

EXECUTIVE SUMMARY

1. This opinion reviews whether article 10.6 of Draft 3.0 of the World Anti-Doping Code – 2007 Code amendments (the “2007 Draft Code”) is compatible with fundamental rights of athletes.
2. Article 10.6 of the 2007 Draft Code reads as follows:

10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility

If the Anti-Doping Organization establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule.

An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization.

[Comment to Article 10.6: Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.]

For the avoidance of doubt, the examples of aggravating circumstances described in this Comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. Violations under Article 2.7 (Trafficking) and 2.8 (Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from four years to lifetime Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance.]

3. The opinion reaches the conclusion that Article 10.6 of the 2006 Draft Code complies with the fundamental rights of athletes. This said, it emphasizes that much will depend on the actual application of Article 10.6 in a given case, which will rest with CAS.
4. To reach its affirmative conclusion, the opinion has in particular examined the following three main issues which arise out of the language of Article 10.6:
 - (i) Are “aggravating circumstances” defined with sufficient precision in order to comply with the principle ‘no crime nor punishment without law’ (*nullum crimen, nulla poena sine lege*)?
 - (ii) Is the possibility to avoid the application of an increased sanction by admitting the anti-doping rule violation as asserted promptly after being confronted with it compatible with the privilege against self-incrimination and the right to remain silent (*nemo tenetur* principle)?
 - (iii) Does the imposition of an ineligibility period of more than two years comply with the principle of proportionality?

On these three questions the opinion concludes as follows:

- (i) “Aggravating circumstances” are defined with sufficient precision in order to comply with the principle ‘no crime nor punishment without law’;
- (ii) The possibility to avoid the application of an increased suspension by admitting the anti-doping rule violation is compatible with the privilege against self-incrimination and the right to remain silent; and
- (iii) The imposition of an ineligibility period of more than two years complies with the principle of proportionality.