

Please note that the following is an English translation of the original French version.

Legal opinion 2019 (*expert opinion*) on the World Anti-Doping Code

(26 September 2019)

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Context for this opinion and historical background

My name is Jean-Paul COSTA. I am a former President of the European Court of Human Rights, honorary member of the Council of State (France) and Arbitrator for the Court of Arbitration for Sport.

I am expressing myself here as a consultant in my personal capacity, outside the scope of my past or current functions.

In 2013, I was called on by WADA to provide a legal opinion on the draft World Anti-doping Code 2015.

I was asked to answer several questions concerning the revised World Anti-Doping Code (the "2021 Code"). The initial version of the draft was dated 31 July 2019. However, in the interim, the draft has been finalized, and is in the form it will be presented on 5 - 7 November at the World Conference on Doping in Sport in Katowice. On several issues that I will identify below, modifications were made to the text of the draft Code because of or as a result of my opinion.

The questions that were posed to me referred to the compatibility of the proposed new measures with international human rights norms¹.

My assignment was initially given to me by Mr Julien SIEVEKING, Director, Legal Affairs, WADA (World Anti-Doping Agency), in an email

¹ One should not be surprised that reference is very often made below to the jurisprudence of the European Court of Human Rights (the "Court" or "the ECHR") to identify these international norms.

This Court, whose judgements ("decisions") have the force of law, certainly only has competence with regard to disputes initiated against States which are parties to the European convention on human rights ("the Convention"), which are 47 in number; in other words, almost all the countries of "greater Europe". However, its seniority and its activity are a source of inspiration worldwide, all the more so since the principal inspiration of the Convention was drawn from the Universal declaration of human rights. The principal international jurisdictions, e.g. the European Union Court of justice ("the ECJ") generally follows the relevant jurisprudence of the ECHR. In addition, as we will see, the Court has expressly declared itself competent, *ratione loci, ratione materiae and ratione personae*, for sentences handed down by the Court of Arbitration for Sport (the "CAS"), which is at the heart of the system for the fight against doping and which obviously occupies a significant place in the World Anti-Doping Code. Unless stated to the contrary, the decisions cited below are those of the ECHR.

dated 15 May 2019. It was officially entrusted to me in a letter from WADA's Director General, Mr Olivier NIGGLI, dated 19 June 2019, to which I replied on the same day.

In 2013, I supplied my opinion on the 2015 Code²², firstly in writing and then in an oral presentation on 13 November 2013 during the fourth World Conference on Doping in Sport in Johannesburg. This opinion already covered the compatibility with the principles of international human rights law of several articles of the 2015 Code. It responded to eight questions (the opinion appears on WADA's website under the heading Legal Documents).

In this opinion, I expressed in particular that I considered that everything related to sanctions provided for by the Code was of a civil and not criminal nature, and I approved Article 10.2 of the draft Code (which entered into force from 1 January 2015) (this is the article which provides for the suspension of athletes in the event of the presence, use or attempted use or possession of a prohibited substance or a prohibited method).

I mention this because certain of the new questions relate to the very substance of these observations.

In methodological terms, this new legal opinion was prepared by me independently and under my responsibility alone. I did however consult some documents and specialists, and in particular Professor Ulrich HAAS, Professor of Law at the University of Zurich. We had various oral discussions and written exchanges. [It is planned that both of us will participate on 5 November in Katowice during the fifth World Conference on Doping in Sport]. I would like to thank him for his help and for his expertise.

This opinion is structured as follows, in five parts:

- The new jurisprudential and doctrinal context
- The *executive summary* of the responses to the questions posed
- The analysis of the questions posed

²² In November 2017, the WADA Foundation Board adopted some limited changes to the 2015 Code concerning *compliance*. These changes, which support the new *International Standard for Code Compliance by Signatories (ISCCS)*, entered into force on 1 April 2018 (they appear on WADAwebsite).

- The points on which the text has been modified because of or following my opinions
- A brief conclusion

I An indispensable preamble: the new jurisprudential and doctrinal context

The international norms in terms of human rights are not immutable; they change over time, based in particular on the jurisprudence of the competent jurisdictions, such as, at the top level (for historical reasons), the European Court of Human Rights (ECHR) already cited³.

The Court of Arbitration for Sport (CAS) for its part applies the Code of Sports-related Arbitration⁴ and, in the field of the fight against doping, the World Anti-Doping Code⁵, and it makes every effort to take inspiration from international human rights norms. Reconciling these norms and the rules for sanctioning anti-doping rules violations set out in the draft 2021 Code is all the more necessary (and often complex) since the forms of doping in sport and the fight against doping have changed greatly over time.

As compared to the period in which the legal opinion on the draft 2015 Code was drafted, significant legal changes have occurred.

Firstly, the previous versions of the World Anti-Doping Code had not yet been much exposed to human rights-based claims. This is no longer the case. In this regard, it is necessary to point out the intervention of a significant decision of the ECHR dated 18 June 2018, *FNASS and others vs. France*⁶. It was much anticipated from the point of view of the compatibility of the *lex sportiva* with

³The ECHR was created by the Convention for the preservation of human rights and fundamental freedoms, signed on for November 1950 within the framework of the Council of Europe. Its purpose is to ensure that the States that are a party to the Convention comply with the commitments incumbent upon them as a result of the Convention and its Protocols.

⁴ Established by the International Council of Arbitration for Sport (ICAS)

⁵ Established by the World Anti-Doping Agency (WADA).

⁶The FNASS is the 'Fédération nationale des associations et syndicats de sportifs' (National Confederation of Sporting Associations and Syndicates). The petition emanated from this Federation, but also from Athletes acting on an individual basis, to which the decision recognised the capacity of victims, contrary to what the Government maintained. The demand was therefore ruled admissible (but not well-founded).

human rights. It should be noted that WADA made a third-party intervention in the case which the ECHR authorised it to do⁷.

Since the European judicial protection system is based on individual recourse against Government defendants, it is only indirectly that the World Anti-Doping Code was criticised. It was mentioned to the extent that the defendant Government, France, which ratified the International Convention of the UNESCO against doping in sport dated 19 October 2005, adopted legislation which largely transposed into national law the provisions of the World Anti-Doping Code⁸.

The claim essentially criticised the whereabouts obligations applicable to Athletes (for the purpose of random drug tests), considered by the petitioners to be an excessive infringement on their right to respect for private and family life, as protected by Article 8 of the European Convention on Human Rights.

The analysis conducted by the ECHR was, however, of a much more general nature. It accepted that the objectives of the criticised whereabouts measures, and also of the fight against doping more generally, are twofold - on the one hand, the protection of health, which is a "legitimate goal" within the meaning of § 2 of Article 8; on the other hand, the fairness of sporting competitions, which affects the rights and freedoms of other people, another legitimate goal within the meaning of the same § 2, these goals both being able to justify an infringement of the right to respect for private life (subject to the infringement also being "provided for by the law" and "necessary in a democratic society").

In addition, the Court also considered 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 instrument⁹. Although the Court concludes in

⁷ WADA's arguments are analysed in §§ 148 - 150 of the decision. A reading of these paragraphs shows that the ECHR, in coming to its decision, was sensitive to these arguments.

⁸ This legislation and the supplementary regulations are codified in the French Code of Sports.

⁹ See in particular §§ 178 - 184 of the decision, which are very explicit.

this case¹⁰ that the constraints related to whereabouts obligations do not breach the Convention because they have created a fair balance (and are therefore "necessary in a democratic society"), it seems to me that it is going well beyond that. Its decision expresses a "benevolent" jurisprudential framework with regard to the World Anti-Doping Code.

Secondly, I again questioned the legal nature of the sanctions pronounced by virtue of the World Anti-Doping Code in the event of anti-doping rules violations, given the changes in the international standards human rights norms, and the jurisprudence of the ECHR. This aspect is more complex.

In my 2013 legal opinion, I concluded that allegations of a violation of the World Anti-Doping Code rules were not "criminal accusations" within the meaning of Article 6 of the European Convention on Human Rights ("the Convention") concerning the right to a fair trial and that therefore the sanctions imposed for these violations are not of a criminal nature.

This conclusion was corroborated by another significant decision by the ECHR, also much anticipated, Mutu and Pechstein vs. Switzerland.¹¹ That case concerned the problem of the applicability of Article 6 of the Convention to the claims presented by Mr Adrian Mutu, a professional footballer of Romanian nationality, in a dispute with his club¹²; and especially (due to doping) to Ms Claudia Pechstein, a speed-skater of German nationality, suspended for doping by the disciplinary committee of the International Skating Federation¹³. In both cases, the Court considered that Article 6 was applicable, but in terms of the civil aspect of the article, since the disputes raised by both petitioners related, according to the Court, to rights and obligations of a civil nature. However, the Court set aside, implicitly but necessarily, the criminal aspect: the proof of this is that Ms Pechstein, sanctioned

¹⁰ As was done domestically, in a decision dated 24 February 2011, by the French State Council, which is the supreme administrative jurisdiction in France.

¹¹ Decision dated 2 October 2018, made definitive on 4 February 2019. In that case, the decision did not involve any third-party intervention by WADA.

¹² Chelsea Football Club.

¹³ The ISU.

with a suspension, had raised a complaint based on the presumption of innocence (Article 6 § 2 of the Convention), which is a guarantee 'par excellence' in criminal matters; however, the Court did not consider it necessary to issue this complaint to the defendant State for its observations, and it did not mention it in its decision.

Moreover, and this is an essential element of the Court's decision, the Court considers that recourse to arbitration in sporting matters is legitimate and appropriate, so long as Court of Arbitration for Sport (the CAS) provides for the guarantees of a fair trial: indeed, whether, in the case of Mme Pechstein, because it was a *forced* arbitration (§ 115 of the decision); or whether, in the case of Mr Mutu, it was a *voluntary* arbitration; the interested party had not *unequivocally* waived the right to the guarantees in Article 6 (§ 112 of the decision).

Lastly, ruling *in concreto*, the ECHR ruled that the CAS was indeed, within the meaning of Article 6 of the Convention, a court established by law, independent and impartial, as the Swiss Federal Court had itself ruled, and it therefore dismissed the two petitions, except on one point raised by Ms Pechstein, the absence of a public hearing before the CAS. Its decision therefore on the whole gives the CAS a stamp of compatibility with the Convention, which was not a foregone conclusion.

In summary, these two decisions from 2018, FNASS and others vs. France, and Mutu and Pechstein vs. Switzerland, are favourable both to the World Anti-Doping Code (former and future) and to the role of WADA and the CAS. The jurisprudential context is therefore new and different from that which prevailed in 2013¹⁴.

This new more benevolent jurisprudential environment is accompanied by a doctrinal approach which is also generally favourable.

¹⁴The European Union and the Court of Justice (the ECJ) are less concerned by sports law and by the prevention of doping than the Council of Europe and the ECHR (except in matters of competition law, as is shown by the decisions by the ECJ mentioned in my 2013 opinion). However, the three-year plan for the promotion of sport adopted by the Council of the EU (the current Plan, 2017-2020, was adopted on 23 May 2017) mentions the fight against doping as one of the objectives of the Plan. Furthermore, the European Commission is an active player in the process for the development of the World Anti-Doping Code.

As a whole, the doctrine underlines that the ECHR takes pains to qualify the fight against doping as "convention-derived", in other words as compatible with the human rights norms arising from the 1950 European Convention¹⁵. Not to mention the importance of the guarantees to be granted to athletes, the dominant doctrine focusses on the great interest of the fight against doping in all its forms.

However, despite the undeniable importance of the recent decisions by the Court of Strasbourg, and in particular the decision *Mutu and Pechstein vs. Switzerland*, the jurisprudential changes since 2013 also increasingly show that all sorts of administrative sanctions give rise to the applicability of Article 6 of the Convention, even if they are not strictly criminal sanctions. This was already the case for certain tax-related sanctions¹⁶. But that was extended by the jurisprudence to sanctions for violations of the stock market regulations handed down by the independent administrative authorities¹⁷, or to administrative violations, e.g. for participation in non-regulatory meetings or assemblies¹⁸. The jurisprudence of the ECJ is headed in the same direction¹⁹.

The conclusion that one can draw from this information is as follows:

It remains that the sanctions provided for by the Code are not *stricto sensu* criminal. But even though all the provisions of Article 6 of the European Convention do not therefore have to necessarily apply "in all their rigour"²⁰, and even though for example the guarantees in §§ 2 and 3 of Article 6 – presumption of innocence, rights of the defence, etc. - are manifestly less applicable than for genuinely criminal sanctions, it appears important to find proportionate guarantees in the case of sporting sanctions. This is

¹⁵By way of example, see the comments – nuanced it is true, but generally favourable - by an excellent specialist, Professor Mathieu Maisonneuve, on the decision *FNASS vs. France* (Review of fundamental rights and freedoms, 2019, Chronicle no. 09), on the decision *Mutu and Pechstein vs. Switzerland* (Quarterly review of human rights, 1 July 2019, pages 687 sqq.)

¹⁶Decision *Jussila vs. Finland* dated 23 November 2006.

¹⁷Decision *Grande Stevens vs. Italy* dated 2 May 2014.

¹⁸Decision by the Great Chamber *Navalnyy vs. Russia* dated 15 November 2018.

¹⁹ See for example its decision dated 18 July 2013, ECJ, *Schindler Holding*.

²⁰See the above-mentioned decision *Jussila vs. Finland*, at § 43.

why in my opinion taken as a whole, I was guided by the search in the draft 2021 Code for stricter standards of protection than may appear to be strictly necessary.

II. Executive summary of my responses to the questions raised by the WADA:

- 1) The application of sanctions for prohibited association is compliant with international human rights norms. However, it would be necessary, in Article 2.10 to specify that the Athlete knew or should have known that he/she was involved in a case of prohibited association; mention in this article the existence, on WADA's website, of the list (ASP list) of persons with a disqualified status; lastly, draft the *disclaimer* which accompanies this list in order to make clear that, without being exhaustive, it must be respected.
- 2) The punishment for acts aimed at discouraging the reporting of anti-doping rule violations committed by Athletes or carrying out reprisals against the authors of these reports (Article 2.11): this measure is compliant with the norms, but it should be specified in Article 2.11 (or failing this in a comment thereon) that the reports must be sent exclusively to the authorities cited in the article and must remain confidential.
- 3) The concept of protected person is compliant with the norms, but it should be specified in Article 10.6.1.3 (and/or in the comment on this article) who these persons are:
 - Athletes with an intellectual impairment
 - All Athletes under the age of 16
 - Those aged from 16 to 18, with the exception of those participating in international competitions open to adults²¹.

²¹ This exception does not appear to be contrary to the principle of non-discrimination within the meaning of Article 2 of the Convention on the Rights of the Child.

At this stage, the notion of non-significant faults or negligence does not create any problem and is compliant with the norms.

4) Aggravating circumstances which may increase the period of suspension:

The new Article 10.4 is compliant with the norms, but this article needs a comment to give a list (non-restrictive) of *examples* of such circumstances, out of a concern for legal security (e.g. violations creating a prejudice for protected persons, the existence of a conspiracy or of deceitful or subversive conduct).

5) Multiple violations and 6) new concept for the calculation of periods of suspension

These concepts and methods of calculation are compliant with the norms. However, it would be necessary to indicate in a comment that any retro-activity must be avoided, specifying that the second breach must have been committed *after* the entry into effect of the new Code, and explicitly defining the notion of non-significant faults or negligence.

7) "Widening the net" in terms of persons and entities subject to the Code. These provisions reflect a legitimate concern for equity and are compliant with the norms. However, it is necessary to specify in a general comment to the related article that these new obligations must be reconciled with several norms, i.e.:

- with the rules of local employment law, for persons subject to employment law
- with respect for personal freedom and the right to respect for private life, for the persons and entities concerned, and for the Athletes.
- And, where governments are concerned (non-signatories of the Code), draft this comment in terms of *recommendations* rather than obligations, including regarding the necessity for

independence of national anti-doping organisations, e.g. from the Ministry of Sport.

8) "Automatic recognition" of decisions and access to justice (new Article 15)

The concept of automatic recognition is not satisfactory, and it would be preferable to refer to the *erga omnes* effect of the decisions (in other words the fact that they are binding on all). In the latest *draft*, the document furthermore abandons this terminology.

The *erga omnes* effect does not pose any problem and it is compliant with the norms. The same is true for access to justice, which is sufficiently guaranteed by the right of appeal and by the mechanisms and procedures of the CAS. That is particularly true since the recent jurisprudence of the ECHR which, whilst analyzing these procedures²², considered the CAS as a whole to be a Court compliant with the rule of law. A comment would clarify, concerning decisions taken during major events, that the Athlete ought to be able to dispute them in accordance with the emergency procedure.

9. Differences of standards between the internal bodies and/or first instance body and the CAS

They do not pose any specific difficulties. The jurisprudence of the ECHR has for a long time accepted that a trial is fair within the meaning of Article 6 of the European Convention on Human Rights, even if the internal and/or first instance bodies are not completely independent and impartial, where the appeal is brought before a Court "with full jurisdiction", in other words competent to rule on all questions of fact and law relevant for the resolution of the dispute. This is indeed the case for the Court of Arbitration for Sport (the CAS).

10. Article 20 of the draft 2021 Code

²² For example, in its Pechstein decision by sanctioning the absence of any public hearing when the petitioner had requested it.

The fact that the anti-doping organisations, which are authorised to delegate the anti-doping controls to service providers (non-signatories), may conclude with them agreements by which they undertake to comply with the World Anti-Doping Code and with the international standards does not seem to create any difficulties. Indeed, the responsibility imposed on these organisations requires them to submit their service providers to the same obligations, and the latter, for their part, are never obliged to accept the proposed delegation, which preserves their third-party rights.

III Analysis of each of the issues raised

1) Article 2.10

The issue relates to prohibited association, which constitutes an anti-doping rule violation and therefore leads to sanctions under the terms of Article 10 of the Code ("sanctions against individuals").

In the 2015 Code, Article 2.10.3 provides that, in order for these provisions to apply, the Athlete (or other person) must have been informed in advance in writing by the competent anti-doping organisation or by WADA, of both the disqualifying status of the member of the management personnel and the potential consequences of association with the latter, and also of the fact that this association should therefore reasonably be avoided.

In the draft 2021 Code, this provision is abrogated and is replaced by Article 2.10.2, which provides that, in order to establish a violation of Article 2.10 (prohibited association constituting an anti-doping rule violation), the anti-doping organisation must establish that the Athlete or other person was aware of the disqualifying status of the support personnel. And the article also provides that the burden of proof is on the Athlete, who must establish that this association could not reasonably have been avoided.

The question is to determine whether this guarantee is proportionate, but also whether it is appropriate or necessary. It should be noted that the list of the members of support personnel (*athlete support personnel*), who were sanctioned and therefore disqualified ("ASP list") is published by WADA on its website in order to inform the anti-doping organisations and Athletes. The current list, available in English, is dated 11 April 2019, four updates to this list are planned on a yearly basis (10 April, 10 July, 10 November and 10 January). The list indicates the identity and the nationality of the persons concerned, the start date and the end date for their disqualification (sometimes, it is for life). It is however accompanied by a "*disclaimer*" from the WADA (disclaimer of liability). WADA – which, it should be recalled, does not itself have the power to sanction Athletes or support personnel – bases the list on information supplied by anti-doping organisations, and thereby highlights the fact that its list is not exhaustive.

The problem is therefore twofold. It is a question of determining whether, on the one hand, we are not imposing on the Athlete (or other person) an excessive burden of proof and, on the other hand, whether the anti-doping organisation is not paradoxically in a situation where it has to meet an impossible burden of proof, in accordance with the proposed Article 2.10.3.

In fact, it would be necessary for it to prove that the Athlete *knew* that the person with whom he/she was associating was disqualified.

In my opinion, it would be better to maintain what was provided for in the first two *drafts* - the organisation must establish that the Athlete knew or ought to have known that the support personnel was disqualified.

However, could we not also consider that even though no one can claim to be ignorant of the law ("*nemo censetur ignorare legem*"), we cannot oblige an Athlete (or other person) to consult WADA's website, especially if it is only indicative? In France, for instance, the French Anti-Doping Agency (the "AFLD"), on its own website, has inserted a link to the WADA list. One need only click on this link to access the list; and yet,

according to Article L 232-9-1 of the French Code of Sports, if the AFLD considers that the Athlete is seeking assistance from an athlete support personnel that is disqualified, it must so notify the Athlete and give him/her a deadline to present his/her observations (this deadline is fifteen days: Article R. 232-41-13 of the French Sports Code). This guarantee was not considered superfluous, but rather a necessary complement. In other words, the current draft 2021 Code is imperfect in my opinion. It does not provide the Athlete with fully satisfactory guarantees. If he is of good faith, he may very well not understand that a person with whom he is associating has a disqualifying status. Certainly, there do exist more general procedural guarantees, provided for under the terms of Articles 7 of the draft 2021 Code (results management), 8 (fair hearing and notification of decisions) and 13 (appeal to the CAS). But there is no specific procedural guarantee relating to the knowledge of the disqualifying status of the person with whom association is prohibited. And at the same time, it makes the anti-doping organisation responsible for proof that is difficult to provide (that the Athlete knew that this person had such a status).

The essential principles of a fair trial, as shown in the consistent jurisprudence of the ECHR, apply even in *non-criminal* matters. They involve in particular "the obligation to offer each party a reasonable opportunity to present its case – including evidence – under conditions which do not place a party in a situation of substantial disadvantage *vis-à-vis* the opposing party"²³.

Even in non-criminal cases, the ECHR requires that the rules of a fair trial be respected, such as the equality of arms between the parties, a minimum of adversarial proceedings, and even adequate reasoning for decisions taken by the administration, for example in terms of sanctions (therefore even upstream of

²³The leading case of the ECHR is *Dombo Beheer vs. Netherlands*, 27 October 1993, particularly § 33. See also, for example, *Cabourdin vs. France*, decision dated 11 April 2006, § 31, or *Gakharia v. Georgia*, decision dated 17 January 2017.

the judicial proceeding itself). One can cite numerous decisions along these lines by the Court of Strasbourg²⁴.

The solution is to mention in Article 2.10 of the draft 2021 Code the existence of WADA's list, which the Athletes would then necessarily be aware of, whereas this is not the case if it can only be found on WADA's website. Any Athlete associated with support personnel appearing on the list knows or *should have known* that this association was prohibited by the Code. And one could then accept that the sanctions imposed on the Athlete as a result are sufficiently justified and enable the Athlete to defend him or herself, for example before the CAS, without his rights to an adversarial process and the equality of arms being breached.

Finally, one could question the current drafting of the "*disclaimer*" which is attached to WADA's list. One can indeed see the utility of this, but is it not contradictory to publish a list, in the interest of the Athletes and, at the same time to declare that the WADA does not accept any responsibility for it? This point needs to be clarified.

A more balanced solution in my opinion would be:

- To maintain the sentence in the first two old *drafts* (the Athlete knew or should have known)
- To mention WADA's list in Article 2.10
- Lastly, to draft the *disclaimer* in a less "modest" way - WADA's list is valuable and it must be promoted rather than minimised.

2) Article 2.11

This is a new article.

It aims to create an anti-doping rule violation for acts by Athletes (or other persons) attempting to discourage by means of threats or intimidation the fact of reporting anti-doping rule violations to the

²⁴For example, the decisions Hentrich vs. France dated 22 September 1994, § 56, Georgiadis vs. Greece dated 25 May 1997, § 48, Krcmar vs. Czech Republic dated 3 March 2000, Muckova vs. Slovakia dated 13 June 2006, § 69, and even Lebedinschi vs. Moldova dated 16 June 2015, §§ 35-36.

authorities, or of seeking revenge (reprisals) against the authors of these reports.

The article specifies that it is intended to protect reports to the authorities which are made *in good faith*. If this is not the case, acts of threatening, intimidation or other reprisals are not sanctionable, on condition, however, of constituting a non-disproportionate response.

In fact, it is an issue which appears to be close to the very current one of whistle-blowers, but distinguishable in that it is not aimed at providing information for the public opinion in general. And it does not therefore directly touch the reputation of anyone else, within the meaning of Article 10, § 2, of the European Convention on Human Rights, on freedom of expression. However, it remains a delicate issue.

It is useful to refer to the jurisprudence of the ECHR concerning whistle-blowers. Since 2008 in any case, the latter²⁵ has sought to define the status of "whistle-blowers" and to protect their freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights, where the disclosure by them of the information fulfils certain conditions: it is made in good faith, in pursuit of an objective of public interest, compensates for the lack of information accessible to the general public, does not cause their "target" any excessive prejudice, and exposes the author of the disclosure to severe sanctions...*Good faith*, even though it is necessary, is therefore not sufficient; it is only one of the criteria which the ECHR uses to assess the legitimacy of whistle-blowing.

The Guja decision was followed by numerous others²⁶, also protecting whistle-blowers, whether in the governmental sphere, for example, civil servants, or in the private employment sector.

However, this protection does not mean, in the eyes of the ECHR, that any "alert" must be protected. It is appropriate to distinguish whistle-blowing from pure and simple *denunciation*, especially where it is of a kind to cause serious prejudice to another. This

²⁵Decision by the Great Chamber Guja vs. Moldova dated 12 February 2008.

²⁶See for example Heinisch vs. Germany, decision dated 21 July 2011, or Palomo Sanchez vs. Spain, decision dated 12 September 2011, or even Görmüs vs. Turkey, decision dated 19 January 2018.

jurisprudence is understandable because one must balance Article 10 of the European Convention on Human Rights and its Article 8, which guarantees the right to respect for private and family life; or even § 1 of Article 10, which sets out the principle of freedom of expression, and § 2 of the same article, which as an exception protects against any possible excess of freedom of expression, particularly when the exercise thereof harms the reputation or rights of other people. For example, *defamation* is not a legitimate exercise of freedom of expression²⁷. Hence, an accusation based on a *rumour* does not constitute a valid exercise of the freedom of expression within the meaning of Article 10 of the European Convention on Human Rights²⁸.

Certainly, and furthermore, the *presumption of innocence* in the case of allegations of violations in the draft 2021 Code is protected under the terms of Article 6 of the European Convention on Human Rights (in connection with its criminal aspects²⁹). This being said, as discussed above, sanctions imposed under the terms of the draft 2021 Code are not based on a "criminal-law accusation" within the meaning of Article 6 of the Convention.

Hence, one cannot invoke the presumption of innocence of Athletes (or other people) in order to protect them against denunciation by other persons concerning their alleged violations, because the presumption of innocence forms part of the "hard-core" of criminal law.

However, while it appears legitimate to want to protect the people who denounce the culpable actions of Athletes, thereby facilitating the fight against doping; it is also necessary to ensure the protection of these people against false accusations.

The current text of the draft provides for two substantial guarantees: that the report to the authorities must be supplied in good faith by its authors, and that the response to the violation (intimidation or reprisals) is not disproportionate. This is satisfactory. Is it completely sufficient?

²⁷See the well-known decision *Lingens vs. Austria*, dated 8 July 1986 and abundant jurisprudence.

²⁸See the decision *Soares vs. Portugal* dated 21 June 2016.

²⁹See for example the decision *Bedat vs. Switzerland*, dated 29 March 2016, particularly in § 51.

It is doubtless sufficient to additionally specify in the article (or at least in the comment, but it would be preferable in the article itself) that reports made by third parties concerning anti-doping rule violations must be made exclusively to government authorities and remain confidential. This is not a question, contrary to the "whistle-blowers" referred to above, of providing information to the general public; but, it must be stated, so as not to give the impression that the risk to the reputation of the Athlete is excessive.

3) Concept of protected person

The question concerns Article 10.6.1.4 in the draft 2021 Code. It should be noted that the question raised by WADA did not request that I consider the notion of occasional Athletes ("*recreational athletes*"), no doubt because it is sufficiently clear. I therefore did not consider it.

The notion of protected person intervenes as an aggravating factor for a violation committed by an Athlete or other person if it involves a protected person or causes him/her harm (*passive protection*), or a mitigating factor for the violation if, on the contrary, it is the protected person who is the perpetrator of the violation (*active protection*).

This does not seem to me to create any issues, in either case. But who are protected persons? In the minds of the authors of the revision of the Code, it seems that these are either minors or protected adults.

This second subcategory calls for a definition or clarification in a comment to these articles. It may involve a person with an intellectual impairment, to the exclusion of physically-disabled persons, who are treated in the same manner as persons who do not suffer from any physical disability, as one observes through the progress - desirable and important - of paralympic sport. The specific vulnerability inherent in the status of persons who must be protected is not arising from a physical

disability, but from an intellectual impairment. This must be specified in a comment on all these articles.

As for minors, the issue is difficult. The age of civil majority varies depending on the country. The Convention of the United Nations relating to the rights of the child³⁰, with which it is important to avoid contradiction (as the question from WADA indicates), provides in its Article 1 that "a child is any human being under the age of 18, unless majority is achieved earlier³¹ by virtue of the legislation which is applicable to him/her". We know that a child is a protected person 'par excellence', and that several provisions, both in the Convention of New York (Article 3-1) and in other instruments, emphasize the notion of "superior interests of the child"³².

In practice, in the great majority of States³³, civil majority³⁴ is reached at the age of 18; sometimes later, though this is not relevant with regard to the above-mentioned convention, pursuant to which the "normal" age is 18 years; and sometimes earlier (at 15, 16 or 17 years³⁵), which conversely is relevant from the point of view of this convention.

The draft 2021 Code is based (see Appendix I "Definitions") on a "universal age in principle", of 18 years, in accordance with the New York Convention, and this regardless of the age of civil majority in such and such a State.

However, this poses the problem of Athletes aged under 18 but participating in international competitions open to adults; in other words, people over the age of majority. It would be unreasonable, in view of their experience, to make them into protected persons within the meaning of the Code, while these "children" are in reality, as a result of their experience and maturity, Athletes like other adults.

³⁰Convention of the UNO dated 20 November 1989, known as the New York Convention. It was ratified by almost all States, with the exception of the United States and Somalia.

³¹ My underlining.

³² The ECHR also uses this criterion in its jurisprudence concerning Article 8 of the European Convention on Human Rights.

³³ In certain federal States, such as Canada or the United States, the age varies depending on the province of the federated State.

³⁴ There is no point in referring to the age of criminal majority, since the subject is not criminal-related.

³⁵ Majority at 15 years is exceptional - only in two States (Saudi Arabia and Yemen).

One may hesitate concerning the lower limit of the range: 15, 16 or 17 years. Since the notion of protection is linked to those of maturity or immaturity, and given that any limit is arbitrary, it would be preferable to use 16 years. This must be specified in a comment to Article 16.1.3.

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, 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 world³⁶. 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,³⁸ 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

³⁶ Between seven and 18 years!

³⁷ Resolution of the A.G. of the United Nations dated 29 November 1985

³⁸ Decisions V. and T. vs. United Kingdom, dated 16 December 1999 (see in particular § 73 in V.)

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 and non-discriminatory.

Concerning the notion of non-significant faults or negligence, it already appears in the 2015 Code and more specifically in Appendix I (Definitions). If the issue is that of the relevance of the notion, there has already been an application over several years of this notion and a jurisprudence of the CAS which has developed. It therefore does not seem that there is any problem in this regard, in particular if this notion has a favourable effect on the situation of the protected person.

4) Aggravating circumstances that may increase the period of suspension

The question concerns the new Article 10.4, which provides that, in an individual case revealing an anti-doping rule violation (other than 2.7, 2.8, 2.9 or 2.11³⁹), aggravating circumstances justify a longer period of suspension than the standard sanction; up to 2 years (from 0 to 2 years) depending on the gravity of the violation and the nature of the aggravating circumstance, unless the Athlete (or other person) can prove that he did not know that he had committed an anti-doping rule violation.

This drafting may create some problems.

³⁹In the current Code (2015, amended in 2018), these provisions concern the trafficking or attempted trafficking of a substance or a prohibited method (2.7), the administration (or attempted administration) to an Athlete in competition or out of competition of a substance or a prohibited method (2.8), and complicity (2.9). As we saw above, Article 2.11, which is new, punishes any acts by an Athlete (or other person) aimed at discouraging reporting to the authorities of anti-doping rule violations or the exercise of reprisals against the authors of these reports.

Firstly, what aggravating circumstances are concerned? The draft does not say. Perhaps it should be stated in the comment on this article.

It should be recalled that, since the start, the trend in the various successive Codes has been toward increasing the seriousness of the sanctions and extending the periods of suspension.

The 2003 Code generally provided for a standard period of suspension of two years. The 2009 Code contained an Article 10.6 on aggravating circumstances, which disappeared in the 2015 edition. It was accompanied by a comment which gave examples (non-limitative) of aggravating circumstances - violations within the framework of a doping plan or program (alone or in conspiracy), recourse to several prohibited substances or methods, deceitful or obstructive conduct. In my opinion, the new Article 10.4 of the draft 2021 Code should at least be accompanied by a comment repeating a list of examples, out of concern for legal certainty and in order to avoid any impression of arbitrariness by decision-makers. The currently planned comment is limited to explaining why the violations in respect of Articles 2.7, 2.8, 2.9 and 2.11 do not need to provide for aggravating circumstances, the alleged reason being that these violations leave sufficient discretion to the sanctioning authorities to justify taking into account any aggravating circumstances.

In my opinion, this explanation is not convincing.

The solution is to provide a comment similar to that in the 2009 Code. It could contain examples of aggravating circumstances, such as:

- The fact that the violation creates a prejudice for a protected person (within the meaning defined above)
- The fact that the violation is the fruit of a conspiracy
- The fact that it reveals deceitful or subversive conduct.

Must the list of examples be exhaustive? No. If *criminal* sanctions were concerned, the principle of a legal basis for crimes and punishments (no punishment without law) would require an exhaustive list since extending the duration can be very variable, as noted above (from 0 to 2 years), and the

suspension may therefore vary from 4 to 6 years in the event of an intentional violation. But as I recalled above, this is not the case; these are not criminal sanctions, despite the jurisprudential trend to the increased "criminalisation" of administrative sanctions.

5) Multiple violations and 6. The new concept for calculating periods of suspension

The two questions merit being treated together. They concern the new Article 10.9.1 and the new Articles 10.9.3.2 and 10.9.3.3.

In fact, the proposed amendments significantly modify the provisions of the 2015 Code, which were contained in Article 10.7, entitled "Multiple violations".

The current system targets the second violation (10.7.1), the third violation (Article 10.7.2), which always leads to suspension for life, plus additional rules (10.7.4). These rules indicate that the *notification* of the first violation is necessary, failing which any violations are considered together to be a single and first violation (10.7.4.1); and also, they provide that the discovery by the anti-doping organisation of events occurring prior to the notification may allow for the imposition of an additional sanction depending on the sanction which could have been imposed if the two violations had been sanctioned at the same time (10.7.4.2). Lastly, each violation must occur during the same period of ten years (17). In other words, if more than 10 years pass between the first violation and a second violation, one cannot refer to multiple violations. Certainly, one can question this period of 10 years, which may appear to be long. However, in my 2013 opinion, when the draft revision of the Code aimed to increase the prescription period from 8 to 14 years, I recommended limiting this increase, from 8 to 10 years, which was finally retained in the 2015 Code. I therefore no longer have any objection on this point.

What changes are made by the draft revision?

In a fairly complex way (and perhaps too complex), the draft amendments no longer refer in the same way to the necessity of a *notification*. However, it is true that the complexity of the drafting is probably the price to be paid for these provisions of the Code to be the most equitable possible.

Even with no notification between these two acts, these constitute separate first violations (and not a single violation). In addition, if more than 12 months pass between the first act and the second act, they are treated as two "first violations", which significantly increases the period of suspension of the Athlete. Lastly, even if there was a notification between the first act and the second, a case of falsification ("*tampering*"), therefore of violation of Article 2.5 of the Code, will be treated (which is favourable to the Athlete) as a second "first violation", and the periods of suspension will be applied separately and not concurrently.

In reality, the period of suspension will be less than eight years in the case of two "first violations" but may reach eight years in the event of a first violation followed by a second violation. It should be noted, even if no question was posed to me on this issue, that, while Article 2.5 may seem "harder" in the draft 2021 Code (in order that the definition of falsification include acts of falsification of documents supplied to an anti-doping organisation and acts of false witness statements supplied by witnesses), the new proposed draft is in fact more favourable to Athletes, particularly in its proposed Articles 10.9.3.2 and 10.9.3.3. The notion of false testimony is also clearer.

Apart from the fact that all these provisions, which are very technical, are complicated and difficult to read⁴⁰, it is necessary to analyse the legal issues they raise.

The problems could be, with regard to the international human rights norms, those related to the *legal basis of the offences and the penalties*, a major principle posed by Article 11 of the Universal Declaration of Human Rights⁴¹ and repeated in Article 7 of the European Convention on Human Rights (a principle

⁴⁰ Once again, this is probably because of a concern for equity.

⁴¹ Adopted on 10 December 1948 by the General Assembly of the United Nations.

which encompasses the non-retroactivity of criminal law, but which is broader in scope). In concrete terms, the questions would be those related to the treatment of *recidivism* on the one hand and the principle of *non bis in idem*⁴².

On the first point, the treatment of recidivism has been considered by the ECHR as coming within the national margin of appreciation, under the penal or repressive policy of each State. In *Achour vs. France*⁴³ the principle is clearly stated, – not for the quantum of the penalty incurred by the recidivist, but on another issue – that it is necessary that the second violation be subsequent to the entry into force of the new law if the latter extends the duration of the period during which a second violation will be considered “recidivism”, failing which such an extension would be deemed retroactive.

A problem could therefore occur in the event of the application to an Athlete of more severe sanctions as a result of a new violation committed *prior to* the entry into force of the new 2021 Code, and not after.

It is therefore necessary to explain, at least in a comment, that the article only applies if the second violation was committed after the entry into force of the new 2021 Code. It is true that transitional provisions have been provided for in the 2021 Code - Articles 27.2 and 27.4. This appears to avoid any risk of retroactivity.

It should be noted that another problem may arise if, apart from the administrative sanctions pronounced within the framework of the Code, any *criminal* sanctions were applied as a result of the same events. This is permitted by the legislation of several countries. For example, in France, on the basis of the Code of Sports,⁴⁴ certain behaviours by Athletes (or other persons) may be prosecuted under criminal law and sanctioned.

⁴²See article 4 of Protocol no. 7 To the European Convention on Human Rights. See also Article 14 § 7 of the international Pact relating to civil and political rights of the UN, even though the Pact is not strictly binding.

⁴³ Decision by the Grand Chamber dated 29 March 2006, in particular § 51.

⁴⁴ Articles L.232-25 to L.232-30.

In such a situation, the ECHR considers that the matter becomes "criminal" within the meaning of Article 7 of the Convention⁴⁵.

The draft 2021 Code, in any event, does not provide for any accumulation of administrative and criminal sanctions. However, according to Article 3.2.4 of the Code, the establishment of facts by a Court (including criminal) constitutes "irrefutable" proof of an anti-doping rule violation (*unless* the Athlete can prove that the decision by the Court violated principles of natural justice - which would appear to include a fair trial). Therefore, the only question is that of the date of commission of the second violation (see above).

The second possible problem is that of the application of the *non bis in idem* principal, i.e. the prohibition against double jeopardy for a single offence. The same remarks can be made. Any accumulation of administrative and criminal sanctions would lead to the applicability of Article 4 of Protocol no. 7 of the Convention⁴⁶. *Conversely*, any accumulation of disciplinary and non-criminal sanctions does not give rise to this problem. My opinion is therefore that the provisions provided for the new Articles 10.9.1, 10.9.2 and 10.9.3 (as well as 10.9.3.2 and 10.9.3.3) are not incompatible with the international human rights norms.

However, given that the ECHR has tended, in its recent jurisprudence, to "criminalise" the most *severe*⁴⁷ administrative or disciplinary sanctions, it would seem advisable to avoid any *retroactivity* of the sanctions, for the sake of caution as expressed above. This recommendation could appear in a comment on these articles relating to multiple violations. As for the notion of non-significant faults or negligence (a notion which the opposite of that of intentional violations) is, a notion already referred to above (see the response to question

⁴⁵See for example the decisions, *mutatis mutandis*, *Dubus S.A. vs. France*, dated 11 June 2009, or *A. Menarini Diagnostics S.R.L. vs. Italy*, dated 27 September 2011, or the decision already cited *Grande Stevens vs. Italy*, dated 4 March 2014.

⁴⁶See also the above-mentioned decision (note 20 above) *Grande Stevens vs. Italy*.

⁴⁷ See in particular the jurisprudence mentioned above in note 20 above.

3, *in fine*), it already appears in the current Code (as amended in 2018), and more specifically in Appendix I (Definitions). There is an application of this notion by the jurisprudence of the CAS, which tends to reduce the severity of sanctions in light of the unintentional nature of corresponding violation. Again, it would be good to recall this in a comment. It is true that this comment could attract attention to Article 10.9.1.3, which sets out the principle of reduction.

7. "Widening the net" of persons subject to the Code.

The question concerns both sporting movements (introduction, §3, articles 20.1.7, 20.2.7, 20.3.4, 20.4.8, 20.5.1, 20.5.10, 20.6.5, 20.7.1 and 20.7.12 and civil servants (20.5.1, 22.3).

Is there any risk of conflict with employment/public law?

The Introduction, in § 3 provides details and an extension of the categories of persons who must accept the anti-doping rules as a condition for their involvement in sporting competitions. The 2015 Code refers to Athletes and other persons. The draft 2021 Code is more precise and more complete - it adds to the category of Athletes that of athlete support personnel, and when it refers to "other persons", it specifies "including administrators, directors, managers, employees and volunteers of the Signatories". While this detailed explanation is likely useful, the question is to determine whether it is justified, or whether it imposes an excessive burden on the *Signatories*, who accept the Code by virtue of its Article 23⁴⁸.

If one summarises the other provisions, which are largely redundant, they consist of imposing similar obligations on the following bodies or entities (which are signatories of the Code):

- The International Olympic Committee (20.1.7)
- The International Paralympic Committee (20.2.3)
- The international Federations (20.3.4)
- The national Olympic and Paralympic Committees (20.4.8)
- The national anti-doping organisations (20.5.1)

⁴⁸Article 23 is practically not revised by the draft 2021 Code, except to specify that the WADA is no longer directly a signatory.

- (20.5.10)
- Major Event Organizations (20.6.5)
- WADA itself (20.7.12), even though it is no longer a signatory of the Code (see note 37 below)
- Governments (22.3), which are however also no longer signatories of the Code.

As for the obligations imposed on all these entities, they consist of requiring from all the directors, managers and employees of these entities (including in certain cases from their service providers and the employees thereof) that they feel, in the capacity of persons, not only in agreement with, but bound by, the anti-doping rules in compliance with the Code.

One can understand the concern in the new draft Code: it is aimed at imposing on the persons who benefit indirectly from sport the same *ethical code* as the direct actors of sport, in other words, at the top level, the Athletes themselves.

But shouldn't a few details be provided?

- A. The anti-doping rules concerned should be specified. It would be useful to specify that these rules are the rules of the Code, excluding those *that are* by nature *specific to Athletes* themselves. Indeed, it is difficult to imagine that legal entities, or even employers or employees could be subject to personal prohibitions on making use of prohibited substances, or to obligations relating to whereabouts, etc. This goes without saying, but it is even better to say it, certainly in a comment.
- B. Could there be conflicts with employment law? And is it necessary to impose obligations in compliance with the employment law of each country, as is suggested by a comment in the draft 2021 Code?

In my opinion, the issue is rather that of the protection of the *privacy* of personnel subject to employment law.

The jurisprudence of the ECHR has for a long time accepted that employment law relationships can be subject to rules relating to human rights, such as those in the Convention.

But it specified in recent decisions that persons subject to employment law must have their privacy protected under the terms of Article 8 of the European Convention on Human Rights, including at their workplace. For example, measures taken by an employer against employees for the non-professional use at their workplace of telephones or IT equipment must comply with minimum guarantees, procedural and substantial, such as the provision of information to the employee, the possibility of appeal and the proportionality of disciplinary measures⁴⁹.

If we transpose this jurisprudence by analogy, one can see that requiring numerous categories of employees to accept the World Anti-Doping Code and specially to feel bound by it in order to be able to work within the entities mentioned above could create a problem with regard to employment law, as interpreted in the name of human rights by the ECHR. In these conditions, a comment referring to the provisions of the employment law of each country would seem to be prudent. In addition, there should be a mention in a general comment applying to all these articles, of the caveat concerning respect for the right to privacy (in order to comply with the jurisprudence referred to above).

But the question then arises concerning the risk of weakening and of lack of uniformity of the provisions of the above-mentioned articles of the draft revised Code.

In reality, it may be specified in the general comment that the new obligations imposed by the draft new Code must go as far as possible, within the following limitations:

- subject to local employment law rules, in other words the employment law applicable in the country of the registered office of the entity subject to the obligation of compliance with the Code;
- and subject to due respect for personal freedoms and privacy, not only of the Athletes themselves but also of the employees of these entities.

⁴⁹See Babulescu vs. Romania, decision by the Grand Chamber dated 5 September 2017. See also Libert vs. France, decision dated 22 February 2018.

C. Is there a risk of conflict with public law?

Two provisions merit examination.

On the one hand, *governments* should be subject to the same obligations. But governments are not obliged to be signatories to the Code. What they are asked to do is to approve the Copenhagen Declaration of 3 March 2003 on doping in sport and to ratify, accept or approve the Unesco Convention of 2005 against doping in sport, or to accede thereto⁵⁰. This is recalled in the introductory paragraph, first sub-paragraph, of Article 22 of the draft 2021 Code.

To require governments to also verify that their own agents feel bound by the Code would be to go too far. Certainly, the notion of *positive obligations* of States has existed for a long time in the jurisprudence of the ECHR⁵¹. But it is a jurisprudential principle imposed by a judge, for which non-compliance is sanctioned. This is not the same thing as an obligation imposed by the Code on governments which are not signatories thereof.

Therefore, in my opinion, Article 22.3 must be formulated in terms of recommendations addressed to governments. This is what would appear to be indicated by the introductory paragraph, 2nd sub-paragraph, of Article 22 of the draft 2021 Code.

On the other hand, the new Article 20.5.1 requires national anti-doping organisations⁵² to adopt an unconditional policy guaranteeing their *independence*, including from the Ministry of Sport, and includes a prohibition on any *conflict of interest* for its administrators, directors, managers, agents or volunteers. Again, this Article risks going too far. Certainly, it is desirable that these organisations should be independent of the executive. Such is the case for example

⁵⁰ Currently, some 187 States throughout the world have ratified it.

⁵¹ See for example the well-known decision *Marckx vs. Belgium*, dated 13 June 1979, § 31.

⁵² Such as the AFLD in France.

of the AFLD in France⁵³. But can one impose this level of obligation on any State without a risk of conflict with its domestic public law? Once again, it would be better to formulate this Article as a recommendation, including the policy on prohibiting any conflict of interest, which should be defined in very general terms.

8. The new concept of automatic recognition (and access to justice).

The question concerns Article 15 (results management of decisions, including provisional suspensions).

In my opinion, the title "Automatic recognition" is not adequate and it would be better to refer to the *erga omnes* effect of the decisions. The *erga omnes* effect means that a decision must be complied with and executed, not only by the addressee of this decision (and by its author of course), but by any person. The decision is binding on all.

Article 15 of the 2015 Code already provides, subject to the right of appeal provided for in Article 13⁵⁴, that decisions by signatory organisations of the World Anti-Doping Code, which are compliant therewith, are enforceable throughout the entire world, and that non-signatory organisations to the World Anti-Doping Code may be recognised by signatories, where they are consistent with the World Anti-Doping Code.

The draft goes into great detail about the modalities of this enforceable and automatically binding nature. It specifies that the scope extends to all sports within the competence of the other signatories; for example, in the case of a decision imposing a suspension for an Athlete, throughout the duration thereof (15.1.2).

Articles 15.1.1, 15.1.2, 15.1.3, 15.1.4, 15.2 and 15.3 as a whole do not seem to present any major issues. It is specified that the

⁵³Which the law qualifies as an independent public authority. See Article L 232-5 of the French Code of Sports, which furthermore provides that the AFLD shall, inter alia, cooperate (in other words, must cooperate) with the WADA.

⁵⁴ Which obviously mentions the CAS.

erga omnes effect runs from the moment when the parties receive notification of the decision (15.1.1).

It should be noted that, for major events or *major competitions* (15.1.4), any decision on violations taken during the event and on an emergency basis shall not bind the other signatories, except if the rules of the event provide for the option for the Athlete to appeal the decision on the merits. However, the comment should specify that it must also be possible for the Athlete to dispute the decision using the emergency procedure. That would clarify the guarantees.

Where results management decisions are concerned, Article 15.1.1.4 provides that any disqualification shall bind all the signatories of the Code.

Generally speaking, we believe that the Code may give an *erga omnes* effect to the decisions which it provides for.

Certainly, such an effect is not generalised. Hence, the International Court of Justice, for example, bound by Article 59 of its Statutes, renders decisions which are, in the strictest sense, obligatory only for States which are parties to the dispute. However, its jurisprudence recognises a binding effect of certain rights and obligations on all⁵⁵. Similarly, the European Court of Human Rights is bound by the letter of Article 46 of the Convention⁵⁶. In practice, States often comply with the jurisprudence of the ECHR arising from disputes to which they are not parties to avoid an adverse decision on an issue previously decided upon by the Court in a case concerning another State⁵⁷. This is an *erga omnes* effect in fact and not in law.

Notwithstanding, it is difficult to see what provision would create an obstacle to the draft 2021 Code recognising an *erga omnes* (effect binding on all) to decisions resulting from its application, such as the measures for suspension or decisions

⁵⁵ See its famous decision dated 24 July 1964 in the case *Barcelona Traction (Belgium vs. Spain)*.

⁵⁶This article provides that "the High Contracting Parties undertake to comply with the definitive decisions of the Court in disputes to which they are a party (our underlining).

⁵⁷A well-known example is that of the jurisprudence arising from the decision *Salduz vs. Turkey*, dated 27 November 2008, concerning assistance from a lawyer with effect from the start of remand in custody.

on anti-doping rule violations, or even those disqualifying the results of sporting competitions.

As for access to justice, the caveat concerning appeals before the CAS under the terms of Article 13 of the draft 2021 Code appears to us to be a sufficient guarantee against the arbitrary and in order to protect the pre-eminence of the law⁵⁸. This is all the more true since, as observed in point 1 above, the jurisprudence of the ECHR is favourable to the existence and the role of the CAS.

In fact, decisions by the signatories to the Code are *presumed* to be taken in compliance with it, but it is necessary to be able to overturn this presumption, which obviously is simple and not irrebuttable.

An appeal to the CAS specifically protects petitioners against this presumption, and more generally against any arbitrariness on the part of any entity imposing a sanction. As indicated above, the ECHR, in the Mutu and Pechstein vs. Switzerland decision, had the opportunity to examine the functioning of the CAS. The Swiss Federal Court, as cited by the ECHR, had expressed its general satisfaction with the organisation and functioning of the CAS⁵⁹, and the Court of Strasbourg adopted the same point of view.

9. Different forms of independence and impartiality depending on the courts (question added in September 2019).

The issue is to determine whether the standards of independence and impartiality, which are very high when the disputes reach the CAS, must be just as high before the sporting bodies or first instance panels, and in particular if the standard of "operational *independence*" suffices. Article 13 of the draft 2021 Code is relevant here.

⁵⁸This pre-eminence of the law ("the rule of law") is essential. The European Convention on Human Rights confirms this in its Preamble. The Court, for its part, solemnly makes reference to it since its first decisions - see for example *Golder vs. United Kingdom*, 21 February 1975, § 34.

⁵⁹See the decision *Mutu and Pechstein*, in particular its § 44. The decision also observes (§§ 17 and 23) that the Federal Court ruled that the competent formations of the CAS were independent and impartial in the *Mutu* and *Pechstein* cases, respectively.

In practice, it is very difficult to require the same guarantees of independence and impartiality before the internal or disciplinary bodies; the risk of "bias" exists as a result of the very structure of the organisations which include these bodies; whereas the composition of the CAS and the procedure followed before it (particularly the options for recusal and the avoidance of conflicts of interest) are much more demanding. The ECHR has had the opportunity, over a lengthy period, to examine the issue of procedural fairness in similar circumstances, for example, in disciplinary matters within a profession⁶⁰, or in urban planning disputes⁶¹, or even in the field of gambling policy⁶²

In summary, its jurisprudence is as follows - if the internal and/or first instance body does not sufficiently satisfy the requirements for a fair trial within the meaning of Article 6 of the European Convention on Human Rights, there is no violation of this article if, and only if, an appeal can be brought before a Court "of full jurisdiction", in other words competent to examine the relevant points of fact and of law for the resolution of the dispute. If the competence of the appeals court is more restricted, there is a violation of the right to a fair trial⁶³.

In my opinion (and I am expressing myself also in my capacity as Arbitrator for the CAS, who therefore knows this Court well), the CAS is a "tribunal with full jurisdiction" within the meaning employed by the ECHR because it re-examines issues of fact and of law. I therefore think that the fact that the bodies ruling upstream of the CAS do not reach as high a threshold does not create any difficulty with regard to international human rights norms and in particular the right to a fair trial.

⁶⁰ Decision *Albert and Lecompte vs. Belgium*, dated 10 February 1983.

⁶¹ Decision *Bryan vs. United Kingdom*, dated 22 November 1995.

⁶² Decision *Kingsley vs. United Kingdom*, dated 28 May 2002.

⁶³ See the above-mentioned *Kingsley* decision, or the decision by the Great Chamber *Al-Dulimi and others vs. Switzerland*, dated 21 June 2016.

10. Is the introductory paragraph of Article 20 of the draft 2021 Code compliant with international human rights norms? (question added in September 2019).

The purpose of this provision, if an anti-doping organisation delegates doping controls (for which it remains responsible in terms of compliance of the control with the World Anti-Doping Code) to a non-signatory supplier of services, is to impose on the anti-doping organization an agreement by virtue of which this supplier must comply with the Code and the international standards.

I did not find any relevant jurisprudence on this point. However, it appears to me (reasoning by analogy, e.g. with the subject of governmental contracts) that this obligation is not contrary to human rights norms. The anti-doping organisation remains responsible for the conformity of the doping controls with the World Anti-Doping Code and, where it is authorised to delegate this control, it must impose the same compliance requirement on the delegated party. The latter is furthermore not obliged to accept the proposed delegation, such that the rights of third parties are preserved. This is a field which is covered by freedom of contract. The jurisprudence of the ECHR has for a long time accepted that the obligations of compliance with human rights do not apply only to governments, but to relationships between individuals⁶⁴. By analogy, one can transpose this obligation to that of complying with the obligations imposed by the World Anti-Doping Code.

IV. The points on which the text has been modified because of or following my opinions

On certain points (not all), the draft 2021 Code was modified in comparison with the previous drafts during the period which followed my initial opinions.

⁶⁴ This is what the doctrine calls *the horizontal effect*, for example of the European Convention on human rights, as opposed to its more traditional *vertical* effect. One often traces this jurisprudence of the ECHR back to the decision *Young, James and Webster vs. United Kingdom*, dated 13 August 1981.

1) Concerning question no. 2 (Article 2.11):

The modification affecting Article 2.11. 2: no longer targets persons who reported an alleged anti-doping rule violation, but rather those who supplied evidence of this violation or information related thereto.

This modification is satisfactory, because it reduces the risk of defamation (or of disclosure of a simple rumour) against an Athlete. In addition, Article 2.10.3 has been replaced by a second paragraph in Article 2.10. 2, which is more succinct and avoids any unnecessary redundancy; this is also satisfactory, even if it is more of a drafting change than a substantive one.

2) Concerning question no. 3 (protected persons):

the modification consisted of moving the reference to protected persons from Article 10.6.1.3 to Article 10.6.1.4 of the draft 2021 Code, and, substantively, of reducing the relevant sanctions - if the protected person can establish that he/she committed a non-significant fault or a negligent act, he/she may suffer a sanction ranging from, at minimum, a reprimand with no suspension, to a maximum suspension of two years. In my opinion, this is satisfactory on the substance.

As for the definitions of protected persons, the draft 2021 Code was also modified since, in Appendix I, it is now specified that the age below which the person is regarded as protected is 16 years, and 18 years if he/she has never participated in an international competition open to adults. This is satisfactory. I note that the issue of persons having an intellectual impairment is dealt with indirectly, but fairly clearly (lack of legal capacity in accordance with national law).

3. Concerning question no. 4 (aggravating circumstances):

The definition of aggravating circumstances is currently contained in Appendix I to the draft 2021 Code. It supplies examples of such circumstances and indicates that the list of

examples is not exhaustive. This is fairly satisfactory even if, in my opinion, one could have been more complete (e.g. by including the case where the anti-doping rule violation harms a protected person).

4. Concerning questions 5 and 6 (multiple violations and calculation of suspension periods:

The drafting of Articles 27.1 - 27.4 of the draft 2021 Code seems to me to have taken good account of the risk of any retroactivity of sanctions. In my opinion, these modifications are satisfactory.

5. Concerning question no. 7 ("widening the net"):

The modifications mainly consisted, in several articles of the draft 2021 Code, of adding the caveat "*subject to applicable law*" (Articles 20.1.7, 20.3.4, 20.5.10, 20.6.5 and 20.7.12)

These modifications are satisfactory because they are aimed at avoiding any conflict with the applicable law. It remains for the competent courts and in the end for the CAS to rule on any conflicts of laws.

9. In summary,

The modifications which were made *in fine* to the draft 2021 Code appeared to me to be satisfactory overall because they are in line with my opinions. This seems to demonstrate good responsiveness on the part of the authors of the draft 2021 Code, which can only delight an independent expert like me.⁶⁵

V. Brief general conclusion

The questions posed by WADA to the author of this legal opinion obviously did not concern all modifications which are

⁶⁵ I made the the same observation in 2013, during the development of the 2015 World Anti-Doping Code.

proposed in the draft 2021 Code and which result from a broad consultation process.

This was already the case in 2013 and I had indicated it when I presented my opinion on 30 November 2013 during the World Conference in Johannesburg.

In comparison with 2013, the modifications which I studied this time are as a whole more technical, and therefore in a way more complex and less problematic.

Since then, the circumstances have greatly changed.

The World Anti-Doping Code is now recognised by the ECHR as a real source of law⁶⁶. Similarly, the Court of Arbitration for Sport (the CAS) has been subject, with a generally positive conclusion, to the judicial supervision of the ECHR⁶⁷. Hence, whereas the *lex sportiva* a few years ago was somewhat in a vacuum in relation to human rights; today these two parallel worlds have intersected, and in my opinion this development is and will be irreversible. The fight against doping and fundamental rights **is reconcilable and must and can be reconciled**.

The draft 2021 Code is now standing on safer legal ground.

It is therefore with satisfaction that I conclude by observing that the modifications which were submitted to me for my opinion, and which in truth do not cover the entirety of the questions which may arise concerning the World Anti-Doping Code, do not create any serious human rights issues.

In an ideal world, one can always improve certain drafting of articles and add certain comments specifically for the purpose of enlightening the stakeholders but also the lawyers, the disciplinary bodies and obviously the Courts, beginning with the CAS.

However, subject to these few reservations, my conclusion is that the provisions of the draft Code examined here are, as a whole **in compliance with fundamental rights**.

⁶⁶ Since the decision cited at the start of the opinion, FNASS vs. France.

⁶⁷ In its decision, also cited to the beginning of my opinion, Mutu and Pechstein vs. France.

I am all the more convinced that, and I repeat this, the fight against the scourge of doping and respect for human rights can be reconciled. The two can and must be reconciled.

26 September 2019