

Legal opinion on the compatibility of the proposed changes to the World Anti-Doping Code 2021 with general Human Rights principles

The Honourable Michael J Beloff KC

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Introduction

1. I am asked to advise in an expert report as to the compatibility of proposed changes to the 2021 World Anti-Doping Code (“WADC 21”) with general Human Rights principles (“the relevant issue”) as requested by Mr. Julien Sieveking, Director of Legal Affairs at WADA, by emails dated 27th June 2024 and 9th October 2024, compiled after discussion with the Code Drafting Team, and confirmed in an email dated 30th September 2024 from Olivier Niggli, Director-General of WADA also dated 30th September 2024. I have not been invited to comment on the many proposed changes which do not raise, even indirectly, the relevant issue, and therefore do so only incidentally.
2. My name is Michael J Beloff KC, a member of Blackstone Chambers in Temple, London, EC4Y 9BW (my professional address). I am an MA (Oxon) with degrees in both History and Law from the University of Oxford and an English barrister called to the Bar by the Honourable Society of Gray’s Inn in 1967 (serving as Treasurer, its elected senior officer, in 2008) and elevated to the rank of Queen’s Counsel in 1981¹. I have appeared as an advocate at all levels of the Courts of England and Wales, in the Privy Council and the Courts of ten Commonwealth countries, as well as in the European Court of Justice (as it then was called) and in the European Court of Human Rights (“ECtHR”) on multiple occasions, acting both for and against the British Government.
3. I was a member of the Court of Arbitration for Sport for 25 years and have chaired the ethics commissions and associated disciplinary tribunals of three global sports: athletics, cricket and skiing. I have held several judicial posts in England and was the Senior Ordinary Appeal Judge in both the Jersey and Guernsey Courts of Appeal. In all these roles I have dealt, inter alia, with disputes and issues involving human rights law. I was also, for a decade between 1996 and 2006, President of Trinity College Oxford and have both written and lectured on human rights, including in seminars for members of the English judiciary in anticipation of the enactment of the Human Rights Act 1998 which came into force on 2nd October 2000.
4. I provide this opinion in my personal capacity pursuant to the instructions referred to in paragraph 1 above.
5. I have been provided initially with:
 - The first revised draft of the 2021 World Anti-Doping Code published for stakeholder consultation on 21 May 2024 (“First Revised Draft”).
 - A summary of the major proposed changes published on 21 May 2024 (“Major Changes Summary”).
 - Judge Costa’s opinion on the 2015 World Anti-Doping Code (2013) (“Costa 2013”).

¹ Now renamed, since the accession of King Charles III, King’s Counsel.

- Judge Costa's opinion on the International Standard for Code Compliance by Signatories (2017) ("Costa 2017")
- Judge Costa's opinion on the 2021 World Anti-Doping Code (2019) ("Costa 2019")
- A list of the changes where my opinion was required, in the email from Julien Sieveking, dated 9 October 2024 updated by Professor Ulrich Haas on behalf of the Code Drafting team in an email dated 18 December 2024² and most recently on 10 July 2025 with a further revised draft showing the changes between the 2021 World Anti-Doping Code (currently in force) ("the 2021 Code") and the changes that the stakeholders had by then have proposed³. Any later proposed changes have not been considered.

6. I take note of and respectfully agree with the following observations of Judge Costa⁴ which will inform my approach to and conclusions on the specific questions with which I am asked to deal as crystallized from the stakeholder submissions and the way in which the Code Drafting Team wants to engage with these submissions.

- (i) Although WADA is not a public authority, human rights principles contained in the European Convention on Human Rights ("ECHR") and equivalent instruments apply to it. The draft 2027 Code's express and expressed purpose (differing more in phraseology than substance from WADC 2021) is *"to ensure that all relevant stakeholders have agreed to submit to the Code and the International Standards, and that all measures taken in application of their anti-doping programs respect the Code, the International Standards and the principles of proportionality and*

² The issues on which my opinion was required changed as the Code Drafting Team continued to review and revise its initial thoughts see e.g. the attachment to the email of Julien Sieveking dated 3rd June 2025. It is a continually evolving document and I have in response continually revised and refined my submissions.

³ I have also been provided by Matthew Graham Head of UNI WORLD PLAYERS with a document entitled "Best Practice improvements to Anti-Doping Programs" ('BPIADP') with associated material including correspondence with WADA dated 3 September 2021 advocating a "Proposed Athletes Rights Impact Assessment" ('ARIA') together ("the World Player Material"). The ARIA considers that the analyses of Judge Costa and other lawyers who answered questions posed by WADA *"are incomplete in a number of material respects and, consequently arrive at conclusions which lack the requisite veracity ... (and) were conducted in a factual vacuum, especially by failing to research, understand and consider the lived in experiences of athletes regulated by the WADC."*

I am instructed that the Code Drafting Team are familiar with the World Player Material, having received submissions on behalf of UNI World Players, and, in so far as those submissions deal with proposed changes to the 2021 Code and raise human rights issues, they have been factored into the questions I am asked to consider. The same material also deals with the structure of WADA as distinct from the content of the Code which falls outside my remit.

Furthermore, I have been provided with an internal and, at that stage confidential, document by Ms. Snežana Samardžić-Marković, an acknowledged expert in human rights, who provided by way of response to World Player concerns an Initial Human Rights Impact Assessment. It is significant that she believes *"the focus should be on the implementation (sc of existing standards) before introducing new norms"* since *"many of the human rights risks identified in the assessment arise from non compliance with the existing standards"*. She suggests that *"enhancing respect for athletes right offers the best chance to transform them from mere objects of doping control into proactive participants in the global fight for clean sport"*.

I would add that there is of course a recognised distinction between best practice and legal requirements and between what Athletes might explicably wish for and what current human rights law requires.

⁴ Where I refer to his ipsissima verba I put them in quotation marks.

human rights.” It further states that it “*has been drafted giving consideration to human rights and the principles of proportionality*”. Article 23 deals with acceptance and implementation; the Signatories become bound by contract i.e. a “*declaration of acceptance*” Article 23.1.2⁵.

- (ii) The principles in the ECHR are a benchmark since it is, “*if not the most universal international instrument, at least the most relevant one in material terms*”⁶.
- (iii) The main, but not the only, articles relevant to the Code are Article 6 (fair trial) and Article 8 (right to respect for private life)⁷ of the ECHR.
- (iv) For the purposes of Article 6 ECHR, allegations of an ADRV are not “*criminal accusations*” and therefore the sanctions imposed for these violations are not of a criminal nature⁸. It is the civil rights of the Defendant which are protected, there being no separate rules under the ECHR relating to disciplinary charges.
- (v) The objectives of the fight against doping more generally, are twofold - the protection of health, and the fairness of sporting competitions, which affects the

⁵ In ‘A Guide to the World Anti-Doping Code’ by Paul David (2008) on earlier iterations of the Code an issue was raised as to whether disciplinary rules of a private organisation such as WADA whose authority stemmed from contract could be invalidated by reference to general human rights principles applicable within the jurisdiction in question at p.45 see e.g. CAS2006/A/1102 and CAS 2006/1146. That issue has now been resolved. See (i) above.

⁶ “*The relevance of the reference to the ECHR and its case law is also justified ratione loci: the Court of Arbitration for Sport (CAS), which has its seat in Switzerland (Lausanne) comes under the appeal jurisdiction of the Swiss Federal Court by virtue of Articles 176 and 190 of the Swiss Law on Private International Law. In addition, the decisions of the latter fall under the jurisdiction of the ECHR for two reasons. In terms of jurisdiction and substance, the Swiss Federal Court’s decisions are binding on Switzerland as it is a State Party to the European Convention on Human Rights (Article 1 of the Convention)* despite not being a member of the European Union. In procedural terms, they stand as the final domestic decision within the meaning of Article 35 of the Convention. Indeed, Article 35 stipulates as a condition of admissibility of applications made to the Court that all domestic legal remedies must have been exhausted and that a period of six months from the date on which the final decision was taken must have elapsed.” Costa 2017

The United Nations Guiding Principles “UNGP”(2011) refer to the International Bill of Human Rights consisting of the Universal Declaration of Human Rights (UDHR) the International Covenant on Civil and Political Rights (“ICCPR”) the International Covenant on Economic Social and Cultural Rights (“ICESCR”) and the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work (“ILODFP & RaW”) and its Follow Up (“ILO Declaration”). The very names of these instruments illustrate that they are concerned with more than core fundamental rights. The UNGP state, however, “*Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.*”

⁷ Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France (“FNASS) Applications 48/15/11 777/69/1318 January 2018 concerned the requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests. The applicants alleged in particular that the mechanism requiring them to file complete quarterly information on their whereabouts and, for each day, to indicate a sixty-minute timeslot during which they would be available for testing, amounted to unjustified interference with their right to respect for their private and family life and their home. The ECtHR held that there had been no violation of Article 8 (right to respect for private and family life and home) of the Convention in respect of the complaint of 17 of the individual applicants, finding that the French State had struck a fair balance between the various interests at stake. In particular, taking account of the impact of the whereabouts requirement on the applicants’ private life, the Court nevertheless took the view that the public interest grounds which made it necessary were of particular importance and justified the restrictions imposed on their Article 8 rights. The ECtHR also found that the reduction or removal of the relevant obligations would lead to an increase in the dangers of doping for the health of sports professionals and of all those who practise sports and would be at odds with the European and international consensus on the need for unannounced testing as part of doping control. I add that the ECJ has also recognised the virtue of anti-doping rules, Meca-Medina v European Commission 2006 ECR I-6991.

⁸ Mutu and Pechstein v Switzerland. Applications 40575/10 67474/10.2 October 2018.

rights and freedoms of other people, both being legitimate goals within the meaning of Article 8 (2) ECHR, so able to justify an infringement of the respect for private life (subject to the infringement also being "*provided for by the law*" and "*necessary in a democratic society*")⁹ and, mutatis mutandis, other Articles of the ECHR similarly structured.

- (vi) The European Court of Human Rights ("ECtHR") has recognized that there is "*now a broad consensus, in Europe and outside Europe, in favour of the fight against doping, of which the Code, relayed by the national laws, is the principal legal instrument*".¹⁰
- (vii) The principles are, however, in a constant state of development "*not immutable*" so requiring continuing reference to the case law, in particular of the ECtHR.
- (viii) At the same time changes are continually envisaged in the anti-doping regime laid down in the Code so providing an updated context in which to apply updated principles ditto¹¹.

7. I shall set out in order of the Articles on which my Advice is specifically sought and my observations thereon from a human rights perspective. I express my gratitude to Professor Ulrich Haas for his fruitful and constructive dialogue during my preparation of this Opinion.

8. I shall use, where convenient, the following acronyms:

ADRV = Anti-Doping Rule Violation

ASP = Athlete Support Personnel

CAS = Court of Arbitration for Sport

DCF = Doping Control Form

Fn = Footnote

ISL = International Standard for Laboratories

POI = Period of Ineligibility

PS = Provisional Suspension

NF = No Fault

NSF = No Significant Fault

Art = Article

Para = Paragraph

Sample Analysis

⁹ FNASS cit sup.

¹⁰ ditto.

¹¹ So with the aid of appropriate search engines, I have kept abreast of those developments. I also found a useful CAS publication dated 28 November 2023 SPORT AND HUMAN RIGHTS; and the Council of Europe's own publication summarising its case law on the same topic.

Article 6.2 and 6.3

1. The two key provisions in relation to the analysis of samples under the general rubric of doping control are these:

6.2 Purpose of Analysis of *Samples* and Assessment of Analytical Data

Samples and related analytical data or *Doping Control* information shall be analysed to detect *Prohibited Substances* and *Prohibited Methods* identified on the *Prohibited List* and other substances as may be directed by WADA pursuant to Article 4.5, or to assist an *Anti-Doping Organization* in profiling relevant parameters in an *Athlete's* urine, blood or other matrix, including for DNA or genomic profiling, or for any other legitimate anti-doping purpose.

In principle, all *Samples* collected shall be promptly analysed. However, the *International Standard* for Laboratories or the *International Standard* for Testing may identify specific conditions under which *Samples* may be collected and stored for possible future analysis.

Article 6.3 Research on *Samples* and Data

Samples, related analytical data and Doping Control information may be used for anti-doping research purposes, although no Sample may be used without the Athlete's written consent where the research involves re-analysis of the Athlete's Sample(s) for a purpose beyond Article 6.2¹². *Samples* and related analytical data or Doping Control information used for research purposes shall first be processed in such a manner as to prevent *Samples* and related analytical data or *Doping Control* information being traced back to a particular Athlete.¹³ Any research involving *Samples* and related

¹² [Comment to Article 6.3: For the avoidance of doubt, Athlete consent would not be required, by way of example, for a) Testing for the presence and/or Use of substances and methods that were prohibited at the time of Sample collection; b) Testing for non-Prohibited Substances or methods that are included in the WADA Monitoring Program (see Code Article 4.5); c) Testing for non-Prohibited Substances for results interpretation purposes (e.g. confounding factors of the "steroid profile", non-Prohibited Substances that share Metabolite(s) or degradation products with Prohibited Substances); d) Testing for non-Prohibited Substances or methods requested as part of a Results Management process by an Anti-Doping Organization with Results Management authority, a hearing body or WADA; e); the use of analytical data. Athlete consent would also not be required for Quality Assurance processes, including without limitation: a) improvement of existing analytical methods; b) development of new analytical methods for detection of presence or Use of substances or methods already prohibited at the time of Sample collection, or for substances included in the WADA Monitoring Program or targeted for results interpretation purposes; c) application of methods for detection of presence or Use of substances or methods already prohibited at the time of Sample collection to new biological matrices (e.g. blood, DBS, hair, saliva); d) use of Samples as reference collections/quality control samples; e) establishing reference population ranges or new/revised thresholds/Decision Limits for substances or methods already prohibited at the time of Sample collection or for other statistical purposes.]

¹³ [Comment to Article 6.3: As is the case in most medical or scientific contexts, use of Samples and related information for Quality Assurance, quality improvement, method improvement and development or to establish reference populations is not considered research. Samples and related information used for such permitted non-research purposes must also first be processed in such a manner as to prevent them from being traced back to the particular

analytical data or *Doping Control* information shall adhere to the principles set out in Article 19.

2. I am instructed that it was a combination of laboratories and athletes' representatives which were responsible for the insertion of a prompt analysis clause initially in the ISL, later in the Code itself. In my opinion, later analysis, as long as directed to the perceptible object of the Code, i.e. to purge any sport, to which it applies, of doping would obviously strengthen one or other aspect of doping control, i.e. deterrence from doping and protection of honest athletes and such use of samples would therefore satisfy the description of a legitimate anti-doping purpose. It follows that storage for such later analysis would also *be intra vires* the Code. **I would nonetheless respectfully suggest, for the purpose of confirmation and of clarification, that the phrase "anti-doping purpose" which appears both in Article 5.1 (testing) and Article 6.2 (analysis of samples) could usefully be inserted in the definitions section of the Code. I do not think that the adjective "legitimate" adds anything since there can be no scope within the Code for an illegitimate anti-doping purpose, and accordingly it should be deleted.**
3. In my view the first paragraph of Article 6.2 does not preclude, indeed actually permits, storage for potential future analysis. Therefore there is no need to treat the words "In principle" and "However", each governing a separate sentence of the second para of Article 6.2, as requiring that storage for future analysis should be an exception to the general rule for prompt analysis (though it could be construed as merely descriptive of the status quo, i.e. that samples used for detection of ADRV are in fact generally analyzed promptly). **I would myself recommend their deletion as serving no useful purpose.** But on no view can they, even if retained, sensibly be construed to prohibit storage of samples for future analysis, for this would be contrary to the purposes of the Code.
4. Article 6.2 is concerned with the analysis of samples for anti-doping purposes, both those taken as part of a test under Article 5 and those such as dried blood samples ("DBS") which may at present be taken with an athlete's consent on an irregular basis, though I am instructed that, in so far as further information becomes available as to the utility of DBS, provision may be made in future codes for their regular acquisition. DBS are more easily and less expensively capable of storage than liquid i.e. urine or blood samples; they require no refrigeration and lend themselves more readily to bulk storage.
5. If a test of a liquid sample raised suspicion but no proof of an ADRV but later a more sophisticated technology allows the sample to be retested and supports a *prima facie* case, DBS could be used to determine whether or not there was an ADRV. Such use of stored DBS could cut both ways from the athlete's perspective. It could exculpate but equally could inculpate. I have been provided with a hypothetical illustrative example which I quote almost verbatim: "*A urine sample is taken on 20.5 and tests positive for stanozolol at very low levels. The question is whether this is the end of an*

Athlete, having due regard to the principles set out in Article 19, as well as the requirements of the International Standard for Laboratories and International Standard for Data Protection.]

excretion tail or whether this is from contamination of a supplement. Assume DBS were taken from the athlete on 15.5. and 10.5. and on 25.5. If they all show low level for stanozolol this would be clear proof that the athlete was and is taking some contaminated supplements. If, however, the DBS on 25.5 shows lower levels of stanozolol than the one on 20.5 and the DBS on 15.5. and 10.5. much higher level for stanozolol, then this would be proof that this is an excretion tail of a therapeutic dose that could not possibly stem from a contaminated product.”

6. A further use to which stored samples (in this context more likely of urine or blood rather than DBS) could be put is when a question is raised as to whether some new substance taken by athletes, not previously classified as prohibited, should be so classified. A question of this kind was raised in relation to meldonium. As recorded, inter alia, in a “WADA Notice 4.11.2016”:

“Introduction

Meldonium is a non-specified substance prohibited at all times (in- and out-of-competition) since 1 January 2016. It had been added to the Monitoring Program on 1 January 2015.

The 2016 Prohibited List was adopted by the WADA Executive Committee on 16 September 2015.

The inclusion of meldonium on the 2016 Prohibited List concluded a long process conducted by the WADA List Committee between 2011 and 2015. This process, which included a review of the available scientific information and the generation of specific data (in particular via the 2015 Monitoring Program, which revealed a high prevalence of the use of meldonium by athletes and teams of athletes) ultimately led to the conclusion that meldonium met two of the three criteria listed at Article 4.3.1 of the World Anti-Doping Code (Code). In particular, claims of performance enhancement had been made by various authors, including the manufacturer of meldonium.”

This Notice itself explains the utility of stored samples in furtherance of the monitoring program set out in the Code Article 4.5.

7. None of this as regards Article 6.2 raises human rights concerns. It is concerned only with anti-doping purposes. Storage of samples for possible future analysis and the opportunity for analysis other than promptly are specifically provided for. The athlete’s consent is inherent in the athlete’s responsibilities under Article 21.1.1 and 21.1.2 of the Code and needs no extra form of expression. None of this, however, is true as regards Article 6.3 which is concerned with the use of samples for a purpose other than detection of an ADRV.
8. Article 6.3 refers back to Article 6.2. The only proposed amendment to the text of Article 6.3 is to substitute the succinct phrase “*for a purpose beyond Article 6.2*” for a longer list of purposes, an exercise in deletion, not addition. The requirement for an athlete’s written consent where the research involves re-analysis of an athlete’s sample for a purpose other than detection of an ADRV remains the same.

9. The question thus posed is whether a bare consent by an athlete to the use of his samples for an (unspecified) purpose beyond Article 6.2 (“a bare consent”) would suffice to render such re-analysis in accordance with the Code and immunize any person involved in such analysis immune from complaint on human rights grounds by an athlete whose sample was re-analyzed for such purpose.
10. I recognize that for such research purposes the sample must be processed so “*as to prevent it being traced back to a particular athlete*” i.e. anonymized (Article 6.3) and that the research involving such sample must “*adhere to the principles set out in Article 19*” (Research) but I am not confident that a bare consent would adequately prevent an athlete who had given such consent from claiming violation of his or her personal rights.
11. Examining the issue through the lens of GDPR¹⁴ - data protection - I note the following:
 1. Protecting individuals in the context of processing of personal data is one of the fundamental rights of the EU¹⁵.
 2. GDPR is certainly engaged in the circumstances set out above paragraphs 2, 5, 7 and 8 since (i) athletes are natural persons GDPR; (ii) information associated to bodily samples are personal data according to Article 4 (1) GDPR; (iii) the information associated with samples are processed (Article 4 (2) GDPR) by being collected, stored and retrieved.
 3. Consent of the athlete will avoid violation of his or her personal rights (Articles 6 (i) (a) and 9 (2) GDPR), but only if such consent is “*freely given, specific, informed and unambiguous*” (GDPR Article 4.11 Recital 3.2 Guide Ch 1 paras 7.1-7.2 Commentary pp. 195-215).
 4. To be informed for this purpose “*the data subject should at least be aware of the purposes of the processing*”. Recital 42 reflecting the principles of fairness and transparency (GDPR article 5(1)(c) Guide Ch I para 7.2.3 Commentary p. 210).
 5. In my view this key element is presently missing. “[A] *purpose beyond Article 6.2*” is wholly unspecific.
 6. The consent must also be “*freely given*” which may not be existing where this is an imbalance of power in relation to the body which requires consent (Guide ch. I Commentary pp04-205¹⁶).
12. The authors of the commentary opine that. “*Anonymised data no longer qualify as personal data since they can no longer be linked to a data subject therefore they do*

¹⁴ I have found particularly helpful Guide to the GDPR Maciej Gawronski 2019 Wolters Kluwer (“Guide”) and GDPR Article by Article Commentary ed Indra Spieker and ors.2023 Hart, Beck Sowon (“Commentary”)

¹⁵ GDPR Recital 1 Art 8(1) of the EU Charter of Fundamental Rights. Guide Ch 1 1.1

¹⁶ see too [ISO 27701 Recitals Guidelines](#) “7. A person must supply a ‘freely given’ consent, distinct from other related matters, and s/he should be offered a ‘genuine choice’ between accepting or refusing to provide it without having to suffer any negative consequences” (*Guidelines on Consent* and recital [42](#)).

not fall within the scope of GDPR Commentary” p.163 [...]; to like effect is the Guidance given by the UK Information Commissioner: “In data protection law, anonymous information is data that does not relate to an identified or identifiable person (i.e. data that is not personal data). Data protection law does not apply to anonymous information”.

13. But this does not in my view provide a complete answer to the question. The GDPR does not cover comprehensively the protection of a natural person’s personality, including privacy rights. This actually appears to be recognized in Article 6.3, which requires an Athlete’s written consent while simultaneously requiring that the samples to be re-analysed be anonymised. Moreover, it is inherent in the concept of consent in such a context that it should be informed, i.e. that the person whose consent is required know exactly to what he or she is consenting. This piece of common sense is expressly recognized in the common law: “*You cannot consent to a thing unless you have knowledge of it.*”, *Re Caughey, ex p Ford (1876) 1 Ch D521* at 528, CA, per Jessel MR.
14. I here identify a further concern. The use of an athlete’s samples for research is provided for in three instances: in a footnote to Article 6.2 Fn 42; in Article 6.3; and in Article 19 (research). The principle of legal certainty applicable to the Code is vouched for by the classic case *USA Shooting and Quigley v UIT CAS 94/129* para 34 “The fight against doping is arduous and it may require strict rules. But the rule makers and rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de practice over the course of many years of a small group of insiders (“the Quigley principles”). Not every sentence of the Quigley principles applies to every context, including the present, in which I quote them; but the thrust of the principles does. Indeed, they reflect what the ECtHR has said on numerous occasions about the rule of law: “The law must be... adequately accessible and foreseeable that is formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct” *AR v UK* Application no 6033/19 Judgment 1 July 2025 para 60.
15. I cannot see any virtue in this triplication. Fn 42 in so far as concerned with research can only look forward to Article 6.3 and is to that extent superfluous and an apt candidate for deletion. Article 6.3 itself absorbs the principles of Article 19. Article 19 contains at para 19.2 the best definition of the kind of research contemplated. There is the potential for confusion between the two types of Research. The current DCF has a box in which the athlete can signify consent to research; but, as long as there remain what I may term Article 6.3 research and Article 19 research, an athlete who ticks it would not be adequately informed to what he/she is consenting. **It would in my view be preferable at least that the consent sought in the form or by other written mechanism could at least refer expressly to the research described in Article 19.2, if Article 6.3 is removed, or to both Articles if both are retained. It is for the Code Drafting Team to decide whether to adopt this suggestion and, if**

so, how to redraft to best achieve it.¹⁷

16. Another proposed amendment is to Fn. 41. The Comment to Article 6.3 reads as follows: “For the avoidance of doubt, Athlete consent would not be required, by way of example, for a) Testing for the presence and/or Use of substances and methods that were prohibited at the time of Sample collection; b) Testing for non-Prohibited Substances or methods that are included in the WADA Monitoring Program (see Code Article 4.5); c) Testing for non-Prohibited Substances for results interpretation purposes (e.g. confounding factors of the “steroid profile”, non-Prohibited Substances that share Metabolite(s) or degradation products with Prohibited Substances); d) Testing for non-Prohibited Substances or methods requested as part of a Results Management process by an Anti-Doping Organization with Results Management authority, a hearing body or WADA; e); the use of analytical data. Athlete consent would also not be required for Quality Assurance processes, including without limitation: a) improvement of existing analytical methods; b) development of new analytical methods for detection of presence or Use of substances or methods already prohibited at the time of Sample collection, or for substances included in the WADA Monitoring Program or targeted for results interpretation purposes; c) application of methods for detection of presence or Use of substances or methods already prohibited at the time of Sample collection to new biological matrices (e.g. blood, DBS, hair, saliva); d) use of Samples as reference collections/quality control samples; e) establishing reference population ranges or new/revised thresholds/Decision Limits for substances or methods already prohibited at the time of sample collection or for other statistical purposes”.
17. Again, I respectfully question the need for such an elaborate footnote especially to Article 6.3. I am persuaded that WADA would be able to justify the list as all referring to the use of samples for anti-doping purposes as provided for by Article 6.2; but that is the subject matter of Article 6.2 and **if a definition of anti-doping purposes (as I recommend) is provided, that ought, in my view to suffice.**
18. There is an additional matter which, in my view, for completeness may require to be addressed (raising an issue anterior to and other than the one of the form of consent) in the light of case law of the ECtHR; see *S and Marper v UK* Applications no’s 30562/04 and 30566/04 judgment of 4 December 2008, which concerned, inter alia the indefinite retention of cellular samples from persons charged with but acquitted of serious crimes. The ECtHR held inter alia that “cellular samples constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals” (para 68). ... In addition to the highly personal nature of cellular samples, they contain much information about an individual including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives (para 72) ... Given the nature and amount of personal information contained in cellular samples, the retention per se must be regarded as interfering with the right to private life or the individuals

¹⁷ The Conditions of Participation for NOC Delegation members Games of the XXXIII Olympiad Paris 2024, if not directly in point, provide by way of example, that a written consent, when required, can refer to a properly defined set of circumstances

concerned.¹⁸ That only a limited part of the information is actually extracted or used by the authorities through DNA and that no particular detriment is caused in a particular case does not alter this conclusion (para 73). ... In the great majority of the Contracting States with functioning databases, samples and DNA profiles derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge (para 108). ... The Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence with which the person was suspected (para 119)¹⁹... The retention of cellular samples is particularly intrusive given the wealth of genetic and health material contained therein. Such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny (para 120) ... In conclusion the Court finds that the blanket and indiscriminate nature of the powers of retention of the ... cellular samples...of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests at stake and that the respondent state has overstepped any acceptable margin of appreciation in the present case. Accordingly the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or absence of such data" (para 125).

19. I note that (i) the Code in Article 17 provides for a statute of limitations for ADRVs or violations of Article 10.14.1 of 10 years after the violation occurred. While this would not of itself preclude the retention of samples for research purposes under Article 6.3 in support of the Monitoring Program or indeed under Article 19, (ii) the similar retention period of 10 years is provided for in the International Standard for Laboratories para 5.3.7.2 so that indefinite retention is not contemplated. I note too that the anonymisation of the samples retained under Article 6.3 and/or Article 19 (see Article 19.6) also differentiates the scenario from that in the Marper type of case and renders extremely remote in the real world a challenge by an athlete to a decade's retention of the athlete's sample.

20. Nonetheless, **I advise that such 10 year retention must be capable of reasonable justification by WADA** were it ever to be the subject of such challenge on human rights grounds.

FOR THE ABOVE REASONS, SUBJECT TO ACCEPTANCE OF MY VARIOUS SUGGESTIONS IN PARAGRAPHS 15 AND 17, IN MY VIEW THE PROPOSED AMENDMENTS TO ARTICLES 6.2, 6.3 AND THE COMMENTS THERETO DO NOT VIOLATE HUMAN RIGHTS PRINCIPLES.

¹⁸ See to same effect Dragan Petrovic v Serbia application no.75229/10 judgment 14 April 2020 para 69 para 79

¹⁹ The domestic law was amended so as to put time limits on the retention of samples see Thomas v United Kingdom application no.24344/08 decision 18 May 2017 paras 12020

Mandatory Provisional Suspension

Article 7.4.1

1. Prior to the proposed amendment, ADOs had alternative procedural obligations in relation to **a mandatory** Provisional Suspension i.e.

To provide either:

A provisional hearing before its imposition

Or

A provisional hearing promptly after its imposition

Or

An expedited final hearing after its imposition.

All subject to a right for an expedited appeal, which is also accorded to the ADO if the decision of the hearing body is **not** to impose a provisional suspension²⁰.

2. I am instructed that the perceived defects of the above system were (i) the excessive time taken of which the case of Valieva CAS 2023/A/9451&9455&9456 provided a classic example and (ii) variation in the operation thereof by different ADOs, only some reacting positively to the demand by athlete's lawyers for more time to put their client's case.
3. The proposed amendments were intended accordingly (i) to speed up the process and (ii) to achieve greater uniformity.
4. The key feature of the proposed amendment is the abolition of the need for a provisional hearing **before** the imposition of a provisional suspension (Article 7.4.1) which may be, however lifted if it is demonstrated to the Results Management Authority or a hearing body that "*adjudication of the alleged violation is likely to result(ed) in a finding of No Fault or Negligence under Article 10.5, a reprimand with no period of ineligibility under Article 10.6.1.2 (Contaminated Source), or the time already served by the Athlete under the Provisional Suspension would exceed the period of ineligibility to be imposed for the anti-doping rule violation*" ("the lifting requirements").
5. That abolition is to some extent mitigated by the new Article 7.4.1.
6. Despite the plethora of mitigating features to be found in Article 7.4.1, it is still the case that athletes subject to a provisional suspension but later found to be innocent will, albeit for a short time, suffer the certain irremediable consequences set out in the

²⁰ There was also provision for an optional provisional suspension based on various ADRVs but I am not instructed that this had any defects.

enhanced Article 10.14 (status during ineligibility or provisional suspension discussed below), and potentially an irremediable damage to reputation.

7. If, however, a provisional suspension could not be imposed for that short period on an athlete later found guilty of the ADRV for which it was imposed, the athlete's ability to compete during that period would disadvantage unfairly the athlete's competitors²¹, albeit the athlete's results during that period could retrospectively be set aside.
8. I note and endorse the observation in Sport Law and Practice Lewis and Taylor 4th ed. at c4.26 "*the power or even the obligation) to impose an interim suspension prior to any finding that an anti-doping rule violation has been committed is a controversial one, especially given the harm that may be done to an athlete's reputation*".
9. The key issue to which I now turn is whether the proposed amendment is compatible with the rules of natural justice and/or the athlete's human rights.
10. It is inherent in the concept of natural justice, reinforced by Article 6 (1) of the ECHR, that *prima facie* a person faced with a decision that could adversely affect its rights is entitled to a hearing before the decision is taken.
11. The principle is not, however, an inflexible one and is subject to exceptions in certain circumstances. By way of example, one such exception is urgency: "*sometimes urgent action may have to be taken on grounds of public health or safety*" (Wade and Forsyth Administrative law 12th ed p. 421).
12. In my view though the matter is finely balanced, I consider that the factors in favour of the amendment outweigh those against it and that the jurisprudence, in particular of CAS supports my view.
13. The factors in favour can be itemised as:
 - The need to reinforce the public faith in and perception of the integrity of sporting competition.
 - The need to protect innocent athletes from the consequences, financial and reputational, of participating against an opponent who may have cheated.
 - The fact that a provisional suspension is not a finding of guilt and does not accordingly violate the presumption of innocence.
 - The need to deter a guilty athlete from impeding a swift adjudication.
14. The factors in favour, in my view, predominate over the factors against:
 - The irreparable harm to the athlete, in particular temporary loss of ability to compete but only during a short period when it cannot be said that s/he would have succeeded.

²¹ A factor always to be borne in mind see e.g. Vernaiev v GEF and FIG CAS 2021/A8210 at para 71 referring to "*the hypothesis of unfair prejudice to competitors who have avoided the ingestion of substances that transgress the legislated standard.*"

- A damage to reputation which could be cured by publicity given to a subsequent acquittal.
15. Case law on provisional suspensions in the doping context supports my view; see CAS Legkov v FIS; CAS 2017/A/4968 Abdelrahman v Egyptian NADO; CAS OG 16/23 para 7.11. In *Modhal v BAF Ltd* 22 July 1999 (unreported) in the House of Lords, then the United Kingdom's apex court, Lord Hoffman implicitly approved the prioritisation by the IAAF (now World Athletics) of the "*wider interests of sport over those of an individual*" again in a doping context.
 16. I do not find anything in the jurisprudence of the ECtHR, which has been sympathetic to doping controls²², to undermine my view; QX v SSHD [2024] UKSC 26 provides, albeit concerned with a different subject matter, a succinct summary of the relevant principles as expounded by the ECtHR: "*60. Article 6 of the Convention guarantees the right of access to justice, with the necessary safeguards to ensure the fairness of the hearing. It is a key human right, not only because access to justice is a pillar of the rule of law, but also because it is the means by which a wide range of other human rights are made enforceable. As the European Court of Human Rights ('the European Court') has said, in a democratic society the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of article 6 (1) would not correspond to the aim and the purpose of that provision: Delcourt v. Belgium (1970) 1 EHRR 355, para 25*" However, the ECtHR does not say that there can never be restrictions. More importantly an updated Westlaw UK survey of the case law including AI research (but confirmed by access to actual reported cases) shows that there are exceptions to the general rule that a person potentially affected by an administrative decision affecting his civil rights must be given a prior opportunity to make representations and have them considered before the decision is taken.
 17. It is notable that analogous provisions in the anti-doping regulations of World Athletics which have been in force for several years and have never been challenged in their current form: they provide (Rule 7.4.4) for the imposition of a mandatory provisional suspension (at the time of the first notice to the athlete via the Notice of Allegation) without a hearing but give the athlete the opportunity to show cause why the provisional suspension should be lifted in a written submission to the AIU within 7 or 14 days.²³
 18. The mitigation alluded to in paragraph 5 above also tells in favour of the proposed amendment, though on my analysis is not strictly required (subject only to the inequality of treatment of athletes on the one hand and international regulatory bodies on the other to be discussed under Article 13).
 19. That "likely", the word deployed in Article 7.4.1 is a concept with two possible meanings dependent on the context is well established not only by English dictionaries

²² See e.g. FNASS cit sup.

²³ The matter is considered internally and the AIU's decision not to lift a provisional suspension upon review of the athlete's written submission is subject to an appeal to CAS (save there is no right of appeal against the AIU's decision not to lift a provisional suspension where the athlete has asserted that the violation is likely to have involved a Contaminated Product).

e.g. Strouds Judicial Dictionary of Words and Phrases 11th ed., but by a variety of common law cases' e.g. [*Cream Holdings Ltd v Banerjee* [2003] EWCACiv 103, [2003] 2 All ER 318 at [12], [54]–[61], [69]–[76], per Simon Brown and Sedley LJ 76]. I am satisfied that “likely” is quite capable of bearing its milder meaning described by those judges as “*something which is reasonably or realistically possible*” As they also noted this construction has ample judicial support in other contexts, citing cases from Australia, Canada and New Zealand found in another well known works of reference”. (ditto)

20. That the word “likely” is accorded the milder of its two potential meanings in this part of the Code appears from the Fn. 53 comment to Article 7.4.1: “*In this Article ‘likely’ means a well-founded assertion. The standard is somewhat less than balance of probability but substantially more than mere possibility or plausibility; the assertion must be supported by a good evidentiary foundation including concrete evidentiary elements*”. Whether the milder or less mild version is applied usually depends upon the context, usually statutory, in which the word is used; but in the context of the Code no such exercise is required; the definition chosen which is perfectly permissible, speaks for itself.

FOR THE ABOVE REASONS IN MY VIEW THE ABOLITION OF THE NEED FOR A HEARING BEFORE IMPOSITION OF A MANDATORY PROVISIONAL SUSPENSION DOES NOT PER SE VIOLATE HUMAN RIGHTS PRINCIPLES.

Sanctions on Individuals

Article.10.2ff.

1. The context to the proposed amendments is itself helpfully explained in the following explanatory amendments:

Article 10.2 provides the framework for determining the period of Ineligibility for violations of Articles 2.1 (Presence), 2.2 (Use or Attempted Use) or 2.6 (Possession). This determination is based on several variables such as: the substance or method involved (i.e., non-Specified Substances/non-Specified Methods, Specified Substances/Specified Methods, or Substances of Abuse); whether the Athlete or other Person committed the anti-doping rule violation intentionally; whether the context of the ingestion, Use or Possession was unrelated to sport performance; and whether the Athlete can establish how the Prohibited Substance entered their system.

Article 10.2.1 addresses the period of Ineligibility for violations of Article 2.1 or 2.2 involving non-Specified Substances and non-Specified Methods. Article 10.2.2 addresses the period of Ineligibility for violations of Article 2.1 or 2.2 involving Specified Substances or Specified Methods. Article 10.2.3 addresses the period of Ineligibility for violations of Article 2.1 or 2.2 involving Substances of Abuse. Article

10.2.4 addresses the period of Ineligibility in special circumstances involving criteria for Therapeutic Use Exemptions. Article 10.2.5²⁴ provides the definition of “intentional” for purposes of Article 10.2.

2. The amendments to Article 10.2 allowing for reductions to the *prima facie* sanction of 4 years ineligibility for violations of Article 2.1 or 2.2 involving non-specified substances or methods, i.e. other than those more likely to have been consumed for purpose other than enhancement of sports performance (Article 4.4.2) fall into two categories, those allowing for a reduction to three years, and those allowing for a reduction to 2 years, common to each being that there was no intention to enhance sports performance.
3. In the former category is the proposed new Article 10.2.1.2 allowing for a reduction to three years where the athlete cannot prove lack of intent but can prove that the source was unrelated to sports performance. This POI is **not** subject to elimination or reduction for NF or NSF.
4. In the latter category is proposed new Article 10.2.1.1 where the Athlete can establish how the prohibited substance entered their system and that the violation was not intentional. This POI **is** subject to elimination or reduction for NF or NSF.
5. Neither of the above amendments raise any potential human rights issues other than proportionality, which is addressed below.
6. More potentially controversial is the proposed Article 10.2.1.3, which provides **that** *“Where the Athlete cannot establish how the Prohibited Substance entered their system, but in exceptional cases can establish to the comfortable satisfaction of the decision making body that, based on reliable analytical evidence, then the period of Ineligibility may be reduced to two (2) years.⁶¹ This period of Ineligibility is not subject to elimination or reduction under Article 10.5 or 10.6”*.
7. The background to this particular proposed reduction to the POI is as follows:
 - (i) Given that, unlike in cases where the Athlete relies on the defences of NF or NSF respectively to eliminate or reduce the POI for which, by virtue of the definitions of those concepts, it is always necessary for the Athlete to establish how the prohibited substance entered his (or her) system, that is not made *a sine qua non* in cases where the charge involves intentional not careless use.²⁵
 - (ii) The critical issue then becomes how it is possible for an athlete to prove lack of intent **without** demonstrating how the prohibited substance entered the athlete’s system.

²⁴ Actually Article 10.2.6 which defines intent to embrace both knowledge and manifestly disregarding a significant risk of an ADRV.

²⁵ A suggestion by representatives of the Council of Europe to make proof of source a *sine qua non* of the defence of no intent in the 2021 Code was rejected. See The European Roots of the Lex Sportiva ed Duval Kruger Lindholm (“Lex Sportiva DKL”) at p.167 J Exner.

(iii) It is already accepted that in principle this should exceptionally be possible, but there is a concern that in some previous cases the “*narrowest of corridors*” (a phrase retained in Fn. 65 to Article 10.2.1.3) through which an athlete must pass to establish that exceptionality has been unduly widened. See for example *Lawson v World Athletics* or *CAS/2019/A/6313 Jack v Swimming Australia CAS 2020/A/5759 & 2020/A/7580*, a majority decision).

8. Accordingly the proposed new Article 10.2 overall seeks to be more specific in the definition of the “*narrowest of corridors*” in Article 10.2.1.3 with its own explanatory comment and Article 3.2.6 which provides that for the purposes of Article 10.2.1.3 “*only reliable analytical evidence establishing that the antidoping rule violation was not compatible with the intentional (as described in Article 10.2) ingestion or use of a Prohibited Substance shall be sufficient to justify a reduction in the period of ineligibility otherwise applicable*” with examples given in a comment as to what would or would not suffice. The new concept increases the standard of proof and restricts the kind of evidence that can be put forward.
9. I can see no objection on human rights grounds to the lowering of the sanction under Article 10.2.1.3 from 3 years (originally proposed) to 2 years (currently proposed) since in my view if an athlete manages to slip through the narrowest of corridors and prove that he/she did not act intentionally, then the sanction ought not to be higher than 2 years.
10. **I do, however, venture a respectful criticism of the drafting involved in reaching that benign outcome.**
 - The first is the reference to “*exceptional cases*” in draft Article 10.2.1.3. The criterion for establishing absence of intent to the appropriate standard of comfortable satisfaction of the decision-making body is “*reliable analytical evidence*”. While it is true that the cases where the athlete can establish such absence of intent by means of such evidence will be “exceptional”, that description adds nothing and is potentially distracting since it may suggest that even where such evidence would lead to such conclusion there was a further criterion to be met of ill-defined content which, in my view, would not be sensible and cannot be intended.
 - The second is the complexity of the definition of the actual criterion, i.e. of how the reliable analytical evidence would disprove intent to be found in the comment to Article 10.2.1.3. itself. I accept that a comment is, in the circumstances, a better method than an enlargement of the main text to explain the point, but I would omit the first two sentences which refer to a now abandoned term of art, and the last sentence which expressly merely confirms that analytical evidence (which remains a *sine qua non*) and allows a hearing body to consider non analytical evidence, but to what purpose is unclear given that only analytical evidence would suffice to disprove intent. What would remain would in fact relate to the key issue, i.e. the kind of analytical evidence that can or cannot be relied upon to trigger the reduction contemplated by this Article.

- The third is the duplication involved in Article 3.2.6 with which its comment seems to serve no additional purpose to that in the comment to Article 10.2.1.3.
11. These defects, if such they be, do not in themselves raise human rights issues (other than possibly as infringing a principle of legal certainty *USA Shooting and Quigley v UIT CAS 94/129 para 34 cit sup.*) since the proposed revised Article is athlete friendly rather than athlete adverse.
 12. Turning to the pervasive issue of proportionality²⁶, Judge Costa considered a sanction of 4 years then increased from 2 years “*moderate even when considering the consequences thereof for the athlete*” Costa 2013 pp7-8 “*moderate in relative terms and not in its outcome excessive*” ditto p. 9. It is noteworthy that at the time he expressed that view the “narrow corridor” jurisprudence had not been created.
 13. It may accordingly be inferred that the relaxation for 4 to 3 years, a fortiori from 4 years to 2, in the circumstances contemplated would have met with Judge Costa’s approval as being itself proportionate.
 14. I myself would take the same view. The balance to be struck between imperatives of clean sport and fairness to the athlete always calls for an exercise of judgment and I have seen nothing that persuades me that the judgment made as to the proportionality of what is proposed is incompatible with principles of human rights. Both lowerings are favourable to the athlete and any objections on grounds of excessive leniency would not be based on human rights; neither unduly infringe the rights of the athlete’s innocent competitors.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED AMENDED ARTICLE 10.2 DOES NOT VIOLATE HUMAN RIGHTS PRINCIPLES

Substances of Abuse

Article 10.2.3

1. The proposed amendment for substances of abuse, defined in the Code as substances more frequently abused in society outside of the context of sport “*is to lower the range of sanctions for ingestion in competition from 6 months (previously 1 year) to 2 years*” depending on the circumstances of the case which are set out non-exhaustively in the comment “*to include, for example, the specific nature of the Use or Possession, the type and quantity of the Prohibited Substance detected, the proximity in time between the ingestion and the Athlete’s actually competing, the potential benefit (actual or perceived) to the Athlete of the ingestion in relation to the Athlete’s performance in the Competition, the Athlete or other Person’s level of anti-doping experience and education, and other fault-related considerations that might*

²⁶ See discussion of the influence of the concept of proportionality on the 2021 Code in Lex Sportiva DKL at pp153-158.J Exner.

not otherwise satisfy the requirements for application of Article 10.5”.

2. I am instructed that the purpose of the amendment is to have greater flexibility in the POI sanctions for ingestion, use or possession of such substances (always where established by the athlete to be unrelated to sports performance)²⁷ given, for example, the inherent difference between marijuana or cocaine which would presumptively require a different response to each.
3. In my view such increase in discretion is not problematic from the perspective of human rights principles; indeed, if anything, it is an improvement from such perspective, not least because the athlete in many, if not most, cases, taking such substances intentionally so as to disable him or her, in principle, from relying on Articles 10.5 or 10.6 which require, in different degrees, absence of fault.
4. I have also been invited to comment on whether the difference in terms of POI as to substances of abuse between out of competition and in competition, the former being *prima facie* lower than the latter is irrational or raises human rights issues. As to this I observe that such difference is present, if to a greater degree, in the 2021 Code, without, as far as I am aware, any legal challenge made.
5. I agree that, given the Code definitions of competition, in competition, and out of competition, whether an athlete's sanctions related to substances of abuse falls into in competition or out of competition category may be perceived as somewhat arbitrary, given the narrowness of the definition of “in competition”, but once the Code recognizes a distinction between the two periods, as it does see e.g. Articles 2.6, 4.2.1, 5.2.1 and Article 10.2.2, for, I would assume, given its history, good and sufficient reason, there will be such issues of perception wherever the line is drawn which can only be eliminated by abandonment of the line itself.
6. I observe that it is frequently the case that where rules prescribe different consequences depending on which side of a temporal line a person subject to those rules falls, some persons will only just, whereas others will by some margin, fall on the wrong side of the line, but both groups will be ordinarily treated the same. I repeat that the problem, if such it be, was already present in the 2021 Code without again, as far as I am aware, any legal challenge made.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED 2027 CODE AS REGARDS SUBSTANCES OF ABUSE INVOLVES NO VIOLATION OF HUMAN RIGHTS PRINCIPLES

Therapeutic use exemptions

Article 10.2.4

²⁷ An addict would not be taking the substance to which she/he was addicted to enhance sport performance but rather because of his or her addiction.

1. The proposed addition in relation to a defense of therapeutic use to an allegation of an ADRV is as follows:

Therapeutic Use Exemption Criteria

10.2.4.1 *“Notwithstanding any other provision in Article 10.2, where the Athlete can establish that the presence, Use or Attempted Use or Possession met each of the criteria in Article 4.2 of the International Standard for Therapeutic Use Exemptions (except for the need to show there was no reasonable permitted Therapeutic alternative) at the time the presence, Use or Attempted Use or Possession occurred, then the period of ineligibility shall be two (2) months. The period of ineligibility established in this Article 10.2.4.1 is not subject to any reduction based on any provision in Articles 10.6, 10.7.1 or 10.7.2”.*

2. In my view this raises no human rights issues. From the athlete’s perspective it is both benign and an improvement on the *status quo ante*. It mitigates the effect of failing to meet the temporal qualifications on obtaining a TUE, and concentrates whether or not the Athlete at the relevant time, i.e. when tested positive was entitled to a TUE, irrespective of when s/he claimed it (this should also be the focus of a NADO which is, of course, not a possessor itself of human rights).
3. The reduction of the POI to 2 months rather than its complete elimination is to incentivize the athlete and to claim a TUE at the earlier opportunity. Without it few, if any, athletes would do so. I can envisage an argument that to impose any POI on an athlete *ex hypothesis* not guilty of an ADRV is disproportionate, but in my view given the incentivizing purpose of the 2 months POI, I consider that such argument would fail.
4. The comment to Article 10.2.4.1 in Fn. 70 *“For purposes of this Article the term ‘Therapeutic’ shall be defined in accordance with the definition contained in the International Standard for Therapeutic Use Exemptions”* is entirely technical and from the human rights perspective neutral.

FOR THOSE REASONS IN MY VIEW THE PROPOSED 2027 AMENDMENT AS REGARDS THERAPEUTIC USE EXEMPTIONS INVOLVES NO VIOLATION OF HUMAN RIGHTS PRINCIPLES

Benefit of Admissions for POIs

Article 10.7.2

1. The proposed Article of the 2027 Code provide as follows:

10.7.2 Period of Ineligibility Reduction for Anti-Doping Rule Violations Based on Early Admission and Acceptable of Sanction

No later than twenty (20) days after receiving notice of an anti-doping rule violation charge, an Athlete or other Person who accepts that the violation is established and accepts all asserted Consequences (including, for the avoidance of doubt, the start date of any period of Ineligibility will receive a twenty-five percent (25%) reduction from the period of Ineligibility asserted in the notice of anti-doping rule violation charge . Where the asserted period of Ineligibility is more than four (4) years but less than lifetime, the reduction shall be one (1) year. Where the asserted period of Ineligibility is lifetime, there shall be no reduction under this Article 10.7.2.

Where the Athlete or other Person receives a reduction in the period of Ineligibility under this Article 10.7.2, no further reduction in the asserted period of Ineligibility shall be allowed under any other Article. If the Athlete or other Person does not accept the reduction in the period of Ineligibility within the time period established in this Article, then this Article, including but not limited to, what the reduction under this Article would or should have been, may not be raised in any hearing or appeal.

2. From the perspective of the ADO, the key advantage is securing a sanction without expending the resources and time needed to prosecute the case through the full disciplinary and hearing process. The discount to incentivize admission is proportionate. A comparator, i.e. a person who makes no admission but is subsequently found to have committed an ADRV and is sanctioned with a longer POI accordingly cannot reasonably complain of unfair discrimination.
3. Both the present and the proposed position allow for a reduction of a POI for certain ADRVs based on early admission and acceptance of sanction (“the facility”).
4. The availability of the facility is at present available only to athletes or other persons notified by an ADO of a potential ADRV which carries an asserted POI of 4 or more years, i.e. aggravated circumstances as defined in present and proposed Article 10.4 and accepts the asserted POI so receiving a one-year reduction.
5. Under the proposed amendment the availability of this facility has been extended to any athlete or other person who may within 20 days after notification voluntarily admit the violation and accept a 25% reduction from the POI asserted in the notice save that (i) where the POI is more than 4 years but less than lifetime, the reduction shall be of 1 year and (ii) where the asserted POI is lifetime there shall be no reduction under this article. As no equivalent provision existed in the past, because the facility only existed for aggravated circumstances (i.e. fixed sanctions). the new rule has to deal with (i) and (ii), because now the facility applies to any ADRV (i.e. also to POI that carry lifetime), which it does so as follows:

10.7.2 Period of *Ineligibility* Reduction for Anti-Doping Rule Violations Based on Early Admission and Acceptable of Sanction

No later than twenty (20) days after receiving notice of an anti-doping rule violation charge, an *Athlete* or other *Person* who accepts that the violation is established and accepts all asserted *Consequences* (including, for the avoidance of doubt, the start date of any period of *Ineligibility* will receive a twenty-five percent (25%) reduction from the period of *Ineligibility* asserted in the notice of anti-doping rule violation charge⁸². Where the asserted period of *Ineligibility* is more than four (4) years but less than lifetime, the reduction shall be one (1) year. Where the asserted period of *Ineligibility* is lifetime, there shall be no reduction under this Article 10.7.2.

Where the *Athlete* or other *Person* receives a reduction in the period of *Ineligibility* under this Article 10.7.2, no further reduction in the asserted period of *Ineligibility* shall be allowed under any other Article⁸³. If the *Athlete* or other *Person* does not accept the reduction in the period of *Ineligibility* within the time period established in this Article, then this Article, including but not limited to, what the reduction under this Article would or should have been, may not be raised in any hearing or appeal.

6. A further part of the proposed amendment disables the athlete who has not made use of the facility within the prescribed time. Then the Article including what a reduction thereunder would or should have been, cannot be raised on any appeal (see the 2nd para of proposed Article 10.7.2).
7. The perceptible purpose of the Article both in its present and proposed form is to resolve a case without a hearing, thereby saving both time and money. It was graphically described to me as “a quick and dirty solution” to potential problems of delay and cost inherent in a charge brought to a hearing.
8. Whether this solution offends in some way against justice or the human rights of an athlete who makes use of the facility in my view raises an issue of principle, not of degree, and is applicable to the Article both in its present and proposed form.
9. From the perspective of the ADO the advantages are again obvious see paras 2 and 7 above and the time limit accorded to the athlete to make use of the facility itself and denial of appeal to raise the Article in any appeal itself prevents an athlete from playing the system by delaying his choice. Furthermore, the athlete or other person guilty of an ADRV can only benefit from the rapid disposal of his or her case by admission.
10. The only concern expressed to me is whether any admission given can per se be stigmatized as coerced rather than voluntary because an innocent athlete might admit guilt because of the benefits to be gained by admission.
11. In my view such concern would not be justified. It is a familiar feature of criminal law that an admission of guilt can lead to a reduction in sentence. The English Sentencing Council Information Sheet states “If you plead guilty you will get a reduction in your sentence. To qualify for the maximum level of reduction (one third), a defendant must plead at the first court hearing. Defendants who plead later will serve longer sentences

than those who accept their guilt and plead at this early stage. The Council's guideline, Reduction in Sentence for a Guilty Plea, sets out how the level of reduction is determined. The purpose of the guideline is to encourage those who are going to plead guilty to do so as early in the court process as possible."

12. English law is also well summarized in Archbold Criminal Law and Practice 26th ed., the criminal practitioners' handbook, states as follows:

General right to reduction in sentence

5A-150 *As a general principle, an offender who pleads guilty may expect some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted by the jury on a plea of not guilty. Section 73 (SC of the Sentencing Act 2020) does not confer a statutory right to a discount, which remains matter for the court's discretion, as is indicated by s.52(7) (§ 5A-207). It remains the policy of the Court of Appeal (and of the Sentencing Council for England and Wales) however, to encourage pleas of guilty.*

Rationale for reduction in sentence

5A-151 *The system wishes to encourage guilty pleas*

Such pleas give rise to significant benefits, including a saving of court time and public money and the sparing of witnesses from having to attend trial to give evidence.

5A-156 *See the discounts recommended in the Sentencing Council's guideline (§ SI-11 in the Sentencing Guidelines Supplement). The 2017 guideline is more structured and rigid than its predecessor but maintains the general approach of a sliding scale from one-third at the first reasonable opportunity.*

5A-184 *The Sentencing Council's guidance on reductions in sentence for guilty pleas (§ SI-11.3 in the Sentencing Guidelines Supplement) is explicit **about the rationale underlying the reduction being that it is in the nature of a reward for keeping the machinery of justice moving and the cost of administering the criminal justice system down.** (my emphasis)*

13. Though it would in theory be open to a defendant who pleaded guilty to challenge his admitted finding of guilt on the basis that that very existence of the plea bargain facility was itself a source of unfair pressure by seeking, under section 4 of the Human Right Act 1998, a declaration of incompatibility with Article 6 ECHR or to complain directly, subject to the usual preconditions, to the ECHR of a breach of that Article, no defendant has to the best of my knowledge done so successfully or indeed at all.
14. The Sentencing Academy also states ***"The practice is near universal: all common law countries – including the US, Canada, Australia, and New Zealand – award sentence reductions if the defendant pleads guilty. The practice has a clear statutory basis in English law. Plea-based sentence reductions have long been a part of sentencing in the nations of the United Kingdom."***
15. As I record later, when dealing with Case Resolution Agreements, plea bargaining is pervasive in European nations and has passed muster with the ECtHR. The rationale

for a reduction in sentence for a guilty plea whether spontaneous or the result of a plea bargain is identical. The different procedures are routes to the same end.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED ARTICLE 10.7.2 AS REGARDS REDUCTION OF SANCTIONS FOR ADMISSIONS DOES NOT VIOLATE HUMAN RIGHTS PRINCIPLES

Benefit of Informing for POIs

Article.10.7.3

1. Article 10.7.3 provides:

An Anti-Doping Organization with Results Management responsibility for an anti-doping rule violation may, prior to an appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the Consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority, professional disciplinary body or sport integrity authority which results in:

- (i) The Anti-Doping Organization discovering facts constituting, or bringing forward a case involving, an anti-doping rule violation or violation of Article 10.14.1 by another Person; or*
- (ii) A criminal or disciplinary body discovering facts constituting, or bringing forward a case involving, a criminal offense or breach of professional rules committed by another Person providing Substantial Assistance is made available to the Anti-Doping Organization with Results Management responsibility; or*
- (iii) WADA discovering facts constituting, or bringing forward a case involving non-compliance with the Code, International Standard or Technical Document against a Signatory, WADA-accredited laboratory or Athlete passport management unit (as defined in the International Standard for Laboratories); or*
- (iv) with the approval of WADA, a criminal or disciplinary body discovering facts constituting, or bringing forward a case involving, a criminal offence or the breach of professional or sport rules arising out of a sport integrity violation other than doping.*

After an appellate decision under Article 13 or the expiration of time to appeal, an Anti-Doping Organization may only suspend a part of the otherwise applicable Consequences with the approval of WADA and the applicable International Federation.

The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on [the value](#) of the Substantial Assistance provided by the Athlete.

⁸⁴ *[Comment to Article 10.7.3: The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport. Except as provided in Articles 10.2.3.1 and 10.2.3.2 the otherwise applicable period of ineligibility as determined under Articles 10.2, 10.3, 10.6, 10.7.1 and 10.7.2 may be suspended as provided in Articles 7.3 and 7.4.]*

2. The perceptible aim of Article 10.7.3 is to encourage those who have committed a doping offence themselves to assist in discovering or establishing violations of the Code by others as a *quid pro quo* for obtaining, elimination or reduction of their own POI.
3. This will increase the evidence available to prosecuting authorities, and pro tanto diminish the burden upon them in fulfilling their beneficial functions. As the comment to Article Fn. 84 states “*the co-operation of Athletes, Athlete Support Personnel and other persons who acknowledge their mistakes and are willing to bring anti-doping violations to light is important to clean sport*”.
4. The key issue is whether its proposed expansion
 - (i) Is overall too generous to the guilty athlete
 - (ii) Leads to unequal treatment between the guiltier and the less guilty athlete (“Unequal Treatment”)?
 - (iii) Gives too much discretion to WADA and/or NADOs (“Excess Discretion”)?
 - (iv) Provides for appropriate or inappropriate discounts (“Appropriate Discounts”)?

I shall deal with these topics in order.

(i) Excess Generosity?

5. In my view the fact that the Article enables whistleblowers, themselves guilty of an ADRV, to lessen the penalty which would otherwise be imposed upon them is an inevitable concomitant of the policy. I presume that it has been reasonably estimated that the policy will result in a greater volume of offenders to be inculcated than would be inculcated in the absence of such policy, even if it means that the whistleblowers can buy themselves out of a *prima facie* appropriate sentence.
6. The fact that persons convicted of a criminal offence can be given credit in terms of their sentences if they provide useful evidence to prosecuting authorities is a well-established feature in common law jurisdictions, e.g. in England and Wales Sentencing act 2020 section 70.

7. In my view the approach explored in the leading cases applying the section or its analogous predecessors is not conditioned by some national idiosyncrasy, but reflects a sensible policy rooted in practical considerations of the public interest as articulated in the criminal context by judges of the highest seniority as well as distinction...

8. As recorded on Archbold,

“5A-113 The primary source of guidance is now the decision in [Royle \[2023\] EWCA Crim 1311](#); [\[2024\] Crim. L.R. 191](#). There the court provided the following guidance:

Why do informers receive a reduction in sentence?

5A-113a The practice of reducing the sentence which would otherwise have been imposed on an offender to reflect the fact that they had provided information and assistance to the police has a purely pragmatic justification. The public interest in rewarding assistance to the authorities and protecting sources has long been recognized: Royle.

9. The policy promulgated in the criminal sphere has no less virtue in the disciplinary sphere and serves the same pragmatic purpose. Indeed, given that, as I am instructed, WADA is so heavily dependent on informers, the justification for the policy is, if anything greater than in the criminal sphere for prosecutors who may have or can obtain information by other means.

10. As to the quantum of reduction I revert to Archbold

How great a reduction should be made?

In [King \(1985\) 7 Cr. App. R. \(S.\) 227](#); [\[1985\] Crim. L.R. 748](#), the Lord Chief Justice stated: the reduction to be made “... will vary, as [counsel] submitted to us, from about one half to two thirds reduction according to the circumstances ...”.

in [A \[1999\] 1 Cr. App. R. \(S.\) 52 \(at \[56\]\)](#); [\[1998\] Crim. L.R. 757](#): “The extent of the discount will ordinarily depend on the value of the help given and expected to be given. Value is a function of quality and quantity.” The information given is unreliable, vague, lacking in practical utility or already known to the authorities, no identifiable discount may be given or, if given, any discount will be minimal. If the information given is accurate, particularised, useful in practice, and hitherto unknown to the authorities, enabling serious criminal activity to be stopped and serious criminals brought to book, the discount may be substantial. Hence little or no credit will be given for the supply of a mass of information which is worthless or virtually so, but the greater the supply of good quality information the greater in the ordinary way the discount will be. Where, by supplying valuable information to the authorities, a defendant exposes himself or his family to personal jeopardy, it will ordinarily be recognised in the sentence passed. For all these purposes, account will be taken of help given and reasonably expected to be given in the future.” It followed that the value of the assistance given was likely to be a crucial factor in the court’s decision as to whether a reduction in the range of half to two-thirds was justified: [Royle](#). The Court in [Royle](#) stated that the following factors may be relevant to the decision as to what reduction was appropriate in a

particular case:

(i) The quality and quantity of the information provided, including whether it related to trivial or to serious offences (the risk to the informer generally being greater when the criminality concerned is more serious);

(ii) The period of time over which the information was provided.

(iii) Whether it assisted the authorities to bring to justice persons who would not otherwise have been brought to justice, or to prevent or disrupt the commission of serious crime, or to recover property

(iv) The degree of assistance which was provided, including whether the informer gave, or was willing to give, evidence confirming the information he had provided;

(v) The degree of risk to which the informer has exposed himself and his family by providing the information or assistance.

(vi) The nature and extent of the crime in which the informer has himself been involved, and the extent to which he has been prepared to admit the full extent of his criminality.

(vii) Whether the informer has relied on the same provision of information and assistance when being sentenced on a previous occasion, or when making an application to the Parole Board: an informer can generally only expect to receive credit once for past information or assistance, and for that reason the text should, where applicable, state whether particular information and assistance has been taken into account in imposing a previous sentence;

(viii) Whether the informer has been paid for the assistance provided and, if so, how much are complementary means of showing offenders that it was worth their while to over-generous to offenders. I revert to this further below under topics (iii)and(iv).

(ii) Unequal Treatment

11. I appreciate that there may be, as put to me, a disparity between a person in Lance Armstrong's position who deliberately takes prohibited substances and can buy himself out with a good story to tell about others involved in doping thereby assisting the prosecuting authorities and that by such means may gain a $\frac{3}{4}$ of reduction so getting less than the *prima facie* two years for the person, a contamination victim, who can rely only on NSF but has no such story to tell, though could gain a reduction by early admission of his or her own offence under Article 10.7.1 and 10 7.2.

12. But the key point is that on its face the provision does not directly discriminate between the two persons mentioned; it applies equally to persons guilty of an ADRV. The potential discrimination is in classic terminology only indirect; and so, in principle, can be justified by reference to the overall policy.

(iii) Excess Discretion?

13. I regard the degree of discretion accorded to WADA and/or NADOs as a point in favour of the policy and not objectionable in human rights terms. I draw attention to the fact

that in the criminal sphere, judges are vested with a power of appreciation analogous to, if not identical with, discretion.

(iv) Appropriate Discounts?

14. I do not consider the range of discounts contemplated by the Article available into different situations to be inherently unfair or unreasonable or in violation of anyone's human rights.

15. I end by noting an accurate AI overview of the practice of using informants:

"the concept of reducing a sentence for providing information to law enforcement, often referred to as "snitching" or being an "informant," is not unique to the UK and is found in various jurisdictions worldwide. However, the specific procedures, extent of reduction, and legal frameworks surrounding this practice vary significantly between countries and even within different legal systems in the same country."

16. The universality but variety of the practice suggests that to impugn it in any particular context would face formidable difficulties. I detect none here.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED ARTICLE 10.7.3 AS REGARDS REDUCTION OF SANCTIONS FOR INFORMERS DOES NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES

Case Resolution Agreements ("CRA")

Article 10.8

1. The proposed Article 10.8 provides as follows:

Where the Athlete or other Person admits an anti-doping rule violation after being confronted with the anti-doping rule violation by an Anti-Doping Organization and agrees to Consequences acceptable to the Anti-Doping Organization and WADA, at their sole discretion, then: (a) the Athlete or other Person may receive a reduction in the period of Ineligibility based on an assessment by the Anti-Doping Organization and WADA of the application of Articles 10.1 through 10.7 to the asserted anti-doping rule violation, the seriousness of the violation, the Athlete or other Person's degree of Fault and how promptly the Athlete or other Person admitted the violation; and (b) without prejudice to the Athlete or other Person's right under Article 10.13.1, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the agreed-upon period of Ineligibility going forward from the earlier of the date the Athlete or other Person accepted the imposition of a sanction or the effective date of a Provisional Suspension which was subsequently respected by the Athlete or other

Person.²⁸ The decision by WADA and the Anti-Doping Organization to enter or not enter into a case resolution agreement, and the Consequences agreed to by WADA, the Anti-Doping Organization and the Athlete or other Person, including the starting date of the period of Ineligibility, are not matters for determination or review by a hearing body and are not subject to appeal under Article 13.

If so requested by an Athlete or other Person who seeks to enter into a case resolution agreement under this Article, the Anti-Doping Organization with Results Management responsibility shall allow the Athlete or other Person to discuss an admission of the anti-doping rule violation with the Anti-Doping Organization subject to a Without Prejudice Agreement.²⁹

2. The purpose of a Case Resolution Agreement again is to save the time and expense involved in taking an ADRV to a hearing. It benefits both the ADO and the Athlete for the same reasons as set out in the discussion under Article 10.7.2 and the rubric Admissions paras 2 and 7.
3. The first difference is in timing. Under this Article an admission can precede any formal notice from the ADO rather than being made only after such notice, the second is the fact that it deals with agreements (sic), i.e. a species of plea bargain rather than spontaneous admission. The third is the complexity of the consequences where such an agreement is entered into.
4. I am instructed that the instances in which this facility is used under its previous name Results Management Agreements have been sparse. But I am not concerned with its utility or whether in the same way Article 10.7.2 and Article 10.8 could be in some way amalgamated, but only whether the proposed amendment violates the human rights of an athlete who enters into it.
5. Plea Bargaining is well established in England and Wales. Jowitt Dictionary of English Law 6th ed states:

The English Court of Appeal has implicitly accepted the reality of plea bargaining, at least to the extent of laying down strict guidelines to govern conversations between counsel and the trial judge regarding the penalty that might be imposed were the accused to plead guilty to particular charges and/or on an agreed set of facts: R. v Turner [1970] 2 W.L.R. 1093 The Court of Appeal is also concerned to ensure that, if the accused does elect to plead guilty, that plea is voluntary and fully-informed. The obvious risk is that the accused will feel pressured into accepting the "best deal on

²⁸ [Comment to Article 10.8: For purposes of calculating the "one half of the period of eligibility going forward" the agreed upon POI shall first be reduced before any period by which the POI has been backdated.]

²⁹ [Comment to Article 10.8.2: Any mitigating or Aggravating Factors set forth in this Article 10 shall be considered in arriving at the Consequences set forth in the case resolution agreement, and shall not be applicable beyond the terms of that agreement.

In some countries, the imposition of a period of Ineligibility is left entirely to a hearing body. In those countries, the Anti-Doping Organization may not assert a specific period of Ineligibility for purposes of Article 10.8.1 nor have the power to agree to a specific period of Ineligibility under Article 10.8.2. In these circumstances, Articles 10.8.1 and 10.8.2 will not be applicable but may be considered by the hearing body. Provided, however, that any application of Article 10.8.2 must be subject to WADA's approval.]

offer", possibly resulting in an innocent person pleading guilty. The legislature has now lent its implicit support to plea bargaining by facilitating a more formalised system of sentence canvass (now see [Criminal Justice Act 2003 s.144](#)), Niceties of language aside, the underlying policy aim is to promote efficient pleas, saving precious judicial resources and sparing complainants and witnesses the uncertainty and trauma of a contested trial, which after many months of waiting on tenterhooks can be cancelled on the day at the whim of the accused. These are undoubtedly laudable objectives, but critics worry that a more formalised system of sentencing canvass and discounts ratchets up the pressure to plead and consequently heightens the risks of injustice. The Crown Prosecution Services Guidelines: Sentencing – Overview, General Principles and Mandatory Custodial Sentences says as follows: "Advance indication of sentence: The procedure by which a defendant can obtain an indication as to the sentence to be imposed upon a plea of guilty is governed by the decision in *R v Goodyear* [2005] EWCA Crim 888. At the defendant's request, the court can indicate the maximum sentence it would impose were the defendant to plead guilty at that stage of the proceedings. Proceedings should be held in open court. In its judgement in *Goodyear*, the Court of Appeal stated that Defence counsel is personally responsible for ensuring that their client is advised that, 'any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal'. Prosecution counsel's duties include, firstly, a duty to remind the Court that it should not provide an indication in the absence of an agreed basis of plea or a finding by the Court that a Newton hearing is not required; secondly, a duty to enquire whether the Court is in possession of all the relevant evidence and the offender's antecedents; thirdly, the Court stated – 'If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where [they] would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney-General to refer any eventual sentencing decision as unduly lenient is not affected.' It is clear from the authorities that the conduct of Prosecution counsel is highly relevant to whether the Court of Appeal is likely to interfere with a sentence referred to it as unduly lenient. The Court of Appeal will scrutinise the circumstances in which the indication was given and, where prosecution counsel has encouraged the plea and the offender has not been warned as to the Attorney's powers, giving rise to a legitimate expectation that the case will not be referred, and subsequently acts to their detriment by pleading guilty, it may decline to interfere. The procedural provision in relation to the making of an application for an advance indication as to sentence is found in [rule 3.23 of the Criminal Procedure Rules 2020 Part 3](#) as amended.

6. Though again, it would in theory be open to a defendant who pleaded guilty to challenge his admitted finding of guilt on the basis that that very existence of the plea bargain facility was itself a source of unfair pressure by seeking, under section 4 of the Human Right Act 1998, a declaration of incompatibility with Article 6 ECHR or to complain directly, subject to the usual preconditions, to the ECtHR of a breach of that

Article, no defendant has to the best of my knowledge done so successfully or indeed at all.

7. Importantly, plea bargaining is not a common law eccentricity. In *Natsvlishvili and Togonidze v. Georgia*: (Application no. 9043/05) the ECtHR carried out a comprehensive survey of the practice in courts of states subject to the ECHR:

“59. Out of thirty Council of Europe member States studied for the existence of criminal procedures similar in nature to Georgia’s plea-bargaining system, no equivalent mechanisms exist in the following three countries – Azerbaijan, Greece and Turkey. A small number of other countries (namely Austria, Denmark and Portugal), while not having passed legislation establishing plea bargaining as a legal concept within their legal systems, are nonetheless familiar with plea bargaining or similar processes in practice.

60. Austria, Belgium, France and Liechtenstein have procedures presenting elements of plea bargaining leading to the discontinuation of criminal proceedings, while Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Malta, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom (England and Wales) have established plea-bargaining processes resulting in a criminal conviction.

61. In addition, Austria, the Czech Republic, Hungary, Montenegro, Russia and Serbia provide for the opportunity to have a more lenient sentence imposed, charges dropped or criminal proceedings discontinued if a defendant cooperates with the authorities and thereby contributes to the resolution of the criminal case.

62. Plea bargaining in Council of Europe member States mostly takes the form of sentence bargaining, this being the case in Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Liechtenstein, Malta, Moldova, Montenegro, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom. Charge bargaining can be found in Hungary, Serbia, Slovenia, Spain, Switzerland and the United Kingdom. The survey shows that sentence bargaining is a more common practice in Council of Europe States than charge bargaining. This aspect is closely linked to the principle of legality providing less leeway for the prosecution to amend and drop charges.

63. Plea agreements leading to a criminal conviction are, without exception, reviewed by a competent court. In this sense, courts have an obligation to verify whether the plea agreement has been reached in accordance with the applicable procedural and substantive rules, whether the defendant entered into it voluntarily and knowingly, whether there is evidence supporting the guilty plea entered by the defendant and whether the terms of the agreement are appropriate.

64. As a result of the survey, it can be established that the court dealing with the matter generally has an obligation to examine the case file before deciding on whether to approve or reject the plea agreement and has to ascertain that evidence provided in the file supports the guilty plea entered or the confession made by the defendant. Conversely, in Italy, the court is not required by law to examine the evidence or to

certify that there is a prima facie case against the accused, and in Switzerland the court is also not automatically obliged to examine the evidence. Russian legislation does not provide for an explicit obligation on the courts to examine the evidence in plea-bargaining cases. Such an obligation could arguably nonetheless be inferred from the obligation on the court dealing with the case to verify whether all conditions for the approval of the plea agreement have been met.

65. In rarer instances, courts are required by law, at least under certain circumstances, to order and examine additional evidence not already contained in the case file in case of expedited proceedings. In this regard, German courts retain their obligation to order evidence aimed at uncovering any aspect of the case that might be relevant for their decision, even if a plea agreement has been entered into. In the United Kingdom, if facts are disputed, the court must be invited to hear evidence to determine the facts, and then sentence on that basis.

66. In most countries surveyed, plea agreements are entered into by the prosecution and the defendant, and subsequently reviewed by a court. In this scenario, the courts in principle have the power to approve or reject the plea agreement but not to modify its terms. In Bulgaria courts are allowed to propose amendments to plea agreements they are requested to consider. However, such amendments need to be accepted by the defendant, the defence counsel and the prosecutor. In Germany, Romania and to some extent in the United Kingdom, the terms of the agreement are defined by the competent court (as opposed to being based on a prior agreement between the prosecution and the defence).

67. Based on the survey, it can be confirmed that the plea-bargaining process leads to expedited trial proceedings in every country that has such processes in place. Procedural safeguards and judicial guarantees are therefore affected in the event of a plea agreement being entered into. To counteract these effects, a number of safeguards are nonetheless in place. 68. For example, the representation of the defendant by counsel is obligatory in Bulgaria, the Czech Republic, France (for any court appearance upon a prior admission of guilt (comparution sur reconnaissance préalable de culpabilité)), Hungary, Malta, Moldova, Russia, Serbia and Slovenia. Other countries surveyed do not have special rules requiring representation by defence counsel in cases of plea bargaining, thus the regular rules relating to legal representation apply.

69. Entering into a plea agreement is conditional on a confession by the defendant in Austria and Liechtenstein (in both States only the concept of “diversion” exists, which leads to the discontinuation of criminal proceedings), in Bosnia and Herzegovina, the Czech Republic, Estonia, France, Germany, Hungary, Malta, Moldova, Montenegro, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom. Italy, on the other hand, constitutes the exception: a plea agreement does not necessarily need to include an admission of guilt on the part of the defendant.

70. However, in nearly all countries surveyed, with the apparent exception of Romania, the defendant’s guilty plea can only be used for the purposes of the plea

agreement. Should the plea agreement not be entered into or be rejected by the court, the guilty plea or the confession of the defendant cannot be used against him.

71. Courts decide on the plea agreement at a hearing in the following countries: Austria, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Malta, Moldova, Montenegro, Romania, Russia, Serbia, Slovakia, Spain, Switzerland and the United Kingdom. The presence of the defendant at the hearing is explicitly required by law in, for example, Bulgaria, Hungary, Montenegro, Romania, Russia, and Slovakia. On the other hand, the presence of the defendant is not necessarily required in Italy.

72. In the majority of the countries surveyed, the right to appeal will be restricted after a plea agreement has been entered into. There seems to be a full waiver of the right to appeal in the event of a plea agreement (at least when the plea agreement has been endorsed by the court) in Slovenia. Entering into a plea agreement results in the restriction of the right to appeal in Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Hungary, Italy, Malta, Moldova, Montenegro, Russia, Serbia, Slovakia, Spain, Switzerland and Ukraine. The right to appeal remains unaffected in Austria, France, Germany, Liechtenstein, Poland, Romania and the United Kingdom.”

Ignoring the variety of ways in which the concept of plea bargaining can be introduced or accepted within a legal system of member states of the Council of Europe, it can accordingly be said with confidence that its existence is the rule, not an exception.

8. Turning to the law, in the same case the ECtHR said:

*87. At the outset and in reply to the first applicant’s empirical arguments about the viability of the early Georgian model of plea bargaining, the Court reiterates that it cannot be its task to review whether the relevant domestic legal framework was, per se, incompatible with the Convention standards. Rather, this matter must be assessed by taking into consideration the specific circumstances of the first applicant’s criminal case. The Court further notes that it can be considered a common feature of European criminal-justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty or nolo contendere plea in advance of trial or for providing substantial cooperation with the investigative authority (see the comparative legal study, paragraphs 62-75 above; see also, in this connection, Slavcho Kostov v. Bulgaria, no. 28674/03, § 17, 27 November 2008, and Ruciński v. Poland, no. 33198/04, § 12, 20 February 2007). **There cannot be anything improper in the process of charge or sentence bargaining in itself (see, mutatis mutandis, Babar Ahmad and Others v. the United Kingdom (dec.), nos. 24027/07, 11949/08 and 36742/08, 6 July 2010). In this connection the Court subscribes to the idea that plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.***

88. The Court considers that where the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, this amounts, in substance, to the waiver of a number of procedural rights. This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards of his or her own free will (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 135, 17 September 2009). The Court observes in this connection that as early as 1987 the Committee of Ministers of the Council of Europe called upon the member States to take measures aimed at the simplification of ordinary judicial procedures by resorting, for instance, to abridged, summary trials (see paragraph 54 above). However, it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest (see, amongst other authorities, *Scoppola*, cited above, § 135-36; *Poitrinol v. France*, 23 November 1993, § 31, Series A no. 277-A; and *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII).

89. The Court thus observes that by striking a bargain with the prosecuting authority over the sentence and pleading no contest as regards the charges, the first applicant waived his right to have the criminal case against him examined on the merits. However, by analogy with the above-mentioned principles concerning the validity of such waivers, the Court considers that the first applicant's decision to accept the plea bargain should have been accompanied by the following conditions:

(a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and

(b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.

90. In this connection, the Court notes, firstly, that it was the first applicant himself who asked the prosecuting authority to arrange a plea bargain. In other words, the initiative emanated from him personally and, as the case file discloses, could not be said to have been imposed by the prosecution; the first applicant unequivocally expressed his willingness to repair the damage caused to the State (see paragraphs 14, 18, 22 and 27 above). He was granted access to the criminal case materials as early as 1 August 2004 (see paragraph 21 above). The Court also observes that the first applicant was duly represented by two qualified lawyers of his choosing (compare *Hermi*, cited above, § 79). One of them met with the first applicant at the very beginning of the criminal proceedings, and represented him during the first investigative interview of 17 March 2004 (see paragraphs 15-16). The two lawyers ensured that the first applicant received advice throughout the plea-bargaining negotiations with the prosecution, and one of them also represented him during the judicial examination of the agreement. Of further importance is the fact that the judge of the Kutaisi City Court, who was called upon to examine the lawfulness of the plea bargain during the hearing of 10 September 2004, enquired of the first applicant and his lawyer as to whether he had been subjected to any kind of undue pressure during the negotiations with the prosecutor. The Court notes that the first applicant explicitly

confirmed on several occasions, both before the prosecuting authority and the judge, that he had fully understood the content of the agreement, had had his procedural rights and the legal consequences of the agreement explained to him, and that his decision to accept it was not the result of any duress or false promises (see paragraphs 27, 28 and 31 above).

91. The Court also notes that a written record of the agreement reached between the prosecutor and the first applicant was drawn up. The document was then signed by the prosecutor and by both the first applicant and his lawyer and submitted to the Kutaisi City Court for consideration. The Court finds this factor to be important, as it made it possible to have the exact terms of the agreement, as well as of the preceding negotiations, set out for judicial review in a clear and incontrovertible manner.

92. As a further guarantee of the adequacy of the judicial review of the fairness of the plea bargain, the Court attaches significance to the fact that the Kutaisi City Court was not, according to applicable domestic law, bound by the agreement reached between the first applicant and the prosecutor. On the contrary, the City Court was entitled to reject that agreement depending upon its own assessment of the fairness of the terms contained in it and the process by which it had been entered into. Not only did the court have the power to assess the appropriateness of the sentence recommended by the prosecutor in relation to the offences charged, it had the power to reduce it (Article 679-4 §§ 1, 3, 4 and 6). The Court is further mindful of the fact that the Kutaisi City Court enquired, for the purposes of effective judicial review of the prosecuting authority's role in plea bargaining, whether the accusations against the first applicant were well founded and supported by *prima facie* evidence (Article 679-4 § 5). The fact that the City Court examined and approved the plea bargain during a public hearing, in compliance with the requirement contained in Article 679-3 § 1 of the CCP, additionally contributed, in the Court's view, to the overall quality of the judicial review in question.

93. Lastly, as regards the first applicant's complaint under Article 2 of Protocol No. 7, the Court considers that it is normal for the scope of the exercise of the right to appellate review to be more limited with respect to a conviction based on a plea bargain, which represents a waiver of the right to have the criminal case against the accused examined on the merits, than it is with respect to a conviction based on an ordinary criminal trial. It reiterates in this connection that the Contracting States enjoy a wide margin of appreciation under Article 2 of Protocol No. 7 (see, amongst others, *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II). The Court is of the opinion that by accepting the plea bargain, the first applicant, as well as relinquishing his right to an ordinary trial, waived his right to ordinary appellate review. That particular legal consequence of the plea bargain, which followed from the clearly worded domestic legal provision (Article 679-7 § 2), was or should have been explained to him by his lawyers. By analogy with its earlier findings as to the compatibility of the first applicant's plea bargain with the fairness principle enshrined in Article 6 § 1 of the Convention (see paragraphs 92-95 above), the Court considers that the waiver of the right to ordinary appellate review did not represent an arbitrary restriction falling foul of the analogous requirement of reasonableness contained in Article 2 of Protocol No. 7 either (for the general principle concerning the correlation between the fairness

requirements of these two provisions, see *Galstyan v. Armenia*, no. 26986/03, § 125, 15 November 2007).

94. *In the light of the foregoing, the Court concludes that the first applicant's acceptance of the plea bargain, which entailed the waiver of his rights to an ordinary examination of his case on the merits and to ordinary appellate review, was undoubtedly a **conscious and voluntary decision**. Based on the circumstances of the case, that decision **could not be said to have resulted from any duress or false promises made by the prosecution**, but, on the contrary, was accompanied by sufficient safeguards against possible abuse of process. Nor can the Court establish from the available case materials that that waiver ran counter to any major public interest.* 95. *It follows that there has been no violation of either Article 6 § 1 of the Convention or Article 2 of Protocol No. 7."*

9. As the passages emphasised above make clear, there is nothing offensive to human rights per se in a defendant's acceptance of a plea bargain as long as the decision was conscious, voluntary and not the result of duress or false promises.

10. Jowitt Dictionary of English Law 6th ed) summarizes the global picture thus:

"With different procedural architecture in place, for example in those continental jurisdictions still embracing a principle of mandatory prosecution, plea bargaining should not be possible, at least not consistently with legal orthodoxy (though in fact some kind of bargaining, more or less implicit" or sub rosa, appears to be endemic to all legal systems, since there are never enough resources to prosecute every case to trial: see Jörg-Martin Jehle and Marianne Wade (eds)³⁰.

11. Given that WADA has adopted an adversarial system to determine whether an ADRV has been committed (Article 8), in my view it would be more incongruous if it did not allow for a plea bargain. The pragmatic considerations in favour, adumbrated in various cases and commentary above are at least as strong in the context of disciplinary as in the context of criminal proceedings. I emphasize that failure by a defendant to make an admission does not expose the athlete to a penalty (which would involve coercion); the athlete simply benefits from making an early admission (which would not involve coercion).
12. There is a necessary caveat; while the facility of a plea bargain may not itself represent unacceptable pressure on the innocent to plead guilty, care must be taken to ensure that in any particular case it has not become so - e.g. if the ADO were to threaten adverse consequences if the athlete or other person refused the facility. In my view the solution would be to procure from the defendant who entered into such plea

³⁰ See for a global picture Stephen Thaman "Plea Bargaining, Negotiating Confessions and Consensual Resolution of Criminal cases" 2007. As Ali Emrah Bozbayındyr writes *"In our times, virtually in every criminal justice system, trial-avoidance mechanisms of various sorts carry the day. Indeed, such mechanisms are spreading across the globe"* E&P 2024.28(3)203-235 at p 203

bargain pursuant to a CRA a written acceptance to the effect that s/he did so voluntarily.

FOR THE ABOVE REASONS IN MY VIEW, SUBJECT TO MY POINT IN PARAGRAPH 12, ARTICLE 10.8 AS REGARDS REDUCTION OF SANCTIONS BY WAY OF AN AGREEMENT, DOES NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES

Status during ineligibility or provisional suspension

Article 10.14

1. Article 10.14 prohibits Participation during a POI or PS (“PS”)³¹(note too fn 95).
2. The proposed amendments have extended the scope of prohibition to participation in certain activities during those periods.
3. The first group extends subsisting prohibitions
 - (i) covers competitions or activities³² (other than authorized anti-doping education or rehabilitation programmes) organized or funded by a Signatory, a Signatory’ s member, or such member ‘s member (i.e. within the pyramid so covered).
 - (ii) covers competitions or training activities organized by any professional league or any international or national event (i.e. outside the pyramid).
 - (iii) covers competition or training activities funded by a government agency e.g. by the military.
4. The second group adds new prohibitions:
 - (iv) covers the provision of sports-related activities.
 - (v) covers forms of service within the pyramid, i.e. constituted by Signatories.
 - (vi) covers receipt of compensation for service within the pyramid other than as a mere employee.
5. Sanctions for violation of these prohibitions are contained in Article 10.14.3, chiefly an additional POI.
6. Additionally financial support during a POI will be withheld pursuant to Article 14.4.
7. The questions posed for my consideration are threefold:

³¹ See also proposed Article 21.2.8 which prohibits a person subject to a POI from providing Athlete Support Personal Services to any Athlete or other person who is bound by rules adopted pursuant to the Code.

³² ‘Activity is defined in a comment which also gives examples which fall outside the prohibition.

1. Are the new prohibitions sufficiently transparent?
 2. Are the new prohibitions excessive?
 3. Are the consequences of breach of the new prohibitions disproportionate?
8. As to Question (1). While the Quigley criteria see CAS 94/129 para 34 are not directly applicable since athletes subject to a POI are *ex hypothesi* not innocent athletes, the need for clarity of regulations whose breach carries sanctions is unqualified and subject to no exceptions. In my view, that as it may, the new prohibitions are sufficiently transparent, especially having regard to the comments in Fns 96, 97 and 98.
 9. As to Question (2); persons subject to a POI stand on a different footing to those subject to a provisional suspension; the former have already been found guilty of an ADRV, and the latter not. However the equation of those two sets of persons was already enshrined in the 2021 Code without, as far as I am aware, challenge on human rights grounds; and the issue is whether the perceptible purpose of segregating persons who might later be found guilty of an ADRV from activities or holding posts in which they may encounter others free from such potential taint justifies the restrictions. In my view, it does as can be seen by envisaging a scenario in which such restrictions did not exist and the person who would have been subject to them is later to have been found guilty of an ADRV.
 10. It is clearly the case that the provisions in Article 10.14. (iii) and/or (v) could affect persons whose training takes place inside a sports facility rather than outside one more than persons for whom the reverse is the case e.g. it may ordinarily affect sportspersons such as football players who would usually train in a stadium rather than long distance runners who would usually train outside one. However, as to this the boundary between the two sets of persons is blurred inasmuch as the former set of persons **could** train outside a facility and the latter set of persons **could** train within one. More importantly, in my view, the extent to which there may in certain circumstances be disparate impact upon different sportspeople subject to a POI or PS does not of itself make the impact on those affected as distinct from those not so affected excessively or unjustifiably discriminatory having regard to the perceptible purpose of the prohibitions.
 11. A proposal for (vi) prohibiting a person subject to a POI or PS from serving as a mere employee within the pyramid e.g. as a groundsman - though this was also present in the 2021 Code (see comment to Article 10.14.1 Fn. 77). This seemed to me to be a prohibition too far, given that the UN Declaration of Human Rights (though not the ECHR) includes a right to work and it is not easy to see how, for example, a groundsman or typist could somehow risk infecting others with a doping virus even if later found guilty of an ADRV and even if the interference was merely a suspension, not a dismissal, it would still be an interference albeit a lesser one. The contrast with what remains prohibited under this subparagraph - i.e., persons in senior positions within the pyramid or those in positions involved with doping control is instructive. While I acknowledge the argument of those who would wish to close off all contact with all doping connected persons, even those subject only to a provisional

suspension, that to treat a groundsman in the same way as a Minister involved in a doping scandal would be a false equation. I note that article 10.14 (vi) allows compensation to be paid by bodies there identified to such an employee. Such relaxation of restrictions favourable to athletes or other persons cannot involve violation of their human rights since it is favourable to them.

12. It is clearly the case as regards (iii) and/or (v) impose restrictions on persons who might otherwise be entitled to use a training facility of a kind therein defined e.g. a swimming pool or running track in the exercise of their ordinary civic rights, and subject to such conditions as the owner of the facility might impose e.g. as to payment of an entry fee, but in my view this cannot invalidate either (iii) and/or (v). But though I acknowledge the concerns of those who think otherwise and that this would be *ultra vires* and therefore automatically disproportionate, in my view the restriction therein is the price those persons pay for their choice to participate in a sport subject to the Code and exposure to sanctions for breach of its rules.
13. I do not consider the sanctions for breach of Article 10.14.1 as set out in Articles 10.14.3 and 10.14.4 excessive or disproportionate. As regards Article 10.14.3 the adding of a similar POI to that violated during ineligibility seems precisely proportionate, especially when capable of downward adjustment depending upon of degree of fault and the (elastic) other circumstances, the lesser sanction for violators of the prohibition against participation during provisional suspension seems also proportionate in absolute as well as comparative terms. The financial sanction under Article 10.14.4 seems nicely judged assuming that, as would appear on a literal reading, the withholding subsists only during the POI and not beyond.
14. There is a further ancillary issue arising out of Article 20.3.5 which comes in a section dealing with the rights and responsibilities of International National Federations and obliges it:

“Subject to applicable law to not knowingly employ a person in any position involving doping control (other than authorized anti-doping education or rehabilitation programs) who is suspended or is serving a period of ineligibility under the Code or, if a person was not bound to rules adopted pursuant to the Code, who has directly and intentionally engaged in conduct within the previous (6) years which would have constituted a violation of anti-doping rules if Code compliant rules has been applicable to such a person (my emphasis).
15. The first part of that Article is in harmony with Article 14.1.(v); the second emphasized is not inasmuch as it goes further than anything in Article 14.1. In its own right, it seems justifiable - a rogue doctor involved in anti-doping activities should reasonably be outlawed from employment by an IF, unless, which would seem unlikely, given that the restriction only affects a limited area of employment, that outlawing contradicts applicable law.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED ARTICLE 10.14 AS REGARDS STATUS DURING INELIGIBILITY OR PROVISIONAL SUSPENSION DOES NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES

Results Management Appeals

Article 13

1. The issue for consideration relates **not** to the decisions subject to appeal **nor** to the differentiation in the route for appeal for those involving international athletes or events (exclusively to CAS) and those involving other athletes or other persons (to a national body as provided in NADOs rules Article 13.2.2) nor to the content or form of appeals (Art 13.1.1 and 13.1.2) but to the persons entitled to appeal (Art 13.2.3), and here **not** in respect of an appeal involving international-level Athletes or International Events (where there is parity of right between the Athlete or other person, who is the subject of the decision being appealed and other listed interested parties) but **only** in relation to appeals involving Other Athletes or Other *Persons*.

2. As to such *Appeals Involving Other Athletes or Other Persons* Article 13.2.2 provides as follows:

In cases under Article 13.2.2, the parties having the right to appeal to the appellate body shall be as provided in the National Anti-Doping Organization's rules but, at a minimum, shall include the following parties: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games, and (f) WADA.

3. As to the above first paragraph, **no** problem arises.
4. However, the same Article provides in its second paragraph:

*For decisions rendered under Article 13.2.2 by a national-level appellate body, **only** WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall have the right to appeal the decision to CAS³³....*

5. Herein lies the problem. What was arguably obscure in the 2021 Code is now crystal

³³ [Comment to Article 13.2.3.2: In such cases, the respondent(s) shall have the right to cross-appeal.]

Not only is the Athlete, unlike the anti-doping community, denied a second bite at the cherry, but s/he is denied an opportunity to put his or her case to the world sport apex court i.e. CAS.

clear. There is a disparity of right between the Athlete and Other Person on the one hand and for what I shall call in, the convenient shorthand of Professor Ulrich Haas, the international anti-doping community (WADA, IOC, relevant IF) on the other.

6. This is intentional is emphasized by the comment 108 to Article 13: *“The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal. Anti-doping decisions by Anti-Doping Organizations are made transparent in Article 14. Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions.”* **Note that the definition of interested Persons and organizations with a right to appeal under Article 13 does not include Athletes, or their National Federations, who might benefit from having another competitor disqualified.”** (my emphasis).
7. If the international anti-doping community does not like the first instance decision and the appellate decision and considers both to be wrong, it can appeal the first instance decision **and** the appellate decision.
8. By contrast, if the athlete does not like the first instance decision and considers it to be wrong, s/he can appeal it; but s/he does not like the appellate decision and considers it to be wrong, s/he is prima facie fixed with it and cannot appeal to CAS.
9. It is true that Article 13.2.4 provides as follows:
Cross appeals and other subsequent appeals by any respondent named in cases brought to CAS under the Code are specifically permitted. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal at the latest with the party’s answer.
10. However, permitting cross appeals and other subsequent appeals advantages the athlete, victim of an adverse appellate decision, **only** if such an appeal is brought, not otherwise. It is accordingly at best a partial solution and does not adequately satisfy the requirement of equality of arms which is a fundamental principle of fair procedures and vouched for as such by the ECtHR.
11. The ECtHR has repeatedly asserted that “[i]t is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence . . . Furthermore, the principle of equality of arms-in the sense of a ‘fair balance’ between the parties-requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”: *Salov v Ukraine* (Application no. 65518/01) ECtHR Judgment, 6 September 2005, at [78], [87]. There is no good reason not to transpose this principle into the disciplinary context given what is at stake for the athlete.
12. An alleged justification for this uneven system summarised in paras 5 and 6 above is that the international-level athlete has only one right of appeal (i.e. to CAS). If one were to allow the national-level athlete to appeal to CAS s/he would be in a better position than the international-level athlete. In my opinion this is no justification. The

international-level athlete does have access to CAS and without incurring the time, expense and delay involved in participation in a lower-level hearing before. In any event in the case of an international-level athlete there is no inequality of arms such as will apply to the other athlete. I have been provided with no other cogent justification. Mere convenience would not suffice. It has repeatedly been said by English and other common law judges “*Convenience and justice are often not on speaking terms*”.

FOR THE ABOVE REASONS IN MY VIEW, IN ORDER TO SATISFY HUMAN RIGHTS PRINCIPLES, THE NATIONAL LEVEL ATHLETE SHOULD BE ACCORDED THE SAME RIGHT OF APPEAL TO CAS AS THE INTERNATIONAL ANTI DOPING COMMUNITY.

Public Disclosure

Article 14.3.3

1. The proposed Article 14.3.3 provides as follows see Appendix:

14.3.3 14.3.4 In any case where it is determined, after a hearing or appeal, that the Athlete or other Person did not commit an anti-doping rule violation, ~~the fact that the decision has been appealed may be Publicly Disclosed. However~~ or violation of Article 10.14.1 or has established that they bear No Fault or Negligence for the anti-doping rule violation. The decision itself and the underlying facts may not be Publicly Disclosed except with the consent of the Athlete or other Person who is the subject of the decision. The Anti-Doping Organization with Results Management responsibility shall use reasonable efforts to obtain such consent, and if consent is obtained, shall Publicly Disclose the decision in its entirety or in such redacted form as the Athlete or other Person may approve. As an exception, if the identity of the Athlete or the other Person is already public or Consequences have already been imposed, then the Anti-Doping Organization with Results Management authority may, without consent, Publicly Disclose the matter to the extent necessary to explain its outcome of the case.

2. There is a division of view between the stakeholders. One group (mainly composed of ADOs) argue that all decisions must be mandatorily disclosed including one newly proposed for non-disclosure, i.e. one involving No Fault or Negligence. They fly the flag of transparency. Another group (mainly composed of athletes' representatives) argue that the decisions currently non-disclosable as well as one newly proposed for non-disclosure, i.e. one involving NF should, subject only to the proposed exception, be kept secret. They fly the flag of privacy and confidentiality.
3. I am instructed that, as a matter of record, out of approximately 30,000 ADRVs only 10 or so include findings of NF. However, the issue of principle is not, in my view, affected by such statistics.

4. Article 8 of the ECHR provides:

“1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

5. That Article, applicable *mutatis mutandis* to the WADC, permits interference with a person’s private life only where *inter alia*, necessary for a number of listed reasons. In my opinion the balance of competing interests, required by the Article 8 of the ECHR and analogous provisions favours enactment of the proposed amendment to extend non-disclosure to where the athlete has established NF, itself under Article 10.5 a process which, as the comment in Fn 78 explains, requires proof of exceptional circumstances.
6. I cannot identify one of the listed reasons which would make disclosure of an NF case necessary. In that context I draw attention to (i) the proposed exception (ii) the fact that where, for example, an athlete is disqualified from a competition because of an ADRV, it will *ipso facto* become public knowledge, even if subsequently the athlete can establish no fault (iii) the possibility of athlete’s consent - any or all of which promote transparency³⁴.

FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED PROVISION TO INCLUDE A NO FAULT CASE IN THE CATEGORY OF NON DISCLOSURE IS SUPPORTIVE RATHER THAN VIOLATIVE OF HUMAN RIGHTS PRINCIPLES

Research

Article 19

1. Article 19 research first found its place in the original Code and was found in all subsequent iterations.
2. The previous and current versions have not aroused any human rights concerns.
3. Research of the kind contemplated by Article 19 is obviously benign. As Article 19.1 states *“Purpose and Aims of Anti-Doping Research; Anti-doping research contributes to the development and implementation of efficient programs within Doping Control and to information and education regarding doping-free sport”*.

³⁴ The inclusion of a finding of non violation of Article 10.14.1 as not publicly disclosable is a logical extension of the current category and demands no separate analysis

4. In *Drugs: Education, Prevention and Policy Volume 31, 2024 – Issue 4*, Krieger suggests that further research is necessary to evaluate the effect of international anti-doping program, noting that a key aim, aside from detecting and sanctioning doped athletes is to prevent the onset of doping through *deterrence* as well as *education* of athletes and their support personnel, such as coaches and parents to which aim for further research can contribute.
5. Article 19.1 continues “*All Signatories and WADA shall, in cooperation with each other and governments, encourage and promote such research and take all reasonable measures to ensure that the results of such research are used for the promotion of the goals that are consistent with the principles of the Code*” which include respect for human rights.
6. In that context I note that of the two proposed substantive amendments enhances rather than diminishes such rights:
 - (i) Article 19.4 by adding the application of “*applicable national ethics standards and legal requirements as they relate to the involvement of human subjects or use of Analytical Data or other personal information in Research/Quality Assurance to internationally recognised ethical practices*”.
 - (ii) Article 19.6 by preventing identification of the person whose data or personal information forms part of the research as well as preventing any sample so provided by such person for such purpose for being evidence of an ADRV.
7. Even if such samples are anonymized **in my view an athlete whose sample is to be used for research purposes ought to be entitled to refuse such use and must therefore be invited to give consent to such use so that s/he can agree or disagree**. Such consent is distinct from the consent which is necessarily to be given in a DCF for testing designed to elicit whether the athlete has committed an ADRV because the sample is taken for a different purpose.
8. It is, I am instructed, possible that a sample taken for research purposes from an individual athlete along with samples taken from other athletes for the same purpose might lead to the discovery of the use of a new hormone which in turn requires prohibition, exposing the athlete in future to possible sanctions; this occurred in the case of growth hormone. But in my view the fact that in such unusual hypothetical circumstances the athlete by provision of such sample may unwittingly have exposed himself to future risk seems less significant as a reason for requiring express consent to the provision of a sample for research than the reason set out in paragraph 7 above.
9. I do not consider that the general subjection of an athlete to the Code through the trickle-down effect suffices. **Given the width and variety of the types of research contemplated in Article 19.2 in my view a consent to be given should expressly refer to it**, though in my view it would be unnecessary, if such cross reference were made, to accompany it with a detailed explanation as to what each type of research envisages.

10. A satisfactory consent form might commence with a formula such as “*I have had my attention drawn to article 19 (research) and consent to my anonymised samples being used for the kinds of research set out in paragraph 19.2*”.³⁵

FOR THE ABOVE REASONS IN MY VIEW, SUBJECT TO IMPLEMENTATION OF PARAGRAPH 10, THE PROPOSED ARTICLE 19 WOULD NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES

Athlete Co-operation

Article 21.1.6

1. Article 21.1.6 of the Code states that athletes have a responsibility “*to cooperate with Anti-Doping Organizations investigating anti-doping rule violations*” and the accompanying comment further elaborates that “*failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a Signatory’s rules*”.
2. Unsurprisingly, it is bodies representing athletes’ interests e.g. the athletes commissions of WADA, team USA and New Zealand’s NADO who argue that athletes have a fundamental right to remain silent and should not be compelled to provide self-incriminating evidence or testimony that could be used against them. Accordingly, they do not agree with the notion that failure to cooperate should be used as a basis for disciplinary action but that on the contrary the Code and Article 21.1.6 should explicitly codify the right to remain silent and the privilege against self-incrimination.
3. In my opinion such reversal of the proposed Article 21.1.6 draft is not required by principles of human rights for the following reasons:
4. In *Valcke v FIFA*, CAS 2017/A/5003, CAS award dated 27 July 2018, the panel, while acknowledging at para 262 that “*the privilege against self-incrimination, although not explicitly included in Article 6 of the ECHR has been recognized as an implied right under Article 6 by the European Court of Human Rights in various judgments on the fairness of criminal trials*” nonetheless continued at para 266 that “*The cooperation of the individuals subject to the ethics or disciplinary rules of a sports association is necessary if the integrity of sport is to be protected ... the danger that the result of such co-operation in fact finding may at a later point trigger a criminal investigation - is-per se - not a valid justification to invoke the privilege against self-incrimination*” with a possible caveat only “*where there are concurrent disciplinary and criminal proceedings*” a fortiori “*where it is obvious that the sports organisation will pass on the information obtained to the public authorities which have opened proceedings against the same individual in the same matter*”. In this context it should be recalled that Judge

³⁵ My discussion under Article 6.3 above must be considered in this context. **It is imperative that whatever is decided about consent in relation to these different articles should be in harmony and not at odds.**

Costa drew a clear distinction between criminal and disciplinary proceedings, see Introduction para 1 (iv).

5. The explanation why the concept of privilege against self-incrimination has not been transplanted without modification from the criminal to the disciplinary sphere was provided in another CAS case in *Mong Joon Chung v. FIFA CAS 2017/A/5086* at para 189 said *“Preliminarily, the Panel recognizes the importance that sports governing bodies establish rules in their respective ethical and disciplinary codes requiring witnesses and parties to cooperate in investigations and proceedings and subjecting them to sanctions for failing to do so. Sports governing bodies, in contrast to public authorities, have extremely limited investigative powers and must rely on such cooperation rules for fact-finding and to expose parties that are violating the ethical standards of said bodies. Such rules are essential to maintain the image, integrity and stability of sport”*.
6. These words were adopted wholesale in *ICC v Ansari Award* dated 19th February 2019 para 6.8 where the panel were considering an alleged breach of Article 2.4.6 of the International Cricket Council Anti-Corruption Code for Participants which makes the following an offence:

“Failing or refusing, without compelling justification to cooperate with any investigation carried out by the ACU in relation to possible Corrupt Conduct under the Anti-Corruption Code (by any Participant), including (without limitation) failing to provide accurately and completely any information and/or documentation requested by the ACU (whether as part of a formal Demand pursuant to Article 4.3 or otherwise) as part of such investigation”.
7. Nonetheless there is, in my view, no reason to deny the athletes safeguards to ensure that his or her exposure to compulsory interview is fairly conducted. S/he should be interviewed only in a language which s/he can understand which, if not the athlete’s own language, can be accurately translated by a qualified interpreter. S/he should be entitled to representation by counsel at any interview and notified of that right and of any availability of pro bono counsel before any interview is commenced. If necessary, the interview should be adjourned to enable her / him to obtain such counsel. Such safeguards would not only be sufficient but necessary to satisfy human rights principles.
8. **Were Article 21.1.6 to be resurrected I recommend that a reference to any such safeguards should be set out in a comment.**
9. A template for an interview is one regularly deployed by the ICC interviewers who are habitually investigating cases of corruption rather than doping.

ENSURE ALL RECORDERS/VIDEO ARE PROPERLY WORKING

At the commencement of the interview of a suspect, the suspect should be given the full caution as follows:

SUSPECTS- PARTICIPANTS

Introduction:

This interview of (insert name) will be conducted by myself, (insert name of the lead interviewer) of and (insert name of the other interviewer) of the ICC Anti-Corruption Unit (the ACU), .

For benefit of the tape, ensure voice to name identification.

It is the..... (date) and time is..... and we are at (insert details of the location).

Also present are (Insert names of the any other present, if any, e.g. interpreter or legal counsel)

Caution:

This interview is taking place as part of an investigation being conducted into suspected offences under the ICC Anti-Corruption Code. You are bound by this Code. A copy of the Code is available if you wish to refer to it at any stage.

You should note that it is an offence to fail to cooperate with, obstruct or delay the ACU's investigation.

You must provide truthful, accurate and complete answers to any questions and provide all information requested.

This interview will be recorded and may be used as evidence against you or any other person, including in any proceedings before a tribunal under the Code. A transcript of this interview may be produced and, if so, a copy can be given to you [upon request].

If you refuse or fail to answer any questions, a tribunal may draw an adverse inference against you. This means the tribunal may conclude that any answers you would have given would incriminate you.

If you are charged with an offence under the Code, it may harm your defence if you do not mention now something which you later rely on before a tribunal.

Do you understand this caution? **[WAIT FOR CONFIRMATION]**

You have the right to have a lawyer or friend present during this interview. This is at your own cost and arrangement. If you wish to have a lawyer or friend, we can pause now in order to allow you a reasonable amount of time to arrange for their attendance, but this cannot be allowed to unreasonably delay the interview.

Do you wish to contact a lawyer or friend at this stage? **[WAIT FOR CONFIRMATION]**

[IF NO] If, at any stage during this interview, you change your mind and decide that you do want a lawyer or friend present, tell us so that we can stop the interview to allow you to make the necessary arrangements.

If for any reason you would like to have a break in the interview, please say so.”

10. **In my view ADO interviews should adopt and respect the essential features, if not every detail, of that template**, and I shall for the purposes of my report assume that they will do so.

FOR THE ABOVE REASONS IN MY VIEW, SUBJECT TO THE IMPLEMENTATION OF PARAGRAPHS 8 AND 10, THE PROPOSED ARTICLE 21.1.6 WOULD NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES

Signatories non doping sample use

Article 23

1. Article. 23.2.2 provides as follows:

*“[...] No additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article. A Signatory’s rules must expressly acknowledge the Commentary of the Code and endow the Commentary with the same status that it has in the Code. **However, nothing in the Code precludes a Signatory from having rules regulating aspects of sport or their activities unrelated to doping. Where a Signatory intends to use Samples or Doping Control information for the purpose of regulating aspects of their sport or activities unrelated to doping (e.g., safety, medical, eligibility or Code of Conduct policies) such organizations would be acting outside its capacity as a Signatory and would be solely responsible for ensuring any of its collection, use, disclosure or other processing of such Sample or Doping Control information is permitted by and in compliance with its own rules and applicable law”.***

2. The last part of Article 23.2.2, highlighted above, is concerned with the use of samples by Signatories for purposes other than anti-doping.
3. There is a proposed explanatory comment to that para in Fn. 148 *“For example, an International Federation could decide, for reputational and health reasons, to have a*

Code of Conduct rule prohibiting an Athlete's Use or Possession of cocaine Out-of-Competition. Subject to applicable laws and foregoing requirements in an anti-doping Sample collection Out-of-Competition, such International Federation would be able to have the laboratory test for cocaine as part of the enforcement of its Code of Conduct policy. On the other hand, the International Federation's Code of Conduct could not impose additional sanctions for the Use of cocaine In-Competition since that is already covered by the sanction scheme established in the Code".

4. While Signatories must implement the Code and "*without substantive change*" (Article 23.2.1 and 2) it is therefore recognized that Signatories might wish to use samples taken for doping control purposes for other purposes unrelated to doping, e.g. for gender identification as well as the ones referred to in the comment under the rubric of health or reputational reasons.
5. The aim of the portion in the last part of Article 23.2.2 highlighted above in red is to ensure that no Signatory can in any way seek to undermine the meaning of "anti-doping" and that the definition of anti-doping recognized in the Code should be universal and not confused in any way, still less conflated with e.g. health promotion, albeit that such health promotion is an express purpose of the Code.
6. The scope for confusion is illustrated by *Higgs v Bahamas Football Association CAS 2018/A/5615* where an issue arose as to whether a sample taken from the Player Claimant had been taken for antidoping or other purposes (para 138). The Panel concluded on the evidence before it "*that the sample collected by the BFA was not intended to fall under the FIFA ADR, the WADC, THE Bahamas ADR and the ISTI. Instead the intention of the BFA was to test the entire squad of educational and/or medical reasons in order to ensure that if any players failed the drug test, they would be sanctioned under the Code of Conduct*" and therefore held "*it follows that the Players failure to participate in the testing cannot be characterised as an ADRV since the sample collection was not for anti-doping purposes*" para 149 ³⁶.
7. In my view the highlighted passage in para 1 draws a bright line between samples taken for anti-doping and those taken for other purposes (however benign) and ensures that Signatories, and indeed other interested parties, are aware of the difference and in particular, that Signatories are aware of their responsibilities if they use samples taken for doping purposes for other purposes.
8. A further issue potentially generated by the proposed amendment is whether WADA might in some way be liable to athletes or others by reason of the mere inclusion of this provision in the Code. Axiomatically the athlete's informed consent to use of his / her samples for non-doping purposes would be necessary, and this would be *prima facie* a matter for the Signatory who wished to use the sample for such non doping purposes. However, if the Signatory failed to obtain such consent sufficiently or at all, could WADA be held responsible for such failure?
9. In my view the answer to the question so posed is that WADA would not be held so

³⁶ See also *Luitz v FIS 2019/A/6089*

responsible for a number of inter linked reasons.

- 1) WADA's authority as defined in the Code extends only to the area of doping control, and not beyond it.
 - 2) WADA has no authority over the Signatories other than in that area as provided in the Code. It could not prohibit Signatories, who took samples for doping purposes in accordance with the Code's procedures, from using those samples for non-doping purposes.
 - 3) The draft provision merely recognizes but does not even purport to permit the use by Signatories for non-doping purposes.
 - 4) The draft provision expressly stipulates that in using samples for non-doping purposes, the Signatory "*would be acting outside its capacity as a Signatory and would be solely responsible for ensuring any of its collection, use, disclosure or other processing of such Sample or Doping Control information is permitted by and in compliance with its own rules and applicable law*" (my emphasis). This provides both belt and braces.
10. It is difficult to envisage stronger language to effect a complete separation between WADA and the Signatory in this context.
11. Of course, if the Code may make no reference at all to the use by Signatories of samples for non-doping purposes such separation would also be effected.
12. In my view, however, such radical surgery is neither necessary, or indeed desirable since the draft provision provides useful information to the reader and there is no inhibition on WADA any more than on any person, natural or legal, on exercising within the limits set by the law its freedom of expression.

FOR THE ABOVE REASONS IN MY VIEW PROPOSED ARTICLE 23.2.2 DOES NOT VIOLATE ANY HUMAN RIGHTS PRINCIPLES (AND DOES NOT OTHERWISE EXPOSE WADA TO RISK).

Treatment of minors/ protected persons ³⁷

Articles passim

1. The key definitions are these:

Minor: A natural Person who has not reached the age of eighteen years.

Protected Person: An *Athlete* or other natural *Person* who at the time of the anti doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any *Registered Testing Pool* and has never completed in any *International Event* in an open category; or (iii)

³⁷ For the genesis of the 2021 Code on the above subject matter see Lex Sportiva DKL pp178-180 J Exner..

for reasons other than age has been determined to lack legal capacity under applicable national legislation.

2. There is a considerable overlap between those definitions but not identity. Ignoring for present purposes, persons who lack legal capacity under applicable national legislation, every Protected Person is a Minor, but not every Minor is a Protected Person. Notably, an under 18 (i.e. 17-year-old) who competes in international events in an open category is a Minor but not a Protected Person.
3. The reason for differentiating within the category of under 18 years is to determine the appropriate POI in case of an ADRV. Underlying the differentiation selected is the view is that if a Minor is in a Registered Testing Pool or has competed in an open category of an international event, he / she has obtained a high sporting maturity and that, in consequence, if such the Minor is deemed to be mature in those terms and accordingly as knowledgeable of the anti-doping rules as an adult, s/he should be treated as an adult with respect to periods of ineligibility. By contrast Minors who do not fulfil these prerequisites, (see the criteria in (ii) of the definition of Protected Persons) are deemed not to have sufficient maturity and therefore may be treated more leniently as regards POI for an ADRV.
4. In contexts other than POI, discussed in detail below, such as education, being a victim of an ASP or mandatory public publication Minors and Protected Persons should, I accept, be treated in the same way because their level of maturity is immaterial for the purpose of the provisions applicable to such contexts.
5. Judge Costa in Costa 2019 opined that the exception to the concept of Protected Persons for athletes aged between 16 and 18 but participating in international competitions open to adults by differentiating between different categories of children i.e. “those below the age of 18 unless under the law applicable to the child’s majority is attained earlier” (UN Convention on the Rights of the child 1989 - “The New York Convention”³⁸ Article 1) and could arguably be considered to offend against the principle of non-discrimination between all “children” on grounds of “other status”, i.e. age within the meaning of the convention Article 2³⁹. He concluded, however, that the differentiation was in the final analysis both proportionate and non-discriminatory as follows:

“But the most difficult question remains that of the compatibility of such a provision with the Convention on the rights of the child. In fact, this Convention in its Article 2 sets out the principle of non-discrimination between all “children” within the meaning of the convention, regardless of the situation on which a difference of treatment is based. The most natural response would therefore be not to introduce into this new Code this exception to the status of protected person. However, on second analysis,

³⁸ See generally Commentary ed J Tobin OUP 2019.

³⁹ *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

I do not believe that this exception applying to Athletes aged between 16 and 18 and participating in international competitions open to adults creates a major problem.

First, the threshold of 16 years is reasonable and does not seem disproportionate.

Second, where the age of criminal responsibility is concerned, the fixed test by the New York Convention is flexible. Article 40 § 3 only requires States to "establish a minimum age below which children will be presumed incapable of breaching the criminal law", without giving any indication concerning this minimum age, which varies considerably from one country to another throughout the world. Similarly, the Beijing Rules³⁷ refer to an age which must not be too low, without fixing one. Third, the ECHR had the opportunity to rule, in Grand Chamber, that the disparity concerning the age of criminal majority from one State to the other reflected the absence of consensus within the international community, and that a low age of criminal majority did not in itself violate the European Convention on Human Rights (implicitly, this falls within the national margin for appreciation).

In summary, considering significant variation can be accepted for the purpose of criminal sanctions, this is even more acceptable for the non-criminal and lighter sanctions in the World Anti-Doping Code. The exception for certain Athletes aged between 16 and 18 is proportionate" (my emphasis).

6. There has been no significant change in the law since Judge Costa reached his conclusion, and I would respectfully adopt it and the reasons supporting it, adding only by way of further support Article 32 of the New York Convention which provides:

1. *States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.*

2. *States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:*

- (a) ***Provide for a minimum age or minimum ages for admission to employment;***

- (b) *Provide for appropriate regulation of the hours and conditions of employment;*

- (c) *Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article* (my emphasis).

A minimum age can vary from state to state.⁴⁰

⁴⁰ The same concept of a minimum but variable age of marry is found in the 1962 UN Convention on Consent to marry, Minimum age of marriage and registration of marriage Article 2 The same concept of a minimum but variable age of marry is found in the 1962 UN Convention on Consent to marry, Minimum age of marriage and registration of marriage Article 2 .There is an interesting discussion "The Temporality on childhood and children Rights" by Naomi Lott 2025 CFLQ 7 but this is concerned with lex ferenda rather than lex lata.

7. There is moreover no obligation in law to replicate in the Code which is *sui generis* distinctions to be found between various categories of minors in the discrete spheres of criminal and tort law.
8. The proposed amendments enlarge the safeguards for Protected Persons and Minors sometimes for the first time for both, sometimes for the first time for Minors only in number of areas.
 - Article 10.3.3 provides for a potentially longer POI for trafficking or administration (as defined in the Definitions) of a prohibited substance or method where a minor (or, as currently, Protected Person) is involved.
 - Article 10.3.4 provides for potentially longer POI for complicity with a Minor or (also for the first time) Protected Person.
 - Article 10.7.3 provides for a suspension in POI for substantial assistance where the information provided involving potential doping relates to Minor or (also) for the first time Protected Persons.
 - Article 10.14.1; A person subject to a POI greater than 4 years may not work with Minors (as well as currently with Protected Persons).
 - Introduction.
 - Various Articles will impose a duty under the pertinent paragraphs of Article 20 on the following bodies; IOC, IPC, IFs, NOCs/ NPCs, NADOs, Major Event Organisers, to investigate ASP within their authority in case of an ADRV involving a Protected Person or Minor or of any ASP who has provided support to more than one athlete found to have committed an ADRV and to report its results to WADA.
 - Various Articles will impose duties designed to enhance education in anti-doping for Protected Persons and Minors.
 - On ASP (Article 21.2.2); an obligation to attend education presentation and provide accurate information to their athletes and on and for Minors.
 - On Government Article 22.11; a commitment to support anti-doping education and training programmes and Protected Persons and Minors themselves.
 - Article 18.4; requires delivery of education programs by signatories to be in line with appropriate safeguarding considerations and legal requirements.
 - Article 14.3.7 removes Minor and Protected Persons from those subject to mandatory public disclosure of decisions about ADRVs and requires optional public disclosure to be proportionate.
9. In my view:
 - (i) The enhanced solicitude for Protected Persons and/or Minors violates no human rights principles, indeed promotes them.
 - (ii) If and in or far as penalties are imposed or increased for those who violate provisions of the Code in a manner which adversely affects Minors or Protected

Persons, bearing in mind in particular the overall scale of penalties in the Code previously vouched for by Judge Costa, are proportionate.

(iii) In so far as increased duties are imposed on various non-natural persons designed to improve the position of Minors or Protected Persons in the context of the Code by investigation or education they have no human rights implications.

(iv) In so far as ASP have human rights, they are not infringed by the additional duties imposed upon them which are an extension of their primary responsibilities attendant on their role.

**FOR THE ABOVE REASONS IN MY VIEW THE PROPOSED AMENDMENTS TO
THE CODE CONCERNED WITH MINORS AND PROTECTED PERSONS DO NOT
VIOLATE ANY HUMAN RIGHTS PRINCIPLES**

A handwritten signature in dark ink, appearing to read 'Michael J Beloff KC', written in a cursive style.

The Honourable Michael J Beloff KC
Trinity College, Oxford, UK
30 July 2025