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The World Anti-Doping Code 2015

ASSER International Sports Law Blog symposium

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DOI
10.1007/s40318-016-0097-9

Publication date
2016

Document Version
Final published version

Published in
The International Sports Law Journal

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Link to publication

Citation for published version (APA):
Duval, A., Ram, H., Viret, M., Wisnosky, E., Jacobs, H. L., & Morgan, M. (2016). The World Anti-Doping Code 2015: ASSER International Sports Law Blog symposium. *The International Sports Law Journal*, *16*(1-2), 99-117. https://doi.org/10.1007/s40318-016-0097-9

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Download date:16 Sept 2026

Int Sports Law J (2016) 16:99–117
DOI 10.1007/s40318-016-0097-9

ARTICLE

The World Anti-Doping Code 2015: ASSER International Sports Law Blog symposium

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Published online: 10 June 2016
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Abstract This article brings together the contributions to a blog symposium on the new World Anti-Doping Code 2015 published on the ASSER International Sports Law Blog in October 2015. The contributions cover a variety of subjects, including the new sanctioning regime, the role of national anti-doping authorities, the working of therapeutic use exemptions and the increasing role played by the notion of intent under the WADC 2015.

Keywords Doping · Burden of proof · Arbitration · Court of arbitration for sport · Proportionality

1 Introduction

On 1 January, a new version of the World Anti-Doping Code (WADC or Code) entered into force. This blog symposium aims at taking stock of this development and at offering a preliminary analysis of the key legal changes introduced. This introduction will put the WADC into a more general historical and political context. It aims to briefly retrace the emergence of the World Anti-Doping Agency (WADA) and its Code. It will also reconstruct the legislative process that led to the adoption of the WADC 2015 and introduce the various contributions to the blog symposium.

1.1 The WADA and its code: a short history

The WADA is a public–private hybrid governance body.[1] It is formally a Swiss foundation, but its executive bodies are composed equally of representatives of public authorities and Sports Governing Bodies (SGBs). The current president of WADA, Sir Craig Reedie, is also vice-president of the International Olympic Committee (IOC). The WADA was created as a response to the massive doping scandal that marred the Tour de France in 1998. Its original aim was "to promote and coordinate the fight against doping in sport internationally."[2] The idea of a specific global organization was submitted at a World Conference on Doping in Sport in Lausanne, in February 1999. A few months later, on 10 November 1999, the WADA was established.

WADA's key task was, and still is, to devise the global set of uniform rules applicable to the anti-doping fight: the WADC. The first version of the WADC was finalized in 2003.[3] After amendments were tabled, a second version of

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[1] Its atypical public–private institutional structure has stirred the attention of scholars of the Global Administrative Law movement. See Casini (2009).

[2] On WADA's mission see WADA, Who we are, https://www.wada-ama.org/en/who-we-are/a-brief-history-of-anti-doping, accessed 22 April 2016.

[3] The 2003 version of the WADC is accessible at WADA, 2003 World Anti-Doping Code, https://wada-main-prod.s3.amazonaws.com/resources/files/wada_code_2003_en.pdf, accessed 22 April 2016.

the Code entered into force in 2009.[4] As the WADA does not dispose of any public (or private for that matter) authority to implement the Code, it must be transposed by the SGBs and governments at the national and international level to gain some teeth.[5] Compliance with the Code is compulsory for the whole Olympic Movement as provided by article 43 of the Olympic Charter.[6] WADA's main responsibility is to monitor and report on the compliance of various federations and States.[7] The Code was first endorsed by States in the Copenhagen Declaration on Anti-Doping in Sport in 2003,[8] and later supported by the adoption of the UNESCO International Convention against Doping in Sport in October 2005.[9] The Convention is one of the most ratified UNESCO Conventions to date with 182 signatories.

The WADC 2015 is a long document of more than 150 pages, composed of 25 articles complemented with comprehensive comments.[10] It defines the anti-doping rule violations,[11] the burden of proof applicable to doping cases[12] and the functioning of the prohibited list.[13] The Code indicates also the technical procedure applicable to doping tests[14] and the procedural rights of suspected athletes.[15] Most importantly, it provides for the sanctions regime applicable in case of a violation.[16] The Code likewise regulates the potential appeal procedures.[17] The WADC is complemented by a set of five International Standards,[18] which are mandatory for the signatories. Finally, the implementation of the Code is also supported by a set of Model Rules, Guidelines and Protocols.[19]

As illustrated by the recent doping scandal involving the Russian Athletics Federation,[20] the question of compliance with the Code is a prodigious challenge for WADA. The organization's *raison d'être* is threatened by the well-known gap between law in the books and law in action. This discrepancy between a global uniform code and its many local realities, has led to recent calls for WADA to be tasked with the implementation of the Code and to take charge of the testing process.[21] The true impact of the Code 2015 will partially depend on the clarification of the competences and responsibilities of WADA in this regard.

1.2 Making the code 2015: the legislative process

The WADC 2015 is the result of a peculiar legislative process. WADA claims, since its early days, that the Code is a living document, subjected to a productive feedback chain. This revision of the WADC started at the end of 2011 and covered three different phases of consultation over a 2-year period. Approximately 2000 proposals for amendments were submitted to the drafting team. In the end, the Code was approved on 15 November 2013 at the World Conference on Doping in Sport in Johannesburg.

A specific team managed the consultation process and each of the three consultation phases included a review and the approval from the WADA Executive Committee. The first phase started on 28 November 2011, whereby a call for comments was communicated to stakeholders (WADA does not indicate how it defines the reach of this category), and feedback was received from 90 stakeholders. The comments led to the drafting of the Draft Version 1.0 of the 2015 Code, which was approved by the WADA Executive Committee in May 2012. On 1 June 2012, the second phase of consultation was initiated with a new call for comments

[4] The 2009 version of the WADC is accessible at WADA, 2009 World Anti-Doping Code, https://wada-main-prod.s3.amazonaws.com/resources/files/wada_anti-doping_code_2009_en_0.pdf, accessed 22 April 2016.

[5] The updated list of the current signatories is available at WADA, Code Signatories, https://www.wada-ama.org/en/code-signatories, accessed 22 April 2016.

[6] Article 43 of the Olympic Charter states: The World Anti-Doping Code is mandatory for the whole Olympic Movement.

[7] On this monitoring of the compliance of signatory see WADA, Code Compliance, https://www.wada-ama.org/en/what-we-do/the-code/code-compliance, accessed 22 April 2016.

[8] The text of the Copenhagen Declaration on Anti-Doping in Sport is available at WADA, Copenhagen Declaration on Anti-Doping in Sport, https://wada-main-prod.s3.amazonaws.com/resources/files/WADA_Copenhagen_Declaration_EN.pdf, accessed 22 April 2016.

[9] The text of the International Convention Against Doping in Sport is available at UNESCO, International Convention against Doping in Sport 2005, http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 22 April 2016.

[10] The 2015 version of the WADC is available at WADA, 2015 World Anti-Doping Code https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf, accessed 22 April 2016.

[11] Article 2 WADC 2015.

[12] Article 3 WADC 2015.

[13] Article 4 WADC 2015.

[14] Article 5,6,7 WADC 2015.

[15] Article 8 WADC 2015.

[16] Article 9,10, 11, 12 WADC 2015.

[17] Article 13 WADC 2015.

[18] WADA's International Standards are available at WADA, International Standards, https://www.wada-ama.org/en/international-standards, accessed 22 April 2016.

[19] WADA's Model Rules, Guidelines and Protocols are available at WADA, Model Rules, Guidelines and Protocols, https://www.wada-ama.org/en/model-rules-guidelines-and-protocols, accessed 22 April 2016.

[20] See WADA, WADA announces details of Independent Commission, https://www.wada-ama.org/en/media/news/2014-12/wada-announces-details-of-independent-commission, accessed 22 April 2016.

[21] "I.O.C. Asks WADA To Take Over Testing", *New York Times*, 18 October 2015, http://www.nytimes.com/2015/10/18/sports/olympics/ioc-asks-wada-to-take-over-testing.html?_r=1, accessed 22 April 2016.

issued to all the "stakeholders". Over a period of 4 months, WADA received feedback from more than 100 stakeholders, which was incorporated in the second Draft of the 2015 Code. Eventually, a third consultation phase took place from 3 December 2012 until 1 March 2013, which led to the Executive Committee adopting a third draft of the Code. The final mould of the Code was submitted to the World Conference on Doping in Sport, hosted in Johannesburg in November 2013.[22] The WADA Foundation Board adopted the final version of the Code at the Conference.

WADA is adamant (and proud of the fact) that the Code was drafted in an inclusive and participative process. Although it is undeniably positive that many stakeholders had the opportunity to access and discuss the drafts of the Code, the specific reasons leading to the policy choices made remain largely undisclosed. It is extremely difficult to know why a proposed amendment made it into the new Code and why another did not. Moreover, the scope of the notion of a stakeholder is key to define who gets to contribute. If, for example (as I suspect), the SGBs and National Anti-Doping Organizations (NADOs) are massively over-represented amongst the stakeholders consulted, it gives them a disproportionate voice in the legislative process of the new Code. The transparency of the process is also lagging, as is illustrated by the fact that the comments are nowhere to be found on WADA's new website.[23] This lack of transparency is worrying for an institution partially founded and managed by public authorities. In any event, improving the transparency and inclusiveness of the adoption process of the WADC is a must to ensure that WADA fulfills the good governance standards it is aspiring to.

1.3 The blog symposium on the WADA code 2015

The blog symposium includes four contributions from very different perspectives, by specialized academics, practitioners and an anti-doping administrator. They deal primarily with the various practical changes to the anti-doping fight induced by the new Code. The objective is to show how the Code has already changed the way the "anti-doping world" is operating, and the transformations it might still trigger in the future. The symposium is organized with the help of both Marjolaine Viret and Emily Wisnosky.

The first contribution by Herman Ram, the Head of the Dutch Doping Autoriteit, covers the impact of the WADC 2015 on the work of national anti-doping agencies. Ram highlights the various ways in which the Code has (or may) profoundly changed the operations of the Dutch NADA. In particular through its focus on a smarter anti-doping fight. He anticipates the stumbling blocks ahead and identifies the key trends already under way.

The second contribution by Marjolaine Viret and Emily Wisnosky, the two researchers involved in the cutting edge WADC-Commentary project alongside Professor Antonio Rigozzi,[24] focus on the new Code's influence on Athletes under medical treatment. They study closely the new legal regime applicable to obtain a Therapeutic Use Exemption and the potential sanctions faced by athletes under medical treatment who have not obtained a TUE before a positive anti-doping test.

The third contribution by Howard Jacobs, a lawyer specialized in anti-doping disputes, analyses the function of the notion of intent in the new Code. Indeed, one of the main innovations of the Code is the introduction of specific sanctions based on the intentional or non-intentional nature of the doping violation. This raises many legal questions linked especially to the burden of proof. Jacobs goes in great lengths to provide a clear analytical map of the problems ahead regarding the need to demonstrate the (non-)intentional nature of an anti-doping violation. He poses fundamental questions that will likely pop up in front of anti-doping tribunals and the CAS, and offers some preliminary answers.

Finally, Mike Morgan, a lawyer specialized in anti-doping disputes, examines the new sanctions regime stemming out of the Code 2015. As pointed out in various recent academic contributions,[25] this is probably the most fundamental change introduced in the Code. It is in any case the most visible, since it will most vividly affect the athletes failing an anti-doping test. As Morgan shows, the new Code vows to introduce a degree of flexibility in the sanctions regime and to provide smarter, tailor-made, sanctions. Whether this aim will be achieved is still very much an open question.

2 The impact of the revised WADC on the work of NADOs

2.1 Introduction

The 2015 WADC is not a new Code, but a revision of the 2009 Code. In total, 2269 changes have been made.[26] Quite

[22] Unfortunately, it is impossible to review the presentations and interventions made at the conference, as its website has been deactivated.

[23] Though they were online on the older version of the website.

[24] See the website of the WADC Commentary, http://wadc-commentary.com/, accessed 22 April 2016.

[25] See, for example, Rigozzi et al. (2015a, b).

[26] WADA, 2015 World Anti-Doping Code—Final Redlined to 2009 Code, https://wada-main-prod.s3.amazonaws.com/resources/files/wada-redline-2015-wadc-to-2009-wadc-en.pdf, accessed 22 April 2016.

a number of these changes are minor corrections, additions and reformulations with little or no impact on the work of NADOs. But the number of truly influential changes is still impressive, which makes it hard to choose. Luckily, WADA has identified the—in their view—more significant changes in a separate document[27] and I have used this document to bring some order in a number of comments that I want to make on the impact of *those* revisions on our daily work.

Part of what follows is based on our experiences with the implementation of the revised Code so far, but quite a bit of what follows cannot be based on any actual experience, because the revised Code has only been in place for 7 months, and only a rather small number of disciplinary procedures in relatively simple cases have come to a final decision under the revised rules. As a result, and because I am not in the business of predicting the future, on this occasion I have decided to share some of my *expectations* with you. Only the future can tell whether I am right on those issues.

2.2 Sanctions

Probably the most discussed aspect of the revision is the longer period of ineligibility that can be imposed on—as WADA formulates it—'real cheats'. In other cases, especially cases of unintentional violations, the revision should lead to more flexibility to impose lower sanctions. Due to the amendments in most cases it will be crucial to establish 'intent'—or the lack of it—in order to be able to determine the appropriate sanction. And because of the Strict liability principle that applies to the burden of proof in cases with Adverse Analytical Findings, NADOs have not focused very much on the establishment of 'intent', simply because under the previous Codes it was not relevant for the outcome of most cases.

In the case of *non-specified* substances, it is now up to the athlete to prove that the violation was *not* intentional, and in the case of *specified* substances it is up to the (N)ADO to prove intent. This is new, and our current practice shows that this kind of evidence is very hard to deliver *for both parties*. As a consequence, 4-year sanctions have been imposed rather matter-of-factly until now in cases where non-specified substances are involved. And such severe sanctions will remain common if *non-specified* substances are detected, but they will be quite rare in other cases. No doubt, jurisprudence will be developed that will help to assess specific situations, but for most cases the 4-year sanction will more or less automatically result from the simple fact that a *non-specified* substance is involved.

Some exploratory analysis of the sanctions imposed under the 2009 Code for *specified* substances has shown that panels have already established a practice with a lot of flexibility in those kind of cases under the 2003 and 2009 Codes, and I do not expect major changes there.

Quite interesting from our (NADO's) point of view is Article 10.6.3, which introduces a role for both the (N)ADO with result management responsibility *and* WADA in cases where athletes or other persons promptly admit an anti-doping rule violation. If both the (N)ADO and WADA agree, a sanction reduction from 4 years to a minimum of 2 years is possible. We do not yet know what WADA's position will be in this kind of cases, but I do know that many NADOs will be inclined to grant a reduction of the period of ineligibility, because we want to stimulate admissions as much as possible. Information given by athletes and other persons is most valuable, and (less important, but still…) we can spare ourselves a lot of costly work in the process.

Somewhat related to prompt admissions (not new, but amended and expanded in the revised Code) is the possibility to reduce sanctions based on substantial assistance (Article 10.6.1). Because of the growing importance of Investigations and Intelligence (see 2.4 below) and the increased emphasis on Athlete Support Personnel (2.5) I think that we will see that this Article will become more important in the work of NADOs. It seems to me that the revisions will help us considerably in all cases where athletes or other persons need reassurance that an agreed-upon reduction of sanctions will be respected 'no matter what'. At the same time, more information will become available that may help us in uncovering and prosecuting other anti-doping rule violations.

2.3 Proportionality and human rights

I can be quite short here: I have not identified a single consequence of this Theme for the NADO that I work for, and I can hardly imagine that other developed NADOs will see this differently. This is not because this Theme is not important (quite the contrary), but because NADOs do not need extra encouragement in order to ensure that proportionality and human rights are taken into consideration on an everyday basis. *And* because—at least in Europe—data protection issues and the related issues of public disclosure and the protection of minors are primarily governed by legislation, *not* by the Code.

[27] WADA, Document on the Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0, https://wada-main-prod.s3.amazonaws.com/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf, accessed 22 April 2016.

2.4 Investigations and intelligence

Indeed, the development of 'Intelligence and Investigations' is one of the major issues that quite a few NADOs are dealing with now. In less than 2 years' time, more than a dozen NADOs have attracted new staff for this purpose, and cooperation between NADOs (and some IFs) in this field is gradually developing, at a pace that is primarily determined by taking care of the legal side of things. The Code revision has not initiated this development, but it certainly confirms and strengthens it. And we are well aware that Intelligence has played a major role in practically all cases (old and recent) where large-scale, organized, doping practices have been uncovered. Which does not mean that we are all prepared for this kind of thing…

First of all, it is necessary to develop and sign bilateral cooperation agreements in which the preconditions for sharing information between (N)ADOs are defined. I have signed several, and there are more to come. But it is also necessary to start and develop a cooperation with customs and law enforcement agencies, and this kind of cooperation needs even more legal preparation in order to be successful (or just possible). Indeed, information sharing with government agencies is just as logical as it is complicated in practice.

I do not know one NADO that does *not* feel the need for cooperation with law enforcement agencies. And that fact, supported by the revised Code, means that NADOs are slowly but surely getting better acquainted with government agencies. It is my opinion that several legislation proposals in various countries in Europe illustrate this development nicely. Countries which have done without specific anti-doping legislations for years—including my own country—are now working on legal measures that aim to facilitate a close(r) cooperation between governments and (N)ADOs (in line with the expansion of Article 22.2 in the 2015 Code).

The investigative powers of Intelligence Officers of NADOs on the one hand, and law enforcement agents on the other hand, are wide apart. In most countries, an Intelligence Officer has no other rights than any citizen, while there are elaborate laws that define and regulate what law enforcement officers may and may not do. The gap between the two has to be narrowed, in order to facilitate and stimulate further cooperation. Which means that Intelligence Officers will need to have specific authorizations that enable them to do their job *within sport*, but without becoming law enforcement officers themselves. The solutions will be different per country, but the common factor will be that NADOs will have more tools to fulfill their tasks.

Apart from these legislative and regulatory developments, which open doors that have been firmly closed until now in many countries, there are not many' quick wins' to be expected because of 'Intelligence and Investigations'. In the long run, however, 'Intelligence and Investigations' will probably have a significant impact on the effectiveness of doping control programs, which will not really become 'smarter' (more brain power has been invested in the testing programs under the 2003 and 2009 Codes than most people can imagine), but certainly more 'targeted' and tailor-made. This may be an equally important effect of 'Intelligence and Investigations' as collecting evidence.

The extension of the statute of limitations (Article 17) to 10 years will not make a big difference in numbers, but the cases where this extension pays off, will for a large part be the kind of cases that we find especially important to bring to justice. There is a downside to this as well, of course, and one of the aspects that I have not seen mentioned often is the fact that relevant samples will have to be stored for another 2 years, which will lead to additional costs. Few people realize how expensive the storing of samples—under the right conditions—is.

2.5 Athlete support personnel (ASP)

This part is closely connected to Sect. 2.4, because anti-doping rule violations by Athlete Support Personnel cannot be proven by the traditional means of proof of ADOs, i.e., the analysis of urine and blood samples. There can be no doubt that catching those coaches and doctors that supply and administer doping to the athletes must be a high priority for NADOs. We are well aware that athletes do not function in a vacuum. As a consequence, NADOs will dedicate a considerable part of their 'Intelligence and Investigations' capacity to ASP. A rise in the number of cases where ASP is involved can be predicted, although—unfortunately—a huge effect is unlikely. Not only because these cases will always be hard to prove (no matter what) but also because large groups of ASP are not (properly) bound by anti-doping regulations. The seriousness of this problem varies per country and per sport (discipline), and the problem may—at least partly—be solved through legislation. But in my own country, I do not see how the Code revision will help the NADO in prosecuting ASP, unless and until we manage to find ways to sufficiently bind all relevant ASP to our rules.

The new anti-doping rule violation 'Prohibited Association' brings us some serious new challenges, I think. One of them being the burden of proof, which often will not be easy to discharge. Here again, 'Intelligence and Investigations' will play a crucial role. But even if it can be proven that an athlete is working with an ineligible coach, trainer or doctor, there may be several legal challenges if the ineligible person has a private practice *outside* organized sport, *and* working with athletes is the livelihood of that person.

2.6 Smart testing and analyzing

As I mentioned above (see 2.4) 'Intelligence and Investigations' will probably have a significant positive impact on the effectiveness of doping control programs. However, it remains to be seen whether this effectiveness will show in terms of the detection of more anti-doping rule violations, *or* in a better deterrence. Whichever it will be, a consequence of the development towards more targeted and tailor-made testing and analyzing, is that the price of testing will go up. Tailor-made testing means more individual testing, on odd hours, in (sometimes) strange places. This is—no surprise—considerably more expensive than testing a number of players at random after a training session of a team.

On top of that, the Technical Document for Sport Specific Analysis[28] that has been developed after the implementation of the revised Code (based on Article 6.4 of that Code), prescribes a minimum percentage of additional analyses per sport discipline, with even more cost increase as a consequence. Some NADOs have managed to get additional funding in relation to these new requirements, but most of us have not (and not many of us foresee a budget increase in the near future). So the global number of tests performed by NADOs will in all likelihood decrease.

Whether this decrease in numbers will be acceptable, depends on the value added by the additional analyses that are now performed. If less tests bring more proof, then it is a good development. However, for the time being, there is no way to tell. And it is predictable that decreasing numbers of tests (the number of tests performed being the most commonly used measuring stick to assess the performance of a NADO) will generate critical questions about how serious we take the fight against doping in sport.

While I am writing this contribution, we are in the middle of the 'IAAF controversy', following the leakage of confidential information to the media, and the subsequent publication of sensitive data. I am not in the position to comment on what exactly is right and wrong in this case (I simply do not know), but I do know that the IAAF anti-doping program is 'smarter' than most, and that it can show results that few IFs can. Nonetheless, the public discussion is focusing on what has *not* been accomplished with all these data. So the large amounts of data that become available through 'smart' testing and elaborate biological passport programs, may become a burden instead of a blessing if the burden of proof is not reached in too many cases. Which—I fear—may be the case.

[28] WADA, Technical Document of 7 December 2015 for Sport Specific Analysis—TD2014SSA, https://wada-main-prod.s3.amazonaws.com/resources/files/wada-tdssa-v2.3_en.pdf, accessed 22 April 2016.

2.7 International federations and NADOs

Another development that is not initiated by the Code revision—but certainly is supported and accelerated by it—is the improvement of NADO–IF cooperation. The revised Code clarifies and solves several of the problems that we have experienced with the 2009 Code. Examples are the control of therapeutic use exemptions (Article 4.4), the testing authority during international events (Articles 5.3, 5.2.6 and 7.1.1), and the coordination of whereabouts failures (Article 7.1.2). All these changes are improvements.

However, cooperation is more in the soul than it is in the rules, and we must acknowledge and accept that there are relevant differences between NADOs on the one hand and IFs on the other hand, in terms of culture, position and tradition. WADA has created Ad Hoc Working Groups of NADOs and IFs separately, and these groups have made inventories of existing problems that are subsequently brought to the table in joint meetings. The Articles in the Revised Code that underline the need for better cooperation will have no meaning if we stay separated in two worlds. But the impact will be huge, if and when we benefit from each other's knowledge and experience. And although I am not an optimist by nature, I am pretty sure that this will work out fine.

2.8 A clearer and shorter code

I think it is obvious that this goal is quite ambitious, and I can only regretfully conclude that the revised Code is neither clearer, nor shorter than the 2009 version. The Code is the most important legal tool in the anti-doping world, and both lawyers and administrators may (and do) delight in the fact that the Code has proven to be an indispensable tool in our toolkit. It is, however, not a tool for athletes (except for those who are also lawyer or administrator) and it will never be. Clarity about the rules is delivered by the Education departments of NADOs, in the form of numerous publications, leaflets, manuals and (more and more) digital tools. And it is my personal opinion that there is not much wrong with accepting that the Code is not meant to educate athletes, but to protect them.

2.9 Miscellaneous

It is difficult to choose what other aspects of the revised Code are worth mentioning here. Let me name only a few.

The new possibility for an athlete to return to training during the last part of the period of ineligibility imposed on him (Art. 10.12.2), is—in my opinion—a balanced compromise between the need to fully execute sanctions, and the interests of team members that have not been

sanctioned themselves. However, this refinement of the sanction regime further complicates the task that has been a burden for many NADOs for years already: how to monitor that sanctions are observed correctly and fully. This monitoring task usually cannot be fulfilled without the help of sport federations and clubs, and—to a certain extent—fellow athletes. Publicly known elite athletes will hardly have an opportunity to violate their sanction without being 'caught', but for lesser gods the situation is different, which fact collides with the Level playing field that we want to achieve.

Article 6.5 of the revised Code addresses the storing of samples for further analysis. It is good that these rules are now clarified, because it is to be expected that the percentage of samples that are stored for future analysis will rise over the years. The revised rules are meant to do justice to both the athlete and the (N)ADO and I think they actually do that, although I am sure that both NADOs and athletes will disagree in any particular case they are involved in.

The importance of the explicit wording of the Articles 20.4.3 and 22.6 that address the need for NADOs to be free from interference in our operational decisions, cannot be overestimated. Anti-doping issues can get a lot of attention in the media, and that may or may not lead to unleashing certain political powers. In my country, parliamentary questions have been asked about specific doping cases on several occasions. Thankfully, in no case this has led to actual interference in our work, but it is very good that the Revised Code is there to ward off such interference in countries where this may be necessary.

3 The "Athlete Patient" and the 2015 Code: competing under medical treatment

3.1 Introduction

Doping often involves the illegitimate use of a therapeutic product. Indeed, many Prohibited Substances and Methods are pharmaceutical innovations that are or have been developed to serve legitimate therapeutic purposes. Much is being done within the anti-doping movement to coordinate efforts with the pharmaceutical industry in order to prevent abuse of drugs that have been discontinued or are still in development phase. At the other end of the spectrum, some Athletes may require legitimate medical treatment and wish to receive that treatment without being forced to give up their sports activities.

This post takes a cursory look at how the 2015 Code tackles these issues and provides a summary of the main changes that affect the modalities for Athletes to receive medical treatment after the 2015 revision. The first part discusses the avenues open to an Athlete to compete while under treatment, namely by applying for a Therapeutic Use Exemption ("TUE") or, in some cases, navigating the provisions governing conditionally prohibited substances. The second part addresses the consequences in case an Athlete should fail to take the proper avenues. This piece closes with observations regarding the current system in light of one of the pillars of the anti-doping movement: the Athlete's health.

3.2 Obtaining clearance to compete—therapeutic use exemptions and conditional prohibitions

3.2.1 Amendments to procedural requirements for granting a TUE

An Athlete undergoing medical treatment that involves a Prohibited Substance must seek a TUE from the competent Anti-Doping Organisation ("ADO"). The 2015 regime preserves the "national vs international" distinction that existed under the previous rules. The basic principle is that International-Level Athletes request TUEs from their International Federation, while National-Level Athletes request TUEs from their National Anti-Doping Organisation ("NADO").[29] During the consultation process leading to the 2015 Code, recommendations were made for an international independent TUE Committee that would grant TUEs in a centralised manner. No such system has been introduced at this point, but the 2015 revision does take steps to ease the procedural burden and enhance clarity for those Athletes whose competition schedule would require multiple TUEs (*e.g.,* those transitioning from national-level competition to international-level competition). In particular, the 2015 Code and 2016 International Standard for Therapeutic Use Exemptions ("ISTUE"):

- *Provide a streamlined process for Athletes seeking international recognition of a national-level TUE.* These Athletes are now relieved from having to go through a whole new application process if they already have the benefit of a TUE granted by their NADO: they can have the TUE "recognised" by the International Federation, which "must" grant such recognition if the TUE is in compliance with the ISTUE.[30]
- *Encourage the automatic recognition of TUEs.* ISTUE 7.1 encourages International Federations and Major

[29] Article 4.4.4 of the 2015 Code further addresses the right for Major Event Organisations to provide specific requirements for their events; for more details, see Rigozzi et al. (2013), n° 173 et seq.

[30] WADA, Document on the International Standard for Therapeutic Use Exemptions (ISTUE), https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-2015-ISTUE-Final-EN.pdf, accessed 22 April 2016.

Event Organisers to declare automatic recognition of TUEs, at least in part—e.g., those granted by certain selected other ADOs or for certain Prohibited Substances.

Another key procedural change reflected in the 2015 revision is an increased storage time for application data, in accordance with the extended statute of limitation period for initiating anti-doping proceedings from 8 to 10 years (revised Article 17 of the 2015 Code). During the TUE process, the application must include the diagnosis as well as evidence supporting such diagnosis.[31] This sensitive medical data is newly stored for 10 years under the revised 2015 regime for the approval form (versus 8 years under the 2009 regime). All other medical information may be kept for 18 months from the end of the TUE validity.[32]

3.2.2 *Amendments to substantive requirements for granting a TUE*

The requirements to receive a TUE were slightly adapted for the 2015 ISTUE—but not in a manner that would significantly alter the assessment—and remain unchanged in the 2016 ISTUE. In short, the TUE Committee must find that the following four criteria are fulfilled:

1. Significant impairment to the Athlete's health if the substance or method were withheld;
2. Lack of performance enhancement beyond a return to a normal state of health through the use of the substance or method;
3. Absence of any other reasonable therapeutic alternative, and;
4. Necessity for use not a consequence of prior use without a valid TUE.

With regard to the manner in which these criteria operate, the 2016 ISTUE:

- *Places the burden of proof on the Athlete.* The 2015 ISTUE received an explicit addition that confirms and codifies the interpretation of the CAS panel in the recent *ISSF v. WADA* award (Article 4.1, *in initio*): "An Athlete may be granted a TUE if (and only if) *he/she can show* that each of the following conditions is met" (emphasis added). While a welcome addition for legal predictability, the hurdle for the Athlete to overcome is high and can lead to nearly insurmountable evidentiary situations, such as in *ISSF v. WADA* regarding beta-blockers in shooting and lack of additional performance-enhancement.[33]
- *Declares standard of proof as a "balance of probability".* An explicit reference to the requisite standard of proof to establish these substantive criteria—a balance of probability—was only added in the most recent revision of the ISTUE. This solution is in line with the Code and general principles of evidence in that it mirrors the general provision for establishing facts related to anti-doping rule violations when the burden of proof is on the Athlete, set forth in Article 3.1 of the 2015 Code.[34]
- *Allows retroactive TUEs for "fairness" reasons.* As a rule, TUEs must be obtained prior to using the Prohibited Substance or Method (ISTUE 4.2). Exceptionally, a TUE may be granted with retroactive effect, which mostly concerns lower-level Athletes for whom the applicable anti-doping rules accept such possibility (Article 4.4.5 of the 2015 Code), or for emergency situations (ISTUE 4.3). The 2016 ISTUE allows for the possibility to grant a retroactive TUE if WADA and the relevant ADO agree that "fairness" so requires. The scope of this new exception remains unclear. A recent award rejected an Athlete's plea that he did not "timeously" request a TUE based on ignorance of the system.[35] One may wonder whether fairness-related reasons could offer a solution for situations of *venire contra proprium factum*, *i.e.,* when the Athlete received assurance from a competent ADO that the substance or method was not prohibited[36] and the latter could thus reasonably be considered estopped from pursuing a violation based on a subsequent positive test.

[31] See, for example, ISTUE, Annex 2.

[32] See WADA, Document on the International Standard for the Protection of Privacy and Personal Information, Annex A, https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-2015-ISPPPI-Final-EN.pdf, accessed 22 April 2016.

[33] See Rigozzi A, Viret M, Wisnosky E, "The ISSF v. WADA CAS Award: Another Therapeutic Use Exemption Request for Beta Blockers Shot Down", *Anti-Doping Blog*, 10 August 2015, http://wadc-commentary.com/issf-v-wada/, accessed 22 April 2016.

[34] *Ibid.*

[35] CAS 2014/A/3876, *Stewart v. FIM*, Award of 27 April 2015. See, for a detailed analysis, see our comment on the *Stewart* CAS Award in Rigozzi, Viret, Wisnosky (2015), p. 61 et seq.

[36] The Prohibited List is an "open list", which means that simply consulting the list does not always provide a conclusive answer as to whether a particular substance or method is prohibited. Prohibited Methods ("M" classes) need by their very nature to be described in somewhat general scientific terms that always leave a certain room for interpretation (see, for example, CAS 2012/A/2997, *NADA v. Y*, Award of 19 July 2013). For substances ("S" classes), the precision of the description of the prohibition under the Prohibited List varies depending on the substance at stake.

3.2.3 *Transparency for conditionally prohibited substances*

Only minor changes were made in the 2015 revision in the context of conditionally prohibited substances. Some categories of Prohibited Substances are widely used to treat minor conditions, including in the context of sports medicine. Moreover, their effects on the Athlete may depend on the mode of use. Thus, the Prohibited List prohibits the following substances only conditionally:

- Certain Beta-2 agonists (class S.3)—e.g., Salbutamol, which is the active ingredient of "Ventolin" and is widely used to treat asthma in endurance sports. "Limits of use" have been determined that are deemed to reflect an acceptable therapeutic use of the substance.[37]
- Glucocorticoids (class S.9),[38] which have been the subject of debates for their use in sports medicine, are prohibited only when administered by certain routes (oral, intravenous, intramuscular or rectal). *A contrario* all other routes of application are permitted.

These categories require adjustments for establishing an anti-doping rule violation compared to the standard regime, as the finding of a violation calls for information beyond the mere detection of the substance. Unless a distinctive trait for dosage or route of administration can be identified directly during Sample analysis,[39] the information must be gathered during results management and generally supposes explanations from Athletes regarding the causes that led to the findings. In particular, for these types of substances, the 2015 Code:

- *Applies a different burden of proof.* Whereas the burden is on the Athlete to show that the criteria for a TUE are realised (see above), or to demonstrate the origins of the analytical findings to obtain a reduced sanction (Article 10 of the 2015 Code), for S.3 and S.9 substances proving dosage and/or route of administration is part of the requirements for a violation. A specific allocation of the burden to the Athlete is only provided in the Prohibited List for findings of Salbutamol and Formoterol above a certain Threshold. In all other situations, it ought to be sufficient for the Athlete to present credible explanations (e.g., listing the substance on the Doping Control form[40]) that the Prohibited Substance originated from an authorised Use. The burden of proof ought then to be on the ADO to convince the hearing panel to a comfortable satisfaction (Article 3.1 of the 2015 Code) that a prohibited Use occurred.
- *Prefers short-cut procedures to transparency*. The International Standard for Laboratories ("ISL") introduces the "Presumptive Adverse Analytical Finding" to promote procedural economy by allowing a laboratory to enquire with the Testing Authority whether a TUE exists prior to the confirmation step of the A Sample for a S.3 or S.9 class substance (normally the presence of a TUE is determined after report of the Adverse Analytical Finding, during the initial review by the ADO). The revised 2015 regime maintains this pragmatic solution, but seeks to foster transparency in order to avoid this short cut from being abused by ADOs to stop cases from going forward. The 2015 ISL makes it explicit that any such communication and its outcome must be documented and provided to WADA (ISL 5.2.4.3.1.1).[41]

3.3 Sanctions for legitimate medical treatment without a TUE

An Athlete who is undergoing legitimate medical treatment that involves a Prohibited Substance but does not have a TUE might—if tested—return an Adverse Analytical Finding. As mentioned above, an anti-doping violation cannot be invalidated for reasons of legitimate medical treatment, save in certain exceptional circumstances where the system allows for a retroactive TUE or for authorised Use of S.3 and S.9 class substances. Thus, Athletes will typically first turn to the options in the sanctioning regime to reduce or eliminate the sanction for Fault-related reasons. The success of this effort varies considerably from case-to-case, with no clear pattern emerging in the CAS jurisprudence.

The 2015 WADC has not improved the clarity of the situation for violations involving legitimate medical

[37] Not to be confused with a Threshold concentration in the Sample. Only Salbutamol and Formoterol currently have a form of Threshold with a Decision Limit (in TD2014DL), beyond which the finding is presumed not to result from a therapeutic use and the Athlete needs to produce an administration study to invalidate the Adverse Analytical Finding.

[38] New terminology under the 2015 Prohibited List. Up to the 2014 List, "glucocorticosteroid".

[39] In particular, by finding Metabolites that differ depending on the route of administration. A solution codified *e.g.* in the revised TD2014MRPL, Table 1, for the glucocorticoid budesonide.

[40] The standard Doping Control Form and ISTI 7.4.5 (q) invite Athletes to disclose all recent medication, supplements and blood transfusions (for blood sampling). On the legal implications of this disclosure, see Viret (2015), p. 573 et seq.

[41] On the imprecise use of the term TUE, see Viret (2015), p. 379 et seq. ADOs would rely in practice on Athlete declarations on the Doping Control Form. The 2015 WADA Results Management Guidelines encourage ADOs to contact the Athlete to enquire about the route of administration if there is no TUE on the record (Sect. 3.4.2.2).

treatment, unless contamination is involved. In the 2009 WADC, if Athletes were "fortunate" enough to have inadvertently Used a Specified Substance then the Panel had the flexibility to settle on a sanction ranging from a reprimand and no period of Ineligibility, up to a 2-year period of Ineligibility; if the Prohibited Substance was not a Specified Substance, the shortest period of Ineligibility available was 1 year. This raises questions of fairness, since violations under similar factual circumstances, and with similar levels of fault are punished with very different sanctions.[42] The 2015 WADC remedied this disparate treatment when the violation involves a Contaminated Product.[43] No analogous exception to receive a facilitated reduction in the case of legitimate medical treatment is available, even though similar policy arguments could also be lodged in this context.

Before Athletes can seek to establish a Fault-related reduction, newly under the 2015 WADC they must first avoid a finding that the violation was committed "intentionally". This prospect poses interpretational issues for medications.[44] According to the definition in WADC 10.2.3, "the term 'intentional' is meant to identify those Athletes who cheat." However, the core of the definition defines "intentional" conduct as encompassing both knowing and reckless behaviour.[45] Since the violations considered in this article involve the knowing administration of a medication, it can be expected that Athletes will rely on the reference to "cheating" to argue that their conduct falls outside of this definition.[46] If they were to succeed with this line of argumentation before hearing panels, then their basic sanction starts at a 2-year period of Ineligibility that is subject to further reduction for Fault-related reasons.[47] If they were to fail, they face a strict 4-year period of Ineligibility, which could raise proportionality concerns for this type of violation.

The Fault-related reductions in the 2015 WADC, like those in the 2009 WADC, rest in an interpretive grey area for violations arising from legitimate medical use. A sanction can be reduced for Fault-related reasons if the Athlete can establish a factual scenario that is accepted to reflect no fault or negligence, or no significant fault or negligence. On one hand, it is well-established that medications often contain Prohibited Substances, thus panels expect a high-level of diligence from an Athlete to avoid a violation arising from medications. Thus, these types of violations often are committed with a high level of negligence at least bordering on "significant" and at times approaching "reckless".[48] As to the level of Fault, CAS panels are not consistent. One CAS panel found that a legitimate medical Use of a Prohibited Substance that could have been (and eventually was) excused by a TUE can implicate only a low-level of Fault,[49] whereas others have come to the opposite conclusion, holding that the (alleged) "legitimate therapeutic use" of a medication was "irrelevant", and contributed to the Athlete's significant level of Fault.[50] In light of these different characterisations, it is difficult to predict how a panel would sanction these violations under the 2015 Code.

[42] See also our comment on the *Stewart* CAS award, *Supra* (35).

[43] A new provision (WADC 10.5.1.2) allows for these types of violations to be subject to a flexible 0–2 year period of Ineligibility, regardless of the type of substance involved.

[44] "Intentional" violations draw a four-year period of Ineligibility, whereas non-"intentional" violations start with a two-year basic sanction. Only non-intentional violations are subject to further reduction for Fault-related reasons. See, more generally, on intentional doping, the piece by Howard Jacobs in this Blog Symposium.

[45] Article 10.2.3 ab initio: "As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk".

[46] For a discussion of the expected role of the term "cheat" in establishing that a violation was "intentional", see Rigozzi et al. (2015a, b). On a related note, an argument akin to those made in the *Oliveira/Foggo* line of cases under the 2009 Code could also arise here: If Athletes do not have actual knowledge that their medications contain a Prohibited Substance, would purposefully consuming the product still be considered "intentional"?

[47] Article 10.2.1 places the burden of proof to establish that the violation was not "intentional" on the Athlete if the violation did not involve a Specified Substance, and on the Anti-Doping Organisation to establish that the violation was "intentional" if the violation did involve a Specified Substance.

[48] See, for example CAS 2014/A/3876, *Stewart v. FIM*, para. 79; See also, CAS 2012/A/2959, *WADA v. Nilforushan*, Award of 30 April 2013, para. 8.21. In rare cases, Athletes have been able to establish No Fault or Negligence under very specific circumstances. See, for example CAS 2005/A/834, *Dubin v. IPC*, Award of 8 February 2006.

[49] See, for example, CAS 2014/A/3876, *Stewart v. FIM*, para. 84 where the CAS panel held that the Athlete's level of Fault must be considered "light" where he was prescribed the medication by a doctor and later obtained a TUE. See also CAS 2011/A/2645, *UCI v. Kolobnev*, Award of 29 February 2012, paras. 87–90, which does not specifically address the possibility of obtaining a TUE, but confirmed a first instance decision (after weighing a list of factors) that a Prohibited Substance taken for purposes unrelated to sport performance, and upon medical advice fell at "the very lowest end of the spectrum of fault".

[50] See, for example, the ITF Independent Anti-Doping Tribunal, *ITF v. Nielsen*, Award of 5 June, that found that it is not relevant "whether the player might have been granted a therapeutic use exemption". See also CAS 2008/A/1488, *P. v. ITF*, Award of 22 August 2008, para. 19, which found it of "little relevance to the determination of fault that the product was prescribed with 'professional diligence' and 'with a clear therapeutic intention'". These cases were both referenced in CAS 2012/A/2959, *WADA v. Nilforushan*, para. 8.20.

3.4 Conclusion—remember health considerations behind anti-doping

Athletes do not have it easy when it comes to reconciling necessary medical treatment with high-level competition in sport. The conditions for claiming the right to compete despite Use of a Prohibited Substance or Method are stringent, and the procedure at times is burdensome. There is no doubt that the system must strictly monitor any possible abuse of medical treatment as a cover-up for doping attempts. Nevertheless, this system should not escalate into penalising Athletes who had a legitimate need for treatment and resorted in good faith to such treatment, especially since in many cases the performance-enhancing effects of the Use of a Prohibited Substance or Method are hypothetical at most.

The current system requires considerable Athlete transparency in matters related to their health. The TUE process is not the only context in which Athletes may have to reveal information about medical conditions and/or ongoing treatment for these conditions. Apart from the disclosure of medication and blood transfusion that Athletes are required to make on the Doping Control form, the anti-doping proceedings themselves may bring to light information about medical conditions affecting the Athlete. This may occur either because the Athlete is bound to reveal information to build a defence, or because the detection system itself may uncover collateral data indicating a pathology—known or unknown to the Athlete.[51]

In return for these expectations, the anti-doping movement must keep in mind one of its key stated goals—the protection of the Athlete's health—when regulating matters implicating legitimate medical treatment. This protection must include efforts to avoid the Athlete inadvertently committing an anti-doping rule violation while under therapeutic treatment, which may include more systematic labelling of medication with explicit warnings. The attentiveness to the Athlete's health, however, could go beyond these efforts and exploit the data collected as part of Doping Control also for the benefit of the Athlete. The current regime already allows for suspected pathologies detected on the occasion of Doping Control to be communicated to the Athlete on certain specific aspects.[52] As Athletes agree to disclose large parts of their privacy for the sake of clean sport, it might be desirable to explore paths through which clean sport might wish to pay these Athletes back by providing them and their physicians with an additional source of data on health matters, an aspect of Athlete's lives that is always on the brink of being endangered in elite sports.

4 "Proof of intent (or lack thereof) under the 2015 World Anti-Doping Code"

Historically, under the anti-doping rules of most organizations (including the WADC), the concept of "strict liability" has meant that the proof of intent (or lack thereof) was irrelevant to the issue of whether or not the athlete has violated the anti-doping rules. However, so long as the rules provide for sanction ranges instead of a set sanction for all offenses, the issue of intent to dope has always been somewhat relevant to the issue of sanction length. The 2015 WADC, with its potential 4-year sanctions for a first violation based on whether or not the anti-doping rule violation was intentional, will make the question of intent an important issue in virtually every anti-doping case. This article analyzes these new rules allowing for 4-year sanctions for a first violation, in the context of how intent (or lack of intent) will be proven.

4.1 Why intent matters under the 2015 World Anti-Doping Code

It should be remembered that under the 2015 WADC intent is still irrelevant to the issue of whether or not an athlete has committed an anti-doping rule violation. This is clear from the Comment to Article 2.1.1: "An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS."

Article 10 of the WADC—dealing with length of sanction, has always taken "intent" into account in determining whether or not a sanction should be reduced.[53] In other words, a sanction that would ordinarily be 2 years

[51] See, as a prominent example, the *Claudia Pechstein* saga with respect to the explanations—doping or rare pathology?—for her abnormal blood values.

[52] See WADA, Guidelines for Reporting and Management of Human Chorionic Gonadotrophin (hCG) and Luteinizing Hormone (LH) Findings in male athletes, https://wada-main-prod.s3.amazonaws.com/resources/files/wada-guidelines-hcg-lh-findings-v2.0-2015-en.pdf, accessed 22 April 2016; as well as the recommendations for ABP expert review in WADA, The Athlete Biological Passport Operating Guidelines and Compilation of Required Elements, https://wada-main-prod.s3.amazonaws.com/resources/files/wada-abp-operating-guidelines-v5.0-en.pdf, accessed 22 April 2016.

[53] See, for example, 2015 WADC Art. 10.4: "if an athlete or other Person establishes in an individual case that he or she bears no fault or negligence, then the otherwise applicable period of Ineligibility shall be eliminated"; and Art. 10.5 on the Reduction of the Period of Ineligibility based on No Significant Fault or Negligence.

could be reduced to no sanction where the athlete had no fault or negligence whatsoever, or could be reduced to some degree if the athlete was not *significantly* at fault or negligent. In this way, intent is indirectly relevant to the issue of how much, if at all, an otherwise applicable sanction (sometimes referred to as the "default sanction") could be eliminated or reduced. This is because an athlete who can prove that he or she did not intend to violate the anti-doping rules would be much more likely to establish a lack of significant fault or negligence in committing the violation in the first place.

Now, however, the 2015 WADC makes the issue of intent directly relevant to the first issue of the length of the default sanction itself. Therefore, intent is now not only relevant to the issue of *reducing* the default sanction, but is also relevant to the threshold issue of what the default sanction is in the first place.

Specifically, Art. 10.2.1 of the 2015 WADC provides: "The period of Ineligibility shall be 4 years where:

> 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the athlete or other Person can establish that the anti-doping rule violation was not intentional.
> 10.2.1.2 The anti-doping rule violation involves a Specified Substance and the anti-doping organization can establish that the anti- doping rule violation was intentional."

Art. 10.2.2 of the 2015 WADC goes on to state that "if Article 10.2.1 does not apply, the period of Ineligibility shall be 2 years." Therefore, under the 2015 WADC, the default sanction is determined as follows:

1. Where the violation does not involve a "Specified Substance", the default sanction is 4 years unless the athlete can prove that the violation was "not intentional"; if the athlete meets this burden of proving "lack of intent", then the default sanction is 2 years.
2. Where the violation involves a "Specified Substance", the default sanction is 2 years unless the National Anti-Doping Organization ("NADO") or the International Federation ("IF") can prove that the violation was "intentional"; if the NADO or IF meets this burden of proving "intent", then the default sanction is 4 years.

In either case, "intent" is now directly relevant to the length of the default sanction; the only difference is who bears the burden of proving "intent" or "lack of intent", depending on whether or not the substance involved is a Specified Substance.

4.2 How will the NADO/IF prove "intent" in cases involving "specified substances"?

Many older CAS cases have discussed the difficulty that a NADO or IF faces in proving that an athlete "intended" to use a prohibited substance, in their discussions of the justification of the "strict liability" rule.[54]

While this difficulty in proving that an athlete "intended" to use a prohibited substance to enhance their sport performance has not changed in theory, it has changed in practice with the definitions that WADA provided for proving "intent" within the meaning of Art. 10.2.1 of the 2015 WADC. Specifically, Art. 10.2.3 now provides the following definition of "intent":

> "As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those athletes who cheat. The term, therefore, requires that the athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-Competition. An anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-Competition in a context unrelated to sport performance."

Therefore, for the purpose of proving "intent" within the meaning of WADC Art. 10.2.1, in the case of Specified Substances, the NADO/IF can meet its burden by proving simply that the athlete engaged in conduct where the athlete "knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk." However, practical realities of this "proof" must be considered against the following questions:

1. How will this definition of "intent" contained in WADC Art. 10.2.3 be read in connection with the

[54] See, for example, CAS 95/141, *C. v. FINA* in Reeb (2001), p. 220, par. 13: "Indeed, if for each case the sports federations had to prove the intentional nature of the act (desire to dope to enhance one's performance) in order to be able to give it the force of an offence, the fight against doping would become practically impossible".

seemingly contradictory comment to 2015 WADC Art. 4.2.2 that specified substances are "substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance"?

2. How will an athlete who knowingly takes a "risky supplement" without knowing that the supplement contained a banned "Specified Substance" be viewed in connection with this definition of "intent" contained in WADC Art. 10.2.3?

Furthermore, in cases where an athlete intentionally used a supplement, but the athlete did not know that the supplement contained a prohibited substance (and where the lack of knowledge was reasonable, such as in cases involving misleading ingredient lists), what will the NADO/IF be required to prove? Will the burden be to prove that the athlete knew or should have known that the supplement contained a prohibited substance, or will it be sufficient to prove that the *type of supplement* or the *supplement manufacturer* itself could be viewed as risky, such that the athlete's use of the supplement could be considered as a manifest disregard of a significant risk, for which the athlete should receive a 4-year sanction? The manner in which CAS tribunals resolve this use could dramatically impact the applicable "default sanction" in cases involving nutritional supplements.

4.3 How does the athlete prove "no intent" in cases not involving "specified substances"?

In cases that do not involve "Specified Substances", the athlete carries the burden of proving "no intent" to avoid the application of a 4-year default sanction. In many cases, therefore, this burden of proof will mean the difference between a career-ending sanction and one from which an athlete could potentially return. Therefore, the manner in which this burden of proof is applied by the arbitral tribunals will be critical.

As mentioned above, Art. 10.2.3 of the 2015 WADC provides that "an anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-Competition in a context unrelated to sport performance." Therefore, in cases involving non-specified stimulants, an athlete can avoid a "default sanction" of 4 years by proving that the stimulant was used out-of-Competition in a context unrelated to sport performance. This raises a number of important issues:

(a) Will arbitral tribunals accept a low concentration level of the prohibited stimulant in the anti-doping test, which low levels would be inconsistent with the purposeful use of the stimulant "in Competition", as sufficient proof of out-of-Competition use?

(b) Will arbitral tribunals accept a polygraph finding that the athlete was truthful in stating that he did not use the prohibited substance at issue on the day of the competition at issue as sufficient proof of out-of-Competition use?[55]

(c) How will arbitral tribunals analyze the issue of whether the out-of-Competition use of the stimulant was "in a context unrelated to sport performance?" As has been seen in past cases, arguments can be made that virtually any substance that an athlete consumes, including food, is done in a context related to sport performance. Therefore, in order to avoid an analysis that renders this phrase meaningless, arbitral tribunals must apply a common-sense and realistic meaning to the issue of when something is consumed in a context that is actually related to sport performance, as opposed (for example) to consuming a product for general health purposes.

For substances that are banned at all times, such as anabolic agents, the analysis of "in-competition" versus "out-of-Competition' use will be unnecessary. In these cases, in order to avoid a "default sanction" of 4 years, the athlete will be required to prove that he or she did not take the substance intentionally. It is therefore critical to consider what will happen to the athlete who has no idea what caused his or her positive test, and who, despite investigation, is unable to prove the source of the prohibited substance. For these athletes, how will arbitral tribunals analyze this issue, which could mean the difference between a career-ending 4-year sanction and a "default sanction" of 2 years? Some important questions arise:

(a) Will the athlete's failure to prove how the prohibited substance entered his or her system (within the meaning of 2015 WADC Art. 10.4 and Art. 10.5.2) automatically result in a 4-year default sanction? Arbitral tribunals should recognize the difference between (1) proving the source of the prohibited substance as a pre-condition to receiving a *reduction* in the "default sanction", and (2) the requirement of proving "no intent" in order to avoid the application of a "default sanction" of 4 years. An athlete should be able to prove "no intent" without proving the source of the prohibited substance, at least in the abstract.

[55] Prior arbitral tribunals have already accepted that polygraph test results are admissible in anti-doping proceedings. See, for example, CAS 2011/A/2384 & 2386, *UCI v. Alberto Contador Velasco & RFEC* and *WADA v. Alberto Contador Velasco & RFEC*, Award of 6 February 2012.

(b) Assuming that the failure to prove how the prohibited substance entered the athlete's system is not automatically equated with intent to use the prohibited substance, how will the athlete who cannot prove the source of the prohibited substance prove lack of intent? Will it be sufficient, for example, for an athlete to submit a polygraph finding that the he was truthful in stating that he did not knowingly use the prohibited substance at issue, as sufficient proof of lack of intent, such that the applicable "default sanction" is 2 years instead of four? Or, even in the absence of a polygraph exam, could an athlete establish "no intent" within the meaning of 2015 WADC Art. 10.2.1.1 solely through her own credible testimony that she did not knowingly ingest the prohibited substance at issue? These will be important evidentiary issues for arbitral tribunals to consider, and the manner in which they are determined will have a significant impact on the sanction length for many athletes under the 2015 WADC.

5 Conclusion

The concept of giving longer sanctions to athletes who intend to cheat, and shorter sanctions to those athletes who do not have such an intent, is certainly laudable, and the 2015 WADC has introduced a number of new legal and evidentiary issues in an effort to further differentiate between intentional and non-intentional "dopers". However, as is often the case, the 2015 WADC has provided very broad concepts, which the arbitral tribunals will have to interpret and apply to real-world situations. How these general concepts are applied in reality will—for many athletes—mean the difference between a 2-year sanction that is "merely" devastating and a 4-year sanction that is career ending. In those cases, where an athlete has no idea where the prohibited substance came from, the arbitral tribunals must be very careful in how they apply these new concepts.

These new concepts related to "intent" will change the manner in which arbitral tribunals address the preliminary issue of the applicable "default sanction". They will not materially affect the manner in which these tribunals address the issues related to the reduction in the "default sanction." However, because of the limitations in how much the "default sanction can be reduced (in cases of no significant fault, the maximum reduction in the "default sanction" is 50 %), the determination of this new "intent" issue as related to the "default sanction" will be doubly important in cases where the older "exceptional circumstances" rules are being asserted as a basis for sanction reduction.

6 Ensuring proportionate sanctions under the 2015 WADA Code

6.1 Introduction

According to the WADA, the 2015 WADC, which came into effect on 1 January 2015, is a "*stronger, more robust tool that will protect the rights of the clean athletes*".[56] Among the key themes of the revised Code, is the promise of "*longer periods of Ineligibility for real cheats, and more flexibility in sanctioning in other specific circumstances*".[57]

While Article 10 of the 2015 Code unquestionably provides for longer periods of ineligibility, the validity of WADA's claim that the harsher sanctions will be reserved for "*real cheats*" depends partly on how one defines the term "*real cheat*", and partly on how the 2015 Code's mechanisms for reducing sanctions are to be interpreted.

This piece reflects on the totality of the context from which the current sanctions regime arose. That is important because Article 10 will have to be applied in a manner consistent with that context in mind if the 2015 Code is to become the tool promised by WADA and if it is to avoid the scrutiny of the courts.

6.2 Context

6.2.1 The Katrin Krabbe case

In the lead up to the adoption of the first version of the WADA Code (2003), there was considerable debate as to what length of sanction could lawfully be imposed on an athlete for a first violation.[58]

The decision finally to settle on a 2-year ban for first offences was heavily influenced by the findings of the Munich Courts in the case of *Katrin Krabbe*, that a suspension exceeding 2 years was disproportionate[59]:

(a) The Regional Court held that a 2-year suspension imposed on an athlete for a first offence "*represents the highest threshold admissible under fundamental rights and democratic principles*".[60]

[56] WADA, The Code, https://www.wada-ama.org/en/what-we-do/the-code, accessed 22 April 2016.

[57] *Supra* (27).

[58] See Oswald (1999) and the Vereinigung fur deutsches und internationals Sportrecht (1999).

[59] See Kaufmann-Kohler et al. (2003).

[60] Decision of the LG Munich of 17 May 1995, *Krabbe v. IAAF* et al, SpuRt 1995 pp. 161, 167.

(b) The High Regional Court held that the 3-year ban imposed by the IAAF "*was excessive in respect of its objective. Such a rigid disciplinary measure as a sanction for a first sports offence is inappropriate and disproportionate*".[61]

And so it came to pass that a first violation under Article 10.2 of the 2003 Code would be punished with a 2-year sanction. Various legal opinions procured by WADA between 2003 and 2008 affirmed the position that a 2-year sanction for a first violation (1) was a significant incursion on the rights of the individual affected; and (2) was likely the limit of the severity that could be imposed in the absence of aggravating circumstances.[62]

6.2.2 *Specified substances*

The 2003 Code proved somewhat inflexible, which resulted in 2-year bans for unintentional and minor anti-doping rule violations. One of the starkest examples of that inflexibility arose in CAS OG 04/003 *Torri Edwards v IAAF and USATF*.[63]

Edwards had consumed glucose powder that, unbeknownst to her, contained the stimulant nikethamide. A 2-year ban was imposed on her on the basis that she could not meet the thresholds for "*No Fault*" and "*No Significant Fault*" and despite the fact that she had, in the words of the CAS panel, "*conducted herself with honesty, integrity and character, and that she has not sought to gain any improper advantage or to 'cheat' in any way*".[64]

Ms Edwards' case became a cause célèbre, leading the IAAF to lobby WADA to have nikethamide and other similar stimulants reclassified as Specified Substances. The then vice-president of the IAAF, Dr Arne Lungqvist explained as follows:

> I asked Torri Edwards whether she would allow me to use her case as an example of the importance of making some sort of differentiation between those weak stimulants that you can get over the counter by accident, carelessness, negligence or whatever. (…) We are not after those who are negligent.[65]

WADA acceded to the IAAF's lobbying and downgraded nikethamide to the Specified Substance list in September 2005. The IAAF Council shortly thereafter reinstated *Edwards* to competition further to the doctrine of *lex mitior*.[66] Following *Edwards'* reinstatement, Dr Lungqvist explained as follows:

> The IAAF wishes to see strong penalties for *real cheats*. This was a different case, […] I did not feel comfortable when I had to defend the then-existing rules against her at the CAS hearing in Athens.
> I judge that Torri has paid a high price for having inadvertently taken a particular substance at the 'wrong' time, shortly before [the reclassification] and from now on such an intake would result in a warning only (Emphasis added).[67]

Four years later, WADA went one step further and, with the introduction of the 2009 version of the WADA Code, broadened the list of substances that would be categorised as Specified Substances, promising "*lessened sanctions….where the athlete can establish that the substance involved was not intended to enhance performance*"[68] under Article 10.4.[69]

The aim was to avoid the likes of the *Edwards* case. Indeed, a number of cases determined under the 2009 Code which involved the same glucose brand that had landed

[61] Decision of the OLG Munich of 28 March 1996, *Krabbe v. IAAF* et al., SpuRt 1996 pp. 133, 138.

[62] See WADA, Legal Opinion of G. Kaufmann-Kohler, G. Malinverni and A. Rigozzi on the Conformity of Certain Provisions of the Draft WADC with Commonly Accepted Principles of International Law, paragraphs 142 and 143, https://wada-main-prod.s3.amazonaws.com/resources/files/kaufmann-kohler-full.pdf, accessed 22 April 2016; WADA, Legal Opinion of C. Rouiller on Whether Article 10.2 of the World Anti-Doping Code is compatible with the Fundamental Principles of Swiss Domestic Law, paragraph *3 (b) (aa) at* page 26 and paragraph *3. (f) (aa) at page* 32, https://wada-main-prod.s3.amazonaws.com/resources/files/Article_10_2_WADC_Swiss_Law.pdf, accessed 22 April 2016; and WADA, Legal Opinion of G. Kaufmann-Kohler and A. Rigozzi on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes, at paragraphs 33, 114, 138 and 139, https://wada-main-prod.s3.amazonaws.com/resources/files/Legal_Opinion_Conformity_10_6_complete_document.pdf, accessed 22 April 2016.

[63] CAS OG 04/003, *Torri Edwards v IAAF* and *USATF*, Award of 17 August 2004.

[64] See paragraph 5.8 of CAS OG 04/003 *Torri Edwards v IAAF* and *USATF*.

[65] Savage S, "Doping-Edwards case influenced WADA rule change", *Red Orbit*, 30 January 2006, http://www.redorbit.com/news/sports/374998/dopingedwards_case_influenced_wada_rule_change/, accessed 22 April 2016.

[66] See IAAF Press Release of 22 November 2005, "Torri Edwards Reinstatement", http://www.iaaf.org/news/news/torri-edwards-reinstatement, accessed 22 April 2016.

[67] Elliott, H, "Sprinter Excited About Reprieve", *Los Angeles Times*, 17 November 2005, http://articles.latimes.com/2005/nov/17/sports/sp-edwards17, accessed 22 April 2016.

[68] WADA, 2009 World Anti-Doping Code Questions and Answers, https://www.wada-ama.org/en/questions-answers/2009-world-anti-doping-code, accessed 22 April 2016.

[69] 2009 Code, Article 10.4 ("*Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*").

Edwards with a 2-year ban in 2004, resulted in periods of ineligibility ranging between 0 and 6 months.[70]

6.2.3 The rise and fall of "aggravating circumstances"

The primary themes of the 2009 Code were, according to WADA, "*firmness and fairness*".[71] "*Fairness*" was to be reflected by the broadening of the Specified Substance list, while "*firmness*" was intended to manifest itself through the concept of "*aggravating circumstances*".[72]

The presence of "*aggravated circumstances*" permitted ADOs to increase periods of ineligibility beyond the standard 2-year ban up to a maximum of 4 years.[73]

A legal opinion commissioned by WADA in relation to the "*aggravated circumstances*" provisions (the "Third WADA Legal Opinion") noted as follows:

> 91. […] it is clear that the intention to enhance performance is not in and-of-itself an aggravating circumstance.
> 92. […] This provision makes it clear that *cheating is an important element of the notion of aggravating circumstances*. However, the mere fact of cheating alone is not sufficient. Additional elements are required.
> 93. The essence of the concept of aggravating circumstances is thus a qualified kind of *cheating*, which involves an additional element (Emphasis added).[74]

Not only, therefore, was actual cheating required to invoke the provision but there needed to be something more than the mere fact of cheating. Examples provided by the 2009 Code included being part of a doping scheme or using multiple prohibited substances.[75]

The "*aggravated circumstances*" provision was rarely invoked and, when it was, it rarely resulted in the maximum increase.[76] That ultimately led to the removal of the "*aggravated circumstances*" provision from the 2015 Code and the introduction of standard 4-year sanctions, explained as follows by WADA:

> There was a strong consensus among stakeholders, and in particular, Athletes, that *intentional cheaters* should be Ineligible for a period of 4 years. Under the current Code, there is the opportunity for a 4-year period of Ineligibility for an Adverse Analytical Finding if the Anti-Doping Organization can show "Aggravating Circumstances." However, in the more than 4 years since that provision has been part of the Code, it has been rarely used (Emphasis added).[77]

The decision to double the standard 2-year sanctions to 4 years may have surprised anyone who had ever read the Third WADA Legal Opinion, since that opinion had expressly cautioned as follows:

> 138. […] one should bear in mind that *a 4-year ban would most often put an end to an athlete's (high level) career and thus be tantamount to a life ban.* Therefore, an aggravated first offence could de facto be punished as harshly as numerous second offences (Article 10.7.1) and almost all third offences (Article 10.7.3).
> 139. *This could raise problems if the ineligibility period were automatically of 4 years in the presence of aggravating circumstances.* In reality, Art. 10.6 provides for an increased suspension of up to 4 years, which means that the adjudicating body is afforded sufficient flexibility to take into account all the circumstances to ensure that aggravating circumstances do not systematically result in a 4-year period of ineligibility (Emphasis added).

6.2.4 Proportionality

The principle of proportionality plays an important role in the determination of sanctions applicable in doping matters. The principle pervades Swiss law,[78] EU law[79] and general principles of (sports) law.[80]

The CAS itself has consistently measured sanctions imposed on athletes against the principle of proportionality both before the inception of the WADA Code and since.

(a) *Pre-WADA Code*: the anti-doping rules of many sports prior to the creation of the WADA Code

[70] See CAS 2011/A/2493 *Antidoping Switzerland v/Vaton Zyberi*, Award of 29 November 2011; CAS 2013/A/3327 *Marin Cilic v. International Tennis Federation* and CAS 2013/A/3335 *International Tennis Federation v. Marin Cilic*, Award of 11 April 2014; AFLD Decision No. 2011-71 dated 7 July 2011; and AFLD Decision No. 2009-50 dated 10 December 2009.

[71] *Supra* (68).

[72] Article 10.6 of the 2009 WADA Code (Aggravating Circumstances Which May Increase the Period of Ineligibility).

[73] Note that Violations under Articles 2.7 (Trafficking) and 2.8 (Administration) were not subject to the application of Article 10.6 since the sanctions for those violations (four years to life) already allowed discretion for aggravating circumstances.

[74] See Kaufmann-Kohler et al. (2003).

[75] *Ibid.*

[76] See CAS 2013/A/3080, *Alemitu Bekele Degfa v. TAF and lAAF*, Award of 14 March 2014, for a detailed assessment by the CAS of the "*aggravated circumstances*" provision.

[77] *Supra* (27).

[78] See CAS 2005/C/976 and 986, *FIFA & WADA*, delivered on 21 April 2006, paragraph 124.

[79] See, Case C-519/04, *P Meca-Medina & Majcen v Commission*, [2006] ECR I-6991, paragraphs 47 and 48.

[80] See Kaufmann-Kohler et al. (2003).

mandated fixed sanctions without the possibility of reductions. The CAS nevertheless sometimes reduced these sanctions on the basis they were not proportionate.[81]

(b) *Post-WADA Code:* The WADA Code introduced mechanisms by which sanctions could be reduced or eliminated. However, the CAS has made clear that the introduction of these mechanisms does not remove the obligation of disciplinary panels to measure the sanctions applied in any particular case against the principle of proportionality. In *Squizzato v. FINA*, the CAS held that:

> 10.24 […] the Panel holds that the mere adoption of the WADA Code […] by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still—like before—regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case.[82]

Though the 2015 Code asserts that it "*has been drafted giving consideration to the principles of proportionality and human rights*",[83] that obviously does not mean that proportionality no longer plays a part in the assessment of sanctions for the same reasons propounded by the CAS in *Squizzato*. Indeed, the 2015 Code itself recognises that it "*is intended to be applied in a manner which respects the principles of proportionality and human rights*".[84] Moreover, the most recent CAS decisions in which the principle of proportionality was applied concerned the sanctioning regimes of the 2003 and 2009 Code, both of which mandated default sanctions of 2 years, not 4 years.[85] The principle of proportionality is, therefore, arguably even more relevant now than it previously was.

[81] See CAS 1996/56, *Foschi v. FINA*, Award of October 1997; CAS 2002/A/396, *Baxter v. FIS*, Award of 30 September 2002; and CAS 2001/A/337, *B./FINA*, Award of 22 March 2002.

[82] CAS 2005/A/830, *Squizzato v. FINA*, Award of 15 July 2005.

[83] See page 11 of the 2015 Code—"*Purpose, Scope and Organization of the World Anti-Doping Program and the Code*".

[84] See the Introduction at page 17 of the 2015 Code.

[85] See, for example, CAS 2010/A/2268, *I. v. FIA*, Award of 15 September 2011; and TAS 2007/A/1252, *FINA c. O. Mellouli* and *FTN*, Award of 11 September 2007.

6.3 Comment

While the 2015 Code does have more mechanisms by which to modify the default sanctions than in previous versions of the WADA Code, that is partly because the default sanctions with regards to most of the violations have doubled[86]:

Violation	Default sanction under the 2015 Code for a first offence	Default sanction under the 2009 Code for a first offence
Presence of a specified substance (Art. 2.1)	2 years (Art. 10.2.2)	2 years (Art. 10.2.1)
Presence of a non-specified substance (Art. 2.1)	4 years (Art. 10.2.1)	2 years (Art. 10.2.1)
Use or attempted use of a specified substance (Art. 2.2)	2 years (Art. 10.2.2)	2 years (Art. 10.2.1)
Use or *attempted use* of a non-specified substance (Art. 2.2)	4 years (Art. 10.2.1)	2 years (Art. 10.2.1)
Evading, refusing or failing to submit to sample collection (Art. 2.3)	4 years (Art. 10.3.1)	2 years (Art. 10.3.1)
Whereabouts failures (Art. 2.4)	2 years (Art. 10.3.2)	1–2 years (Art. 10.3.3)
Tampering or *attempted tampering* (Art. 2.5)	4 years (Art. 10.3.1)	2 years (Art. 10.3.1)
Possession of a specified substance (Art. 2.6)	2 years (Art. 10.2.2)	2 years (Art. 10.2.1)
Possession of a non-specified substance (Art. 2.6)	4 years (Art. 10.2.1)	2 years (Art. 10.2.1)
Trafficking or *attempted trafficking* (Art. 2.7)	4 years to life (Art. 10.3.3)	4 years to life (Art. 10.3.2)
Administration or *attempted administration* (Art. 2.8)	4 years to life (Art. 10.3.3)	4 years to life (Art. 10.3.2)
Complicity (Art. 2.9)	2–4 years (Art. 10.3.4)	Elements of this violation previously formed part of the "Administration or Attempted Administration" violation
Prohibited association (Art. 2.10)	2 years (Art. 10.3.5)	This violation did not exist under the 2009 Code

[86] Note that the table only reflects the default sanctions applicable before consideration of any of the mechanisms intended to increase or decrease those sanctions.

Athletes accused of committing a violation under Articles 2.1, 2.2, 2.3 or 2.6 are now in a position in which they are required to meet the Article 10.2 thresholds regarding "intent" simply to get them back to the 2-year default sanctions that would have applied under previous versions of the Code.[87]

If the 2015 Code is to become the tool promised by WADA and if it is to avoid or survive legal challenges, tribunals will need to ensure that their interpretations of the reduction mechanisms, such as those contained at Article 10.2, do not result in disproportionate sanctions.

The parameters within which the proportionality of a sanction falls to be measured were described as follows by the panel in CAS 2005/C/976 and 986 *FIFA* and *WADA*:

> 139. A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. *To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim* (Emphasis added).

The evaluation of whether a sanction is proportionate therefore begins with the identification of the "*justifiable aim*". According to WADA, the increased sanctions were intended to target "*intentional cheats*". That is echoed by the wording of Article 10.2.3 of the 2015 Code, which provides as follows:

> As used in Articles 10.2 and 10.3, *the term "intentional" is meant to identify those Athletes who cheat*. The term, therefore, requires that the athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or *knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk* (Emphasis added) […]

The final sentence emphasised above is, arguably, open to interpretation. However, the first line identifies the overarching aim of the provision—i.e., "*the term 'intentional' is meant to identify those athletes who cheat*".

According to the Oxford Dictionary, a "*cheat*" is a "*person who behaves dishonestly in order to gain an advantage*" and the act of "*cheating*" amounts to "*a fraud or deception*". A reasonable inference, therefore, is that athletes who "*cheat*" are athletes who have acted knowingly and dishonestly to gain an unfair advantage.

Article 10.2 cannot, therefore, be intended to punish careless athletes. Bearing in mind the limits pronounced by the courts in *Krabbe* and bearing in mind the "*justifiable aim*", any interpretation of the provision that would result in a 4-year ban for nothing more than careless—or even reckless, but otherwise honest—conduct would risk inviting the sort of scrutiny exercised by the German courts in the *Pechstein*[88] and *Krabbe* cases.

Likewise, the interpretation of the other reduction mechanisms, such as Article 10.5 ("*No Significant Fault or Negligence*"), will require the same degree of pragmatism. If the parameters for "*No Significant Fault*" were to be applied as strictly today as they were in the *Edwards* case, anti-doping would end up right back to where it was in 2004, when the Code's sanctioning regime was perceived to be so inflexible that it had to be overhauled in 2009. Assuming that the aim of the 2015 Code is not to take 11 years' worth of backward steps, tribunals will have to ensure that "*No Significant Fault*" is interpreted in a manner that fulfils WADA's promise of "greater *flexibility*",[89] particularly in cases involving Specified Substances and Contaminated Products.[90]

6.4 Concluding remark

The 2015 Code has the potential to become the fairest WADA Code to date. However, it also has the potential to be the cruelest. Interpreting it in a manner consistent with the totality of the context from which it was conceived is the surest way to ensure that the right version prevails.

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[87] Note that article 10.2 only applies to those violations. For a detailed assessment of Article 10.2, see Rigozzi et al. (2015a, b).

[88] See Landesgericht (LG) München, *Claudia Pechstein v. DESG and ISU*, 26. February 2014, 37 O 28331/12; and Oberlandesgericht (OLG) München, *Claudia Pechstein v. DESG and ISU*, 15 January 2015, Az. U 1110/14 Kart.

[89] WADA, 2015 World Anti-Doping Code, https://www.wada-ama.org/en/questions-answers/2015-world-anti-doping-code, accessed 22 April 2016.

[90] Notably, the concept of "*No Significant Fault or Negligence*" in previous versions of the Code was limited to ''*exceptional circumstances*''. That limitation has been removed in the context of Specified Substances and Contaminated Products under Article 10.5.1 of the 2015 Code. Thus, it should now be easier for athletes to trigger the application of "*No Significant Fault*" in those types of cases than it previously was. See Sect. 6.2 of Rigozzi et al. (2015a, b) for a detailed discussion of the point.

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