete claimed that (i) under Swiss constitutional law a difference in treatment based on the criterion of sex would require strong justifications, (ii) the CAS panel would have omitted to carry out a complete weighing of all the interests involved, and (iii) the interests pursued by the IAAF would not be appropriate to justify certain infringements and that these would not only exceed what is necessary to achieve the intended aim but would also be clearly disproportionate to the aims pursued by the IAAF.

By contrast, the SFT notes that:

(a) the CAS panel, at the end of an arbitration procedure during which it held a hearing for five days and heard a very large number of experts, issued a detailed award, comprising no less than 165 pages, dealing not only with very complex scientific questions but also extremely delicate legal problems. In this context, the CAS panel carried out a full examination of the arguments raised by the parties;

(b) the CAS panel carried out a careful weighing of the various interests involved. On the one hand, the CAS panel took into account the interest in guaranteeing fairness in competitions within women's athletics and in defending the "protected class", with a view to allowing female athletes without DSD to be able to compete at the highest level. On the other hand, it considered the effects of oral contraceptives on the health of 46 XY DSD athletes, the damage associated with intrusive physical examinations aimed at assessing androgen sensitivity, problems relating to confidentiality and the possibility for 46 XY DSD athletes to successfully maintain their testosterone levels below the regulatory limit.

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[10] Swiss Federal Tribunal, 25 August 2020, 4A_248/2019, 4A_398/2019 https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document.

In light of the above, the SFT has concluded that the result reached by the award was neither untenable nor even unreasonable. In particular, the SFT underlined that (i) the concern to ensure, as far as possible, the fairness of competitions constitutes a perfectly legitimate interest, also recognized by the ECtHR; (ii) the pursuit of sports fairness is an important objective which may justify serious infringements of the rights of sportspersons; (iii) the objective pursued by the IAAF (namely, to guarantee the fairness of the competitions), is not the only one that comes into play. Indeed, as the CAS panel pointed out, the Semenya case is characterized by the fact that private interests are in conflict, since the interests of the 46 XY DSD athletes are opposed to those of the other female athletes who do not present DSD; (iv) the CAS panel did not fail to express certain concerns on several occasions. However, after examining the DSD Regulation from every angle, it concluded that it constitutes a proportionate measure. In this context, it did not overlook any important circumstance, since it took into account, in particular, the effects of oral contraceptives on the health of athletes, the damage linked to intrusive physical examinations and problems of confidentiality; (v) the CAS panel has not validated, once and for all, the DSD Regulation but has, on the contrary, expressly reserved the possibility of carrying out, if necessary, a new examination from the point of view of proportionality when applying this regulation in a particular case.

8. The ruling of the ECtHR

On 18 February 2021, the athlete challenged the ruling by the SFT before the ECtHR for violation of Artt. 3 (prohibition of torture and inhuman and degrading treatment), 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

On 11 July 2023, the ECtHR ascertained the violation by Switzerland of Art. 14 taken together with Art. 8 of the Convention as well as of Art. 13 in relation to Art. 14 taken together with Art. 8 of the Convention.[11] In particular, the points of greater interest dealt with in the ruling of the ECtHR concern the following aspects:

(a) the jurisdiction of the Court
(b) the prohibition of discrimination (taken together with the right to private and family life) – Artt. 14 and 8 of the Convention
(c) the right to an effective remedy – Art. 13 of the Convention in relation to Art. 14 taken together with Art. 8 of the Convention.

[11] M. Vinall, *Caster Semenya in Strasbourg: Applying the ECHR to the "entire sporting world"?* https://www.sportslawbulletin.org/caster-semenya-in-strasbourg-applying-the-echr-to-the-entire-sporting-world/.

8.1 The jurisdiction of the ECtHR

According to the Swiss government, the ECtHR would not be competent to rule on the appeal presented by the South African athlete because:

(a) the present case concerns an athlete domiciled in South Africa and her national federation, incorporated as an association under South African private law, that have challenged before the CAS, a non-state body, the validity of a regulation issued by the IAAF, an association of Monegasque private law. Furthermore, in the context of the proceedings before the CAS, it did not examine the validity of the contested regulation with respect to Swiss law, since it applied the internal regulations of the IAAF, the Olympic Charter and, alternatively, Monegasque law;

(b) in this context, the mission of the SFT, before which an appeal in civil matters is brought against an international arbitration award, does not consist in ruling with full power of control, as a court of appeal, but only in examining whether, within the limits of the legally admissible grounds against this award (*i.e.,* those listed in Art. 190.2 PILA), the complaints invoked against the award are founded or not;

(c) accordingly, the SFT cannot rule materially on the content of the appealed award but only examine, on the basis of the facts ascertained in this award, whether or not the result to which it leads is contrary to the essential values which, according to the prevailing conceptions in Switzerland, should form the foundation of any legal system.

Against this, while acknowledging that Switzerland had no role in the adoption of the contested DSD Regulations, issued by the IAAF, a Monegasque private law association, the ECtHR recalls that Art. 1 of the Convention states that "*The High Contracting Parties guarantee to all within their jurisdiction the rights and freedoms defined in Title I of the (...) Convention*". Furthermore, the ECtHR recalls that from the moment in which a person brings an action before the civil courts of a State, there is incontestably a "judicial link" between that person and the State, notwithstanding the possible extra-territoriality of the facts giving rise to the action. In the case of the South African athlete, therefore, the appeal against the arbitral award of the CAS filed with the SFT has, *a priori*, brought into play the jurisdiction of Switzerland pursuant to Art. 1 of the Convention.

Moreover, the ECtHR recalls that in the case at hand the athlete was faced with a compulsory arbitration which deprives her of the possibility of recourse to the ordinary courts in her country or elsewhere. In this context, while acknowledging the advantages of such a "centralised" system for disputes relating to sport, in particular in order to ensure a certain consistency and uniformity of the CAS jurisprudence at international level, the ECtHR considers that, should it declare itself incompetent to know of this type of appeal, it would run the risk of precluding access to the ECtHR to an entire category of persons (namely, professional sportsmen), which cannot be consistent with the spirit, object and purpose of the

Convention, given that such a conclusion would be difficult to reconcile with the idea of the Convention as a constitutional instrument of European public order, whose foundations the States parties are required to guarantee at least to all subjects subject to their jurisdiction.

Furthermore, as already stated in the *Mutu and Pechstein* case,[12] although the CAS is neither a State court nor another institution governed by Swiss public law, but a body emanating from the International Council of Arbitration for Sport (ICAS, *i.e.* a Swiss private law foundation which, as such, does not directly apply the Convention), when the SFT rejects an appeal against an award of the CAS, the SFT inevitably ends up attributing the force of *res judicata* in the Swiss legal system to the arbitration award.

On the other hand, as regard the argument of the Swiss government that the power of review of the SFT is limited in such proceedings, the ECtHR accepts that the review exercised by the SFT is limited to the compatibility of the appealed arbitral award with public policy and that this notion is interpreted very restrictively by the SFT. However, it follows from the jurisprudence of the SFT that the notion of public order, in the material sense, includes, *inter alia*, the prohibition of discrimination and respect for human dignity and, to a certain extent, the right to the free exercise of a profession such as enactment of personality rights, *i.e.* the same rights that are at the heart of the athlete's appeal. Furthermore, since the SFT examined the athlete's complaints from the point of view of discrimination, personality rights and human dignity, it cannot be argued that these complaints cannot be examined by the ECtHR.

8.2 The prohibition of discrimination (taken together with the right to private and family life) – Artt. 14 and 8 of the Convention

In finding a violation of Art. 14 of the Convention taken together with Art. 8, the ECtHR mainly focuses on the following points:

(a) the supervisory power of the CAS and the SFT;
(b) the scientific doubts relating to the justified nature of the DSD Regulations;
(c) the balancing of interests and evaluation of the secondary effects of the hormonal treatment prescribed by the DSD Regulations;
(d) the horizontal effects of discrimination.

As regard point (a), the ECtHR notes that the CAS panel, despite a very detailed award issued at the end of a hearing that lasted five days during which numerous witnesses and experts were heard, addressed the issue of the necessary, reasonable and proportionate nature of the DSD Regulations without any reference to Art. 14 of the Convention and to the jurisprudence of the ECtHR. Moreover, the ECtHR considers that the very limited control exercised by the SFT can be justified in the field of commercial arbitration, where companies, generally on an

[12] 2 October 2018, *Mutu and Pechstein v. Switzerland*, https://hudoc.echr.coe.int/fre?i=001-186828.

equal footing, agree on a voluntary basis to devolve their disputes to an arbitration board. Conversely, the limited scope of the SFT's review may be more problematic in sports arbitration, where individuals are often confronted with very powerful sports organizations.

As regard point (b), the ECtHR also notes that the seriousness of the athlete's arguments regarding the violation of the prohibition of discrimination based on sex and sexual characteristics has never been called into question by the CAS panel. The latter, in fact, in its award, underlined that the side effects of the hormonal treatment were "significant"; that an athlete, while scrupulously following the hormonal treatment that had been prescribed to her, could find herself unable to meet the requirements of the DSD Regulations; and that the evidence for a concrete athletic advantage in favour of 46 XY DSD athletes in the 1.500 metres disciplines was weak. Nonetheless, the ECtHR observes that these serious concerns did not lead the CAS panel to suspend the DSD Regulations, as it had done a few years earlier in the *Dutee Chand* case,[13] failing to consider that the DSD Regulations itself provides that the athlete[14] must enjoy the benefit of the doubt. Despite this, the SFT did not attempt to reject the doubts expressed by the CAS panel regarding the practical application and scientific basis of the DSD Regulations. In particular, the Federal tribunal SFT did not take into account the recent reports of competent bodies in the field of human rights (in particular the Parliamentary Assembly of the Council of Europe and the United Nations High Commissioner for Human Rights) which raise serious concerns about discrimination against women in sport, including intersex female athletes, based on rules such as the one at issue in the present case.

As regard point (c), the ECtHR recalls that under Art. 14 of the Convention a difference in treatment is discriminatory if it is not based on an objective and reasonable justification, *i.e.* if it has no legitimate aim or if there is not a reasonable relationship proportionality between the means employed and the aim pursued. In other words, to satisfy the requirements of Art. 14 of the Convention, the SFT would have had to weigh the interests invoked by World Athletics, in particular that of fairness of competitions, with those invoked by the athlete, in particular those relating to her dignity and reputation, her physical integrity, her privacy, including her sexual characteristics, and her right to practice the profession. However, the SFT did not do so since, according to its jurisprudence, such an examination does not fall within the notion of public policy. More specifically, the Court points out the following shortcomings in the SFT's ruling:

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[13] CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF).*

[14] Art. 2.2.a) iii), footnote 6: "*A woman who has androgen insensitivity syndrome (AIS) is completely (CAIS) or partially (PAIS) insensitive to testosterone, thereby eliminating (CAIS) or reducing (PAIS) the physiological effect of that testosterone. An athlete with CAIS is not a Relevant Athlete. An athlete with PAIS will only be a Relevant Athlete if she is sufficiently androgen sensitive for her elevated testosterone levels to have a material androgenising effect.* ***The benefit of any doubt on this issue will be resolved in favour of the athlete***" (emphasis added).

– the SFT has accepted the principle according to which the DSD Regulations offered the appellant a real "choice", noting that contraceptive pills are not necessarily prescribed to 46 XY DSD female athletes since such female athletes always retain the possibility of refusing to follow such "treatment". Nonetheless, the ECtHR notes that, contrary to what was maintained by the SFT, the appellant does not have a real choice: either she undergoes a pharmacological treatment, likely to harm her physical and psychological integrity, in order to reduce her level of testosterone and to be able to practice her profession, or she refuses this treatment with the consequence of having to give up her favourite competitions, and therefore to practice her profession. In other words, whatever the choice of the athlete, the solution adopted still implies a waiver of some rights guaranteed by the Art. 8 of the Convention. In this context, in order to consider the requirements of the Convention satisfied, the SFT would have had to face the dilemma facing the athlete;
– the SFT did not sufficiently take into account the argument of the side effects linked to the use of oral contraceptives, despite the fact that the CAS panel had underlined that these effects are "significant". In particular, the SFT, while recognizing that medical treatment administered against the will of an individual constitutes a "serious interference" in personal freedom and goes to the very heart of the dignity of the person concerned, endorsed the CAS award according to which these effects they do not differ in nature from the side effects experienced by thousands, if not millions, of other women with karyotype XX taking oral contraceptives. However, the ECtHR is not convinced by this argument, which fails to take into account the fact that, particularly due to the side effects of hormonal treatment, many women do not take oral contraceptives. Nor does it consider the fact that the side effects, as experienced by women who practice out-of-competition sporting activity, can have an even greater impact on the body and on the physical and mental balance of a high-level athlete and therefore negatively affect his sporting performance.

Lastly, as regard point (d), the ECtHR notes that according to the SFT, the guarantee of the prohibition of discrimination provided for by the Swiss Constitution concerns exclusively the State and does not, in principle, produce any direct horizontal effect on relations between private individuals. In fact, according to the SFT, it is far from obvious that the prohibition of discrimination issued by a private law subject is one of the essential and widely recognized values which, according to prevailing conceptions in Switzerland, should form the basis of any legal system.[15]

[15] See A. Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, Ch. Müller, S. Besson, A. Rigozzi (Eds), *New Developments in International Commercial Arbitration 2020*, Stämpfli 2020, 78 – 130.

Against this, the ECtHR notes that States are required to take measures to protect persons under their jurisdiction from discriminatory treatment, even if the discriminatory treatment is administered by private individuals. In other words, according to the ECtHR, national judges are required to guarantee real and effective protection also against discrimination committed by individuals. By contrast, in the case at hand, the SFT did not consider that the prohibition of discrimination issued by private law subjects fell within the scope of the notion of public order pursuant to Art. 190.2 e) PILA and, consequently, has not submitted the DSD Regulations issued by World Athletics, a non-state act, to the check of compliance with the Constitution or the Convention as requested by the athlete.

For these reasons, the ECtHR considered that the athlete did not benefit in Switzerland from sufficient institutional and procedural guarantees which would have enabled her to effectively assert her complaints, Therefore, and taking into account the relevant personal interest for the appellant, namely her participation in athletic competitions at international level and thus her professional occupation, Switzerland overcame the narrow margin of appreciation it enjoyed in the present case, which concerned discrimination based on sex and sexual characteristics, which it can only be justified by "very strong considerations". The significant stakes in the case for the athlete and the limited margin of appreciation of the respondent State should have resulted in a thorough institutional and procedural scrutiny, from which the athlete did not benefit. It follows that the ECtHR is unable to state that the contested regulation, as applied to the athlete, can be regarded as an objective measure proportionate to the aim pursued.

8.3 The right to an effective remedy – Art. 13 of the Convention in relation to Art. 14 taken together with Art. 8 of the Convention

In its ruling the ECtHR also found that in the case of the South African athlete there has been a violation of the right to an effective remedy under Art. 13 of the Convention (in relation to Art. 14 taken together with Art. 8 of the Convention) for the same reasons which led it to find a violation of Art. 14 in conjunction with Art. 8 of the Convention (*i.e.*, the absence of sufficient institutional and procedural guarantees in Switzerland).

In this regard, the ECtHR recalls that, in the context of a compulsory arbitration, the athlete had had no other choice than to apply to the CAS to challenge the validity of the DSD Regulations. However, in holding that it was certainly discriminatory but nevertheless constituted a necessary, reasonable and proportionate means to achieve the aims pursued by the IAAF, the CAS panel did not assess the validity of the regulation in question in the light of the requirements of the Convention and, in particular, did not analyse allegations of discrimination under Art. 14 of the Convention, despite the athlete's well-founded and credible complaints. On the other hand, as regard the SFT, the ECtHR notes that its power of review was very limited, since it concerned arbitration in sports matters, and

was therefore limited to the question whether the contested award was contrary to public policy within the meaning of Art. 190.2 e) PILA.

9. Concluding remarks

The Semenya case can be examined from different perspectives and points of view, given that, as recognized by the CAS panel, the case "*involves a collision of scientific, ethical and legal conundrums*".[16]

From a strictly human perspective, the South African athlete clearly arouses a lot of sympathy for at least two reasons: firstly, although she is a woman and has not violated any rules, she is required to undergo invasive medical treatments in order to be able to participate in sports competitions in the category of female athletes; secondly, the athlete and her legal dispute sharply represent the image of a modern Goliath struggling with the giant (*i.e.*, the federation).

From a practical point of view, it is important to note that the issue at stake before the ECtHR was not the validity of the DSD Regulations, but the respect of the Convention by Switzerland in terms of institutional and procedural safeguards to allow Caster Semenya to have her complaints examined effectively. Accordingly, the ECtHR's ruling does not invalidate the DSD Regulations, as confirmed by the Press Release issued by World Athletics right after the ruling: "*World Athletics notes the judgment of the deeply divided Chamber of the European Court of Human Rights (ECHR). We remain of the view that the DSD regulations are a necessary, reasonable and proportionate means of protecting fair competition in the female category as the Court of Arbitration for Sport and Swiss Federal Tribunal both found, after a detailed and expert assessment of the evidence. The case was filed against the state of Switzerland, rather than World Athletics. We will liaise with the Swiss Government on the next steps and, given the strong dissenting views in the decision, we will be encouraging them to seek referral of the case to the ECHR Grand Chamber for a final and definitive decision.* ***The current DSD regulations, approved by the World Athletics Council in March 2023, will remain in place***" (emphasis added).[17] Moreover, pursuant to Art. 43 of the Convention, within a period of three months from the date of the judgment of the Chamber, any party to this procedure may, in exceptional cases, request that the case be referred to the Grand Chamber. For the referral to be accepted the case must raise a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance. In light of the forgoing, it seems difficult to argue that the Semenya case does not raise a serious question affecting the interpretation or application of the Convention and/or a serious issue of general importance.

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[16] CAS 2018/O/5794 & CAS 2018/O5798, para. 460.

[17] https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023.

From a scientific and/or ethic perspective, the DSD Regulations raise so many and complex issues that it is impossible to assess them through the lens of legal science only.

From a legal perspective, however, the most striking effect of the ECtHR's ruling is that, in case of mandatory arbitration, eventually alleged violations of athletes' human rights must be fully scrutinized by both the CAS and the SFT with express reference to the Convention's provisions. Moreover, this principle seems to apply regardless of the substantive law governing the arbitration proceedings. However, it is worthy to note that in the Semenya case the law (subsidiarily) governing the arbitration procedure was not the *lex fori* (*i.e.,* Swiss law), but still the law of a contracting State (*i.e*., Monaco).[18] *Quid iuris* in case where the law of the arbitration is that of a State not signatory to the Convention?

To this regard, it is not surprising that in their dissenting opinion three Judges (Grozev, Roosma and Ktistakis) acknowledged that in the case at hand the jurisdiction of the Court probably represents the most important issue. In particular, the three Judges strongly opposed to the majority's decision according to which, since the SFT has jurisdiction to hear an appeal against an arbitral award, it must fully apply the Convention in the context of the review it carries out. In particular, the dissenting opinion notes that:

(a) since the jurisdiction of the SFT is based on Swiss law, pursuant to the Convention it is for the SFT to interpret and apply national law. By contrast, the ECtHR has ruled that the notion of public order under Art. 190.2 e) PILA should encompass, without exception, all obligations arising from the Convention and the case law of the ECtHR;

(b) however, this conclusion is highly controversial for at least two reasons: (i) in so doing, the ECtHR clearly interferes in the interpretation of domestic law and it pretends to interpret it in a way contrary to that of the highest domestic court; (ii) the majority's conclusion gives the Convention a global scope which does not derive from the case law of the ECtHR and the Convention was never intended to have.

In this context, it is not possible to underestimate the concern expressed by the Swiss government regarding the concrete possibility of applying the principle affirmed by the Court. In particular, before the ECtHR the Swiss government argued that "*if Switzerland were held responsible for the implementation of all the substantive guarantees of the Convention in cases of this type, it could only attempt to fulfil its obligations – incompletely – by establishing a means for a national court to fully review the CAS arbitral awards*". However, such a system "*would not only contradict the provisions of the LDIP but would also completely call into question the very notion of arbitration and the nature of the system put in place in the field of sport, which was designed*

[18] M. Vinall, *Caster Semenya in Strasbourg: Applying the ECHR to the "entire sporting world"?* (see above footnote 10).

precisely because, given the international nature of the actors and events involved, national courts do not provide an appropriate forum in this context". Moreover, in the long term such a questioning of the system could lead to the transfer of the seat of the CAS to a State which is not a signatory to the Convention.

As regard the merit of the alleged discrimination, the ECtHR ruled that the athlete could claim to be victim of discrimination based on sex within the meaning of Art. 14 of the Convention as well as on sexual characteristics, a notion which is undoubtedly covered by Art. 14. However, it is important to note that, on one hand, the athlete never claimed to be victim of sex discrimination; and, on the other hand, that the athlete is a woman, and the DSD Regulations treat differently women with DSD and women without DSD. Accordingly, it is hardly understandable how the ECtHR could reach the conclusion that the athlete was discriminated because of her sex. Moreover, as regard the discrimination on sexual (genetic) characteristics, it is important to note that (i) it is not disputed that the athlete is genetically different from other women, and (ii) the DSD Regulations were applied to her on the basis of this difference. Accordingly, to substantiate the claim of discrimination based on sexual characteristics the ECtHR should have clearly explained how, given the genetic difference, the athlete's situation could be considered analogous and/or comparable to that of other women.

Another aspect worthy to note concerns the eligibility of female athletes (XX) with no DSD, but suffering from hyperandrogenism caused, for example, by Polycystic Ovary Syndrome (PCOS). Before the entry into force of the DSD Regulations, a biological female athlete suffering from PCOS fell under the IAAF's Regulations governing the eligibility of female with hyperandrogenism to compete in women's competitions and, pursuant to Art. 6.5 of those Regulations, the athlete was allowed to compete provided that (i) she had androgen levels below the normal male range (*i.e.*, 10 nmol/L); or (ii) she had androgen levels within the normal male range but had an androgen resistance such that she derived no competitive advantage from having androgen levels in the normal male range.

By contrast, the DSD Regulations clearly state that they "*do not apply to any other conditions (including, without limitation, polycystic ovary syndrome), even if such conditions cause the individual to have blood testosterone levels above the normal female range. If, as a result of an assessment conducted under these Regulations, it is established that an athlete has any other condition, she may be recommended to obtain appropriate medical assistance, but her participation in the sport of athletics will not be restricted in any way by these Regulations*".[19]

Accordingly, it seems that athletes with PCOS are fully eligible to compete in women's competitions regardless of their level of testosterone. However, it could be argued[20] that, unless it is proven that the high level of testosterone caused

[19] Footnote 4.

[20] In fact, the athlete did support this argument before the CAS (see para. 60).

by PCOS in a 46XX athlete does not represent a competitive advantage like that of 46XY DSD athletes, the foundation of the DSD Regulations may turn less solid than claimed.

In particular, it is important to note that, under the 2018 DSD Regulations, SDS athletes were required to lower their testosterone level to 5 nmol/L on the basis of the following scientific evidence:

(i) women (including elite female athletes) without DSDs have serum levels of testosterone of between 0.12 and 1.79 nmol/L (95% two sided confidence limit);
(ii) women with PCOS have serum levels of testosterone with an upper limit of 3.1 nmol/L (95% one sided confidence limit) and 4.8 nmol/L (99.99% one sided confidence limit);
(iii) the normal range of serum testosterone levels in men is 7.7 to 29.4 nmol/L (95% two sided confidence limit);
(iv) women (including female athletes) with DSDs covered by these Regulations can have serum levels of testosterone above 5 nmol/L and well into (or even above) the normal male range.

By contrast, under the 2023 DSD Regulations, athletes are required to lower their testosterone level to 2.5 nmol/L. However, considering that XX athletes with PCOS have levels of testosterone from 3.1 nmol/L to 4.8 nmol/L, the new 2.5 nmol/L thresholds could raise new doubts and foster further critics.

Moreover, under the 2023 DSD Regulations to be eligible athletes must have continuously maintained the concentration of testosterone in their serum below 2.5 nmol/L3 for a period of at least 24 months, *i.e.,* four times the period provided for under 2018 DSD Regulations.

That said, considering on one hand the highly restrictive nature of the 2023 DSD Regulations and, on the other hand, the complexity of the subject matter, in order to safeguard the autonomy of sport and avoid increasingly frequent proceedings before the ECtHR for alleged violations of human rights sports authorities should regulate DSDs in a way that the rules are based as much as possible on sound and objective scientific bases.

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QUANDO LA PLUSVALENZA È REALMENTE "FITTIZIA": ANALISI ECONOMICO-GIURIDICA SUL CASO

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ABSTRACT: The purpose of this paper is to explain, as clearly as it is technical, one of the most controversial issues within the Italian sports scene: hypothetically "fictitious" capital gains and the resulting false accounting. Using more legally correct terminology, reference is made to the "crime of false corporate notices". Starting with a description of the institution, attention is drawn to the typical balance sheet scheme of a soccer club, which is different for a variety of reasons from that of a company that can be defined as 'classic'. The authors describe the criminal case from this theoretical basis by contextualizing it within the corporate and soccer macro sector. Following a summary of the Prism case involving FC Juventus, the authors propose antidotes to accounting maquillage, among which emerges that of correct and diligent use of the valuation tool of the impairment test, as described by 2426 Civil Code, but also by national (OIC 9) and international (IAS 36) accounting standards.

Il presente contributo si pone l'obiettivo di fornire una spiegazione tanto chiara quanto tecnica di una delle tematiche maggiormente controverse all'interno del panorama sportivo italiano: le plusvalenze ipoteticamente "fittizie" e il falso in bilancio che ne deriva. Utilizzando una terminologia più corretta in termini legali, si fa riferimento al "delitto di false comunicazioni sociali". Partendo da una descrizione dell'istituto si pone attenzione sullo schema bilancistico tipico di una società di calcio, che si contraddistingue per svariate ragioni da quello di una società definibile come 'classica'. Da questa base teorica, gli autori descrivono la fattispecie criminosa contestualizzandola all'interno del macrosettore aziendale e calcistico. A seguito di un breve riassunto sul caso Prisma che coinvolge la FC Juventus, si propongono degli antidoti al maquillage contabile, tra cui emerge quello di un corretto e diligente utilizzo dello strumento valutativo dell'impairment test, così come descritto dal 2426 c.c., ma anche dai principi contabili nazionali (OIC 9) ed internazionali (IAS 36).

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