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ARTICLE

Fixed sanction frameworks in the World Anti-Doping Codes 2015 and 2021: Can hearing panels go below the limits in the pursuit of proportionate punishments?

Jan Exner[1]

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Abstract
In this paper, I argue that hearing panels have the discretion to impose ineligibility for anti-doping rule violations below the limits fixed by Code 2015 or Code 2021, if the otherwise applicable sanction would be excessive and disproportionate in the context of all objective criteria of the case and all subjective elements concerning the athlete or other person. Ideally for legal certainty, WADA should introduce a provision in the Code which would specify conditions of such flexibility to ensure that the pursuit of a proportionate punishment is in balance with other core anti-doping elements. In the absence of such a provision in both Code 2015 and Code 2021, I still believe that hearing panels have the discretion to impose ineligibility below the fixed limits. Code 2015 and Code 2021 limit the sanctioning flexibility of hearing panels by fixing the basic sanctions and their ranges as well as by exhaustive list of options for their elimination, reduction or suspension. Nevertheless, there inevitably were, are and will be cases where the solution contained in Code 2015 or Code 2021 does not work. In such cases, when Code 2015 or Code 2021 do not provide a proportionate sanction, hearing panels should patch such a loophole with general legal principles, including the principle of proportionate punishment. I believe that such sanctioning flexibility of hearing panels does not necessarily compromise the purpose of the Code to fight doping effectively, harmonize sanctions, ensure equality for athletes and other persons, secure legal certainty and other core anti-doping elements. On the contrary, such an approach enables hearing panels to fully adapt sanctions for doping to circumstances of particular cases and to fulfil the internationally recognized general principle of proportionate punishment.

Keywords World Anti-Doping Code · WADA · Doping · Proportionate punishment · Fixed sanction · Sanctioning flexibility · Hearing panels · CAS · Harmonization · Equality · Legal certainty

Abbreviations

ATP	Association of Tennis Professionals
CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
Code	World Anti-Doping Code
Code 2004	World Anti-Doping Code 2004
Code 2009	World Anti-Doping Code 2009
Code 2015	World Anti-Doping Code 2015 with 2019 amendments
Code 2021	World Anti-Doping Code 2021
ECtHR	European Court of Human Rights
EU	European Union
FIA	Fédération Internationale de l'Automobile
FIFA	Fédération Internationale de Football Association (International Federation of Football Associations)
FINA	Fédération Internationale de Natation (International Aquatics Sports Federation)
FIS	Fédération Internationale de Ski (International Ski Federation)
IIHF	International Ice Hockey Federation
ITF	International Tennis Federation
NADCB	National Anti-Doping Commission of Barbados

✉ Jan Exner
exnerj@prf.cuni.cz

[1] Faculty of Law, European Law Department, Charles University, Prague, Czech Republic

Olympic Charter 2019	Olympic Charter, as in force from 26 July 2019
TFEU	Treaty on the Functioning of the European Union
WADA	World Anti-Doping Agency

> Would it not be possible, in certain exceptional cases, to set the penalty at something less than the absolute 1-year limit in order to take the personal situation of the offender into account, just as a criminal judge should do?[1]

1 Introduction

On 5 October 2017, Peru faced Argentina in the qualification rounds of the 2018 Fédération Internationale de Football Association ("FIFA") World Cup in Russia. After the match, the captain of the Peruvian national football team José Paolo Guerrero tested positive for cocaine metabolite benzoylecgonine, which was included in the Prohibited List 2017 as a part of the World Anti-Doping Code 2015 ("Code 2015")[2] and implementing FIFA Anti-Doping Regulations. The FIFA Disciplinary Committee decided that Guerrero committed an anti-doping rule violation and rendered him ineligible for 12 months. Later, the FIFA Appeal Committee reduced the sentence to 6 months. On 14 May 2018, the panel of the Court of Arbitration for Sport ("CAS") imposed on Guerrero a period of ineligibility of 14 months. The panel did so despite several mitigating factors including his previous clean record and his claim that the positive test was due to the consumption of an ordinary drink out of competition, which contained, contrary to Guerrero's allegedly reasonable belief, a small quantity of the prohibited substance, which could not enhance his performance.[3]

On 31 May 2018, the Swiss Federal Tribunal suspended the 14-month ban by a freezing order, allowing Guerrero to participate in the 2018 FIFA World Cup in Russia. According to the statement of the Swiss Federal Tribunal, "the President of the Civil Law Department has taken particular account of the various disadvantages which the 34-year-old footballer would suffer should he not attend an event which would crown his football career".[4] The statement further stated that "(Guerrero) did not act deliberately or through gross negligence, as is clear from the press release of the CAS on this case. In addition, FIFA and the World Anti-Doping Agency ("WADA") have both come to the conclusion that they are not categorically opposed to the complainant's participation in the (FIFA) World Cup".[5] In August 2018, following the completion of the 2018 FIFA World Cup, the temporary suspension ended, and Guerrero's 14-month ban came into effect again.[6]

The Swiss Federal Tribunal rejected Guerrero's final appeal in March 2019.[7]

The case of José Paolo Guerrero, especially the decision of the CAS panel, stirred up the discussion about the proportionality of sanctions for anti-doping rule violations,[8] which I consider a necessary condition of both legality and legitimacy of the fight against doping in sport. I agree that doping is fundamentally contrary to the spirit of sport. Therefore, I fully support the fight against doping as a way of preserving what is intrinsically valuable about sport,[9] namely protecting the athletes' fundamental right to participate in doping-free sport and promoting health, fairness and equality for athletes worldwide.[10] The punitive system, which also takes on a general preventative role, must be in keeping with what is at stake.[11] On the other hand, the fight against doping should never turn into a witch-hunt by imposing disproportionate sanctions on athletes. Such an approach would contradict the principle of proportionate punishment, internationally recognized general principle of law. Moreover, it could delegitimize the fight against doping in the eyes of the public.[12]

The autonomy of sporting governing bodies to enact and enforce Code 2015 as well as the World Anti-Doping Code 2021, which will enter into force on 1 January 2021 ("Code 2021"), and implementing anti-doping regulations is conditional upon compliance with internationally recognized general principles of law that "encompass the notions of

[1] Rouiller 2005, pp. 36–37.

[2] World Anti-Doping Code 2015 with 2019 amendments ("Code 2015").

[3] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero.

[4] Statement of the Swiss Federal Tribunal, 31 May 2018.

[5] Statement of the Swiss Federal Tribunal, 31 May 2018.

[6] Swiss Federal Tribunal rules FIFA appeal in Guerrero case is inadmissible. The Sports Integrity Initiative (online), 29 November 2018.

[7] Peru's Paolo Guerrero loses final doping appeal, cannot play until April. ESPN (online), 7 March 2019.

[8] See, amongst others, Rigozzi and Quinn 2018.

[9] Code 2015, World Anti-Doping Code 2021 approved at the Fifth World Conference on Doping in Sport in 2019 in Katowice ("Code 2021"), Fundamental Rationale for the World Anti-Doping Code.

[10] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Programme and the Code. The European Court of Human Rights ("ECtHR") recognized the protection of health and the fairness of sporting competitions as legitimate goals of the fight against doping able to justify an infringement of the right to respect for private life. See ECtHR, National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France, no. 48151/11 and 77769/13, 18 January 2018, ECLI:CE:ECHR:2018:0118JUD004815111.

[11] Rouiller 2005, pp. 36–37.

[12] To this end, see also Exner 2018.

proportionality of sanctions and prohibition of excessively severe sanctions".[13] International, European as well as national courts have ruled that a disproportionate sentence, in particular regarding the length of the sentence, is unlawful.[14] Under Swiss law, the principle of proportionality is a part of the public policy, in the light of which the Swiss Federal Tribunal reviews CAS awards.[15] Moreover, the CAS, itself recognized proportionality as a general principle of sports law applicable to everyone and particularly to persons facing disciplinary sanctions.[16] As such, the CAS panels shall deal with any challenge to an anti-doping rule based on the principle of proportionality.[17]

Both Code 2015 and Code 2021 state that they were drafted considering the principles of proportionality and human rights[18] and that their anti-doping rules are intended to be applied in a manner, which respects these principles.[19] Code 2021 further provides that its purpose as well as the purpose of the World Anti-Doping Program, which supports it include the respect for the rule of law. That means ensuring that all relevant stakeholders have agreed to submit to Code 2021 and the International Standards, and that all measures taken in application of their anti-doping programs respect Code 2021, the International Standards, and "the principles of proportionality and human rights".[20]

Jean Paul Costa, former president of the European Court of Human Rights ("ECtHR") and a CAS arbitrator, expressed his legal opinion on both the draft Code 2015 and the draft Code 2021 and confirmed the compliance of selected parts of both drafts with recognized general principles of international law and human rights, including the principle of proportionate punishment.[21] In his legal opinion on the draft Code 2015, Costa argues that "the principle of the necessity of sanctions or the proportionality of the sanctions to the violations" applies also to sanctions for anti-doping rule violations.[22] Moreover, he claims that sanctions, including those for doping, must not be automatic and they must be adjustable depending on the circumstances, which is a consequence of the principle of the individualization or personalization of sanctions and sentences.[23] Costa concludes that the selected parts of both drafts comply with the above-mentioned principles.[24]

Nevertheless, I believe that Costa's application of the principle of proportionality is too narrow and one-sided. Costa seems to deal with proportionality within the framework of the draft Codes 2015 and 2021, considering that the drafts contain proportionate sanctions and empower hearing panels with enough flexibility to adjust sanctions to particular circumstances. However, the principle of proportionate punishment is an internationally recognized general principle of law.[25] Therefore, its scope of application is broader than the World Anti-Doping Code ("Code") and it is not limited by the boundaries of the Code. Therefore, I believe that hearing panels should consider and apply proportionality not only within, but also beyond the Code. In spite of Code 2015 and Code 2021's proclamations and Costa's favourable opinion on the compliance of their selected parts with recognized general principles of international law and human rights, there have been voices calling for reconsidering proportionality of the sanctioning regime of the Code, both within its framework as well as on a more generic basic beyond its boundaries.[26]

The reason for concerns regarding proportionality within the Code is often that it significantly limits the margin of appreciation of hearing panels while individualizing sanctions, conducting case-by-case assessment and considering all objective and subjective elements of particular cases. The fixed sanction frameworks of Code 2015 and Code 2021 specify the length of the basic period of ineligibility for each anti-doping rule violation and provide an exhaustive list of circumstances for eliminating, reducing or suspending the

[13] Costa 2013, p. 9.

[14] CJEU, C-519/04 P, Meca-Medina and Majcen v. Commission, ECLI:EU:C:2006:492; French Constitutional Council, Decision 248-DC dated January 17, 1989; US Supreme Court, Decision No. O1-1289 dated April 7, 2003 in State farm mutual insurance Co v. Campbell; see also Janák 2015, Costa 2013, p. 9, Rigozzi et al. 2003, p. 41.

[15] Swiss Private International Law Act, art. 190 (2) (a)–(e). FIFA & WADA, CAS 2005/C/976 & 986, para 143. I am thankful to Despina Mavromati for this personal reflection during the 2019 International Sports Law Journal Conference. See also Baddeley 2019.

[16] See, amongst others, CAS 2005/A/830 Squizzato v. FINA, CAS 1999/A/246 McLain Ward v. FEI. See also Houben 2007, p. 15; Costa 2013, p. 8; Niggli and Sieveking 2006; Rigozzi 2005.

[17] Petržela 2018, p. 77.

[18] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[19] Code 2015, Code 2021, Introduction.

[20] Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[21] Costa 2013, 2019.

[22] Costa 2013, p. 8.

[23] Costa 2013, p. 8.

[24] Costa 2013, Costa 2019.

[25] CJEU, C-519/04 P, Meca-Medina and Majcen v. Commission, ECLI:EU:C:2006:492; French Constitutional Council, Decision 248-DC dated January 17, 1989; US Supreme Court, Decision No. O1-1289 dated April 7, 2003 in State farm mutual insurance Co v. Campbell; see also Janák 2015; Costa 2013, p. 9; Rigozzi et al. 2003, p. 41.

[26] See, amongst others, Soek 2006, Houben 2007, Janák 2015, Petržela 2018 or Exner 2018. Representatives of athletes themselves often call for the WADA to put more focus on the human rights of athletes, including the right to a proportionate punishment—see Time for WADA to study the true human cost of the global anti-doping system. World Players Association (online), 10 December 2019.

basic period of ineligibility.[27] Nevertheless, there are seemingly important objective and subjective elements which hearing panels may not take into account while imposing sanctions. Both Code 2015 and Code 2021 prevent hearing panels from considering elements such as the stage and the remaining time left in the athlete's career, the timing of the sporting calendar or potential loss of the opportunity to earn money during ineligibility, while assessing an athlete's fault.[28]

Hearing panels might frequently not investigate or judge questions such as the effect of the doping substance found in the athlete's body, the gravity of the athlete's fault influenced by the age, the education and the general situation of the athlete in a way they would be considered under state law. The same applies to the effect of the sanction on an athlete's career and therefore on his or her professional and personal development.[29] By harmonizing the core anti-doping elements and limiting the flexibility of hearing panels, Code 2015 and Code 2021 intends to be specific enough in order to advance the anti-doping effort.[30] As a result, however, anti-doping rule violations occurring under different circumstances may sometimes lead to the same consequences, which appears to contradict the principle of proportionate punishment, in particular the individualization or personalization of sanctions, as well as equity of athletes or other persons worldwide.

Having in mind the above-mentioned concerns as to the proportionality within the sanctioning frameworks of both Code 2015 and 2021, I focus primarily on the application of the principle of proportionate punishment beyond the Code in this paper. I would like to satisfy my curiosity, which some readers may share, as to how Code 2015 and Code 2021 ensure proportionality of sanctions in those rare cases where the flexibility of hearing panels within the limits of Code 2015 or Code 2021 appears insufficient. What if the sanctions fixed by Code 2015 and Code 2021 would be disproportionate in the context of all subjective and objective elements of the particular case? Can hearing panels deviate from the fixed sanction and impose ineligibility below the limits of Code 2015 or Code 2021 applying the principle of proportionate punishment? Can they do that, or do they have to keep within the limits and risk imposing sanctions that seem *prima facie* disproportionate and that result in very significant, real life consequences for the athlete involved?[31]

On a legislative level, WADA is primarily responsible for making sure that Code 2015 and Code 2021 comply with the general principle of proportionate punishment.[32] From the application perspective, hearing panels must ensure proportionate sanctions while applying Code 2015 and Code 2021 as well as implementing regulations to the facts of concrete cases. Nevertheless, neither Code 2015 nor Code 2021 explicitly provides hearing panels with the possibility to apply proportionality beyond their limits and to impose ineligibility below the minimum set scale, not even if the otherwise applicable sanction would be disproportionate in the context of all objective and subjective elements of particular cases. Moreover, hearing panels, especially those of the CAS, have not been favourable to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by Code 2015.[33]

Regarding the previous versions of the Code, the published case law of the CAS contains only two examples of panels going below the limits of the applicable rules. In 2006, the CAS panel considered the case of the Argentinian tennis player Mariano Puerta. He claimed to have accidentally drunk from a glass that appeared to him to be empty. However, his wife had previously used the glass as a vessel for premenstrual tension medicine containing a negligible amount of prohibited substance, which could not have any performance enhancing effect. Moreover, the player has sustained a previous positive test for an asthma medication for which he could have but had not obtained a therapeutic use exemption. In the context of these circumstances, the CAS panel imposed on Puerta a 2-year ban, instead of 8 years fixed by the World Anti-Doping Code 2004 ("Code 2004") for the combination of the two anti-doping rule violations.[34]

In 2011, the CAS panel considered the case of the Polish cart driver Igor Walilko. When he was 12 years old, Walilko tested positive for the prohibited substance nikethamide during a competition in Ampfing, Germany. If the CAS panel strictly followed the wording of the World Anti-Doping Code 2009 ("Code 2009"), it would impose on the driver a period of ineligibility of 2 years since he was not able to rebut the presumption of guilt and obtain the elimination or reduction of the sanction based on Code 2009's provisions. Nevertheless, the CAS panel reduced the otherwise applicable sanction below the limits of Code 2009 and imposed on

[27] Code 2015, Code 2021, art. 10. See also Baddeley 2019, p. 13; David 2017, pp. 328–462.

[28] Code 2015, Code 2021, Appendix 1 (Definitions): Fault.

[29] Baddeley 2019, p. 13.

[30] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code. See also Code 2015, Code 2021, comment to art. 10.

[31] Janák 2015.

[32] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 90.

[33] See, amongst others, CAS 2017/A/5112 Arashov v. ITF, paras 121–127, CAS 2018/A/5739 Cadogan v. NADCB, paras 79–83.

[34] CAS 2006/A/1025 Puerta v. ITF.

Walilko the ban of 18 months having regard to the driver's young age, youth category and the timing of the sporting calendar.[35]

In the light of the above-mentioned, my central research question in this paper is as follows: Do hearing panels have the discretion to impose the period of ineligibility for anti-doping rule violations below the limits set by Code 2015 or Code 2021, if the otherwise applicable sanction would be disproportionate? While seeking answer to this question, I will initially briefly introduce the fixed sanction frameworks of Code 2015 and Code 2021 focusing on the flexibility of hearing panels and the elements that they can take into consideration in order to impose proportionate sanctions. Furthermore, I will consider the purpose of the Code to fight doping effectively, harmonize sanctions, ensure equality for athletes and other persons as well as legal certainty, in order to establish balance between these core anti-doping elements and the pursuit of proportionate sanctions. In other words, I will deal with the problem of equilibrium between more certainty and more flexibility.[36]

I will first consider the influence of possible hearing panels' flexibility to impose sanctions below the limits of the Code on the harmonization of sanctions ensuring equality for athletes worldwide, which seems to be the reason for the mandatory fixed sanction regime[37] and the strongest argument against excessive flexibility of hearing panels.[38] Consequently, I will focus on the core of my main research questions and analyse whether hearing panels have the flexibility to consider proportionality even beyond the limits of Code 2015 or Code 2021 I will simultaneously consider the influence of such flexibility on the effectivity of the fight against doping aiming at its complete eradication, and on legal certainty that appears in the CAS case law as an argument against reducing yet further the period of ineligibility provided for by the Code.[39]

2 Fixed sanction frameworks in Code 2015 and Code 2021: enough flexibility for hearing panels?

In this chapter, I will examine how much flexibility Code 2015, Code 2021 and implementing regulations leave to hearing panels in order to determine proportionate sanctions for doping. In terms of flexibility, the Code evolved substantially over nearly 17 years of its existence. In the words of the main drafter of Code 2021 Richard Young, "every time, the team had built in more flexibility".[40] Code 2021 continues in the trend of more flexibility. As Richard Young puts it, "the version of the 2021 Code was more flexible than the 2015 Code".[41]

Code 2015 defines doping as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of Code 2015.[42] Code 2021 modifies certain anti-doping rule violations and introduces a new Article 2.11 covering acts discouraging or retaliating against reporting to authorities.[43] Consequently, an athlete's or other person's anti-doping rule violation may result in one or more consequences stipulated by Code 2015 and Code 2021 including disqualification, provisional suspension, ineligibility, financial consequences, or public reporting or disclosure.[44]

In this paper, I focus on sanctions on individuals,[45] namely the period of ineligibility following an anti-doping rule violation. During the period of ineligibility, an athlete or another person may not participate in any competition or other activity authorized or organized by any signatory of Code 2015 or Code 2021, its member organization or a club. Moreover, the athlete or other person may not participate in competitions organized by any professional league or any national or international event organization, or any elite or national sporting activity funded by a governmental agency.[46] I also consider other consequences connected to ineligibility, which highlight its negative effect for athletes

[35] CAS 2010/A/2268 I v. FIA, para 142.

[36] I am thankful to Despina Mavromati for this personal reflection that she shared during her lecture on 8 July 2019 at the Common Law Society Summer School 2019: Global Law of Sport, View from a Mountain in Špindlerův Mlýn, Czech Republic.

[37] Rigozzi et al. 2003, p. 64.

[38] Code 2015, comment to art. 10, p. 78. See also Duffy 2013.

[39] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, paras 89–90.

[40] WADA Executive Committee Meeting Minutes, 14 November 2018, p. 21.

[41] WADA Executive Committee Meeting Minutes, 14 November 2018, p. 21.

[42] Code 2015, arts. 1,2. See also David 2017.

[43] Code 2021, art. 2.11.

[44] Code 2015, Code 2021, Appendix 1 (Definitions): Consequences of Anti-Doping Rule Violations.

[45] Code 2015, Code 2021, art. 10.

[46] Code 2015, Code 2021, Appendix 1 (Definitions): Consequences of Anti-Doping Rule Violations—Ineligibility. See Code 2015, art. 10.12.1, and Code 2021, art. 10.14 for details of an athlete's or other person's status during ineligibility.

or other persons, namely possible withholding of financial support[47] as well as related personal and social.

According to Code 2015, hearing panels determine the length of the period of ineligibility in four consecutive steps outlined in the comment to Article 10.6.4 of Code 2015.[48] Even though Code 2021 abolishes this comment, it keeps the substance of the original article.[49] Moreover, Code 2021 does not substantively modify the structure of either Article 10 or other sanctioning provisions of the Code. It is true that Code 2021 brings a few significant novelties into the sanctioning of doping, which I present further throughout this paper.[50] Nevertheless, these novelties do not influence the process or mechanism of determining the period of ineligibility as such. Therefore, I believe that hearing panels will follow similar process even after Code 2021 enters into force on 1 January 2021.

In the first step, hearing panels determine which of the basic periods of ineligibility apply to the particular anti-doping rule violation pursuant to Articles 10.2, 10.3, 10.4 and 10.5 of Code 2015. Second, hearing panels determine the length of the applicable period of ineligibility within the eventually provided range according to the athlete other person's degree of fault. In the third step, hearing panels consider whether there is a basis for elimination, suspension, or reduction of the period of ineligibility under Article 10.6 of Code 2015. Finally, hearing panels determine the start of the period of ineligibility.[51] In addition, a period of ineligibility may include its public disclosure.[52]

Before diving deeper into the analysis of the flexibility of hearing panels to impose proportionate sanctions for anti-doping rule violations, I would like to highlight the importance and consequences of the strict liability principle in this regard. According to the strict liability principle, an anti-doping organization does not have to demonstrate intent, fault, negligence or knowing use on the athlete's part in order to establish the presence of a prohibited substance or its metabolites or markers in an athlete's sample or use or attempted use of a prohibited substance or a prohibited method.[53] It is the athletes' personal duty to ensure that no prohibited substance enters their bodies and that no prohibited method is used. In other words, athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.[54]

Therefore, hearing panels do not consider an athlete's fault when establishing whether one of the above-mentioned anti-doping rule violations occurred. On the contrary, hearing panels can only take fault into account while determining the consequences of such a violation under Article 10 of Code 2015 or Code 2021.[55] According to CAS, the strict liability principle is necessary to fight doping in an effective manner, notwithstanding a certain degree of hardship.[56] I agree with that, but also believe that the more hardship athletes bear at this stage, the more effort hearing panels should invest into seeking suitable and proportionate sanctions. In other words, if athletes cannot refer with success to their fault when hearing panels decide on the occurrence of the violation, such panels should fully consider athletes' fault and other subjective and objective elements of particular cases when determining the punishment.

2.1 Basic period of ineligibility

Coming back to the process of determining the period of ineligibility, hearing panels initially choose the basic period of ineligibility, which is in most cases two or 4 years depending on the anti-doping rule violation in question.[57] In the case of trafficking or attempted trafficking[58] and administration or attempted administration of any prohibited substance or prohibited method,[59] the period of ineligibility can be up to lifetime, depending on the seriousness of the violation.[60] According to Code 2021, the same applies newly to complicity or attempted complicity by an athlete or other person[61] and acts discouraging or retaliating against reporting to authorities.[62]

Taking another direction, Code 2021 newly provides hearing panels with greater flexibility while determining the

[47] Code 2015, art. 10.12.4, Code 2021, art. 10.14.4.

[48] Code 2015, art. 10.6.4, comment to art. 10.6.4. See Code 2015, Appendix 2 for several examples of how Article 10 of Code 2015 is to be applied. See Rigozzi et al. 2015 for a proposal of a process to determine the length of the initial period of ineligibility associated with the basic sanction for anti-doping rule violations involving the presence of a prohibited substance under Code 2015 as a response to different possible interpretations of the sanctioning regime of Code 2015.

[49] Code 2021, art. 10.7.3.

[50] Nevertheless, my goal in this paper is not to analyse all novelties introduced by the sanctioning framework of Code 2021in detail. I rather focus on the importance of these novelties for the flexibility of hearing panels to impose proportionate sanctions for doping.

[51] Code 2015, comment to art. 10.6.4.

[52] Code 2015, art. 10.13.

[53] Code 2015, Code 2021, Appendix 1 (Definitions): Strict Liability.

[54] Code 2015, Code 2021, arts. 2.1.1, 2.2.1.

[55] Code 2015, Code 2021, comment to art. 2.1.1. See also Rigozzi et al. 2003, p. 41.

[56] See, amongst others, CAS 95/141 V. v FINA; CAS 99/A/239, UCI v. Moller. See also Code 2021, comment to art. 2.1.1.

[57] Code 2015, Code 2021, arts. 10.2, 10.3.

[58] Code 2015, Code 2021, art. 2.7.

[59] Code 2015, Code 2021, art. 2.8.

[60] Code 2015, Code 2021, art. 10.3. .

[61] Code 2015, Code 2021, arts. 2.9, 10.3.4.

[62] Code 2021, art. 2.11.

basic period of ineligibility for evading, refusing or failing to submit to sample collection,[63] or tampering or attempted tampering with any part of doping control.[64] Under Code 2015, the period of ineligibility for these anti-doping rule violations shall be 4 years unless, in the case of failing to submit to sample collection, the athlete can establish that the commission of the violation was not intentional. In such a case, the period of ineligibility shall be 2 years.[65] Code 2021 newly provides that in all other cases when the athlete or other person can establish exceptional circumstances that justify a reduction of the period of ineligibility, the ban for the two anti-doping rule violations shall be in a range from 2 to 4 years depending on the athlete or other person's degree of fault.[66] I wonder why hearing panels cannot consider exceptional circumstances also while imposing sanctions for other anti-doping rule violations.

Moreover, Code 2021 introduces a new category of substances of abuse and modifies sanctioning or their ingestion or use. Substances of abuse shall include "those prohibited substances which are frequently abused in society outside of the context of sport and are specifically identified as substances of abuse on the Prohibited List".[67] This modification is particularly important in case of cocaine, which Code 2015 does not classify as a specified substance. Therefore, if an athlete cannot demonstrate no fault or negligence, the shortest period of ineligibility is still 12 months.[68] As such, cocaine has been subject to many controversial cases under Code 2015, including that of José Paolo Guerrero, raising concerns about proportionality of the punishment.[69]

Code 2021 provides that if an athlete can establish that any ingestion, use or possession of a substance of abuse occurred out-of-competition[70] and was unrelated to sport performance, then the period of ineligibility shall be 3 months. Moreover, hearing panels may further reduce such a ban to 1 month if the athlete or other person verifies satisfactory completion of a substance of abuse program approved by the anti-doping organization with results management responsibility. Nevertheless, hearing panels cannot further reduce the period of ineligibility established pursuant to the above-mentioned framework based on Article 10.6 of Code 2021 concerning no significant fault of negligence.[71]

On the other hand, the above-mentioned 3-month, or eventually 1-month period of ineligibility only applies to ingestion, possession or use of substances of abuse happening out of competition. If the ingestion, use or possession of a substance of abuse occurs in competition, hearing panels will sanction the athlete or other person with the basic period of ineligibility for presence, use or attempted use or possession of a prohibited substance ranging from 2 to 4 years.[72] Nevertheless, if the athlete can establish that the context of the ingestion, use or possession was unrelated to sports performance, then hearing panels shall neither consider the violation "intentional" for purposes of Article 10.2.1 of Code 2021 nor as a basis for a finding of aggravating circumstances which may increase the basic period of ineligibility.[73]

Code 2021 reintroduces the concept of aggravating circumstances and gives hearing panels the power to raise the basic sanction for certain anti-doping rule violations[74] by up to 2 years, unless the athlete or other person can establish that he or she did not commit the violation knowingly. The ineligibility within the scale depends on the seriousness of the violation and the nature of the aggravating circumstances.[75] Code 2021 contains a non-exhaustive list of aggravating circumstances including, for example, the failure to respect a provisional suspension, usage or possession of multiple prohibited substances or prohibited methods, or tampering during results management or hearing process.[76] In this regard, I wonder why there is no new provision in Code 2021 concerning mitigating circumstances that could lead to the reduction of the basic period of ineligibility for other anti-doping rule violations on the top of evading, refusing or failing to submit to sample collection, or tampering or attempted tampering with any part of doping control mentioned above.

[63] Code 2015, Code 2021, art. 2.3.

[64] Code 2015, Code 2021, art. 2.5.

[65] Code 2015, art. 10.3.1.

[66] Code 2021, art. 10.3.1. 2021 Code Revision—Third Draft (Following the Third Consultation phase), Summary of Major Changes, para 7, p. 4.

[67] Code 2021, art. 4.2.3.

[68] Code 2015, art. 10.5.2.

[69] See, amongst others, CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero; Czech Olympic Committee Arbitration Commission 2018-1 Anti-Doping Committee of the Czech Republic v. Jan Šefl. See Exner 2019, pp. 1–2; Greene and Vermeer 2018.

[70] Code 2021, Appendix 1 (Definitions): Out-of-Competition, In-Competition.

[71] Code 2021, art. 10.2.4.1.

[72] Code 2015, Code 2021, arts. 10.2, 10.2.4.2., 10.3.

[73] Code 2021, art. 10.2.4.2.

[74] The aggravating circumstances concern all anti-doping rule violations except trafficking or attempted trafficking, administration of attempted administration, complicity or acts by an athlete or other person do discourage or retaliate against reporting. These anti-doping rule violations are not included in the application of this article because the sanctions for these violations already build in sufficient discretion up to a lifetime ban to allow consideration of any aggravating circumstances. See Code 2021, comment to art. 10.4.

[75] Code 2021, art. 10.4.

[76] Code 2021, Appendix 1 (Definitions): Aggravating Circumstances.

2.2 Elimination, reduction or suspension of the basic period of ineligibility

When hearing panels determine the basic sanction, they decide whether there are conditions for the elimination of the period of ineligibility under Article 10.4 of Code 2015 or 10.5 of Code 2021 on grounds of no fault or negligence.[77] Nevertheless, both Code 2015 and Code 2021 specify that this provision applies only in exceptional circumstances and enumerate conditions under which athletes or other persons cannot rely on this possibility.[78] Moreover, both Code 2015 and Code 2021 prevent hearing panels from evaluating athletes' fault based on consideration of elements such as the stage and the remaining time left in the athlete's career, the timing of the sporting calendar or potential loss of the opportunity to earn money during ineligibility. The reason is that the circumstances considered must be specific and relevant to explain the athlete's or other person's departure from the expected standard of behaviour.[79]

The same consideration applies to possible reduction of the period of ineligibility for non-intentional violations under Article 10.5 of Code 2015 or 10.6 of Code 2021, if the athlete or other person establishes that the fault or negligence was not significant.[80] In this regard, Code 2015 and Code 2021 further distinguish between specified substances and newly under Code 2021 even specified methods,[81] contaminated products,[82] newly under Code 2021 protected persons and recreational athletes,[83] and other circumstances.[84] If the anti-doping rule violation involves a specified substance or a substance coming from a contaminated product, hearing panels shall impose, at a minimum, a reprimand and no period of ineligibility, and at a maximum, 2 years of ineligibility, depending on the athlete's or other person's degree of fault.[85]

When protected persons[86] or recreational athletes[87] commit an anti-doping rule violation, which does not involve a substance of abuse, and they can establish no significant fault or negligence, hearing panels shall also impose, at a minimum, a reprimand and no period of ineligibility, and at a maximum, 2 years ineligibility. The range depends on the protected person or recreational athlete's degree of fault.[88] As opposed to other athletes, protected persons and recreational athletes do not have to establish how the prohibited substance entered their system in order to benefit from the elimination based on no, or reduction based on no significant fault or negligence.[89] Moreover, protected persons and recreational athletes benefit from milder treatment also when they commit evading, refusing or failing to submit to sample collection, or tampering or attempted tampering with any part of doping control.[90] Finally, their public disclosure is subject to milder rules.[91]

In other circumstances including non-specified substances, the period of ineligibility reduced on grounds of no significant fault or negligence may not be less than one-half of the period otherwise applicable, or 8 years if the basic period of ineligibility is lifetime.[92] Therefore, hearing panels may reduce the basic 2-year ban to 12 months, but no more. In the case of the Norwegian cross-country skier Therese Johaug, the CAS panel provided hearing panels with guidance on how to use their flexibility in similar cases. The CAS panel set three categories of fault or negligence and the corresponding duration of ineligibility: (1) a significant degree of fault may lead to a sanction of 20–24 months; (2)

[77] Code 2015, art. 10.4, Code 2021, art. 10.5. Code 2015, Code 2021, Appendix 1 (Definitions): No Fault or Negligence.

[78] Code 2015, comment to art. 10.4. Code 2021, comment to art. 10.5.

[79] Code 2015, Code 2021, Appendix 1 (Definitions): Fault.

[80] Code 2015, art. 10.5, Code 2021, art. 10.6, Code 2015, Code 2021, Appendix 1 (Definitions): No Significant Fault or Negligence.

[81] Code 2015, arts. 4.2.2 and 10.5.1.1, Code 2021, arts. 4.2.2 and 10.6.1.1.

[82] Code 2015, art. 10.5.1.2, Code 2021, art. 10.6.1.2.

[83] Code 2021, art. 10.6.1.3.

[84] Code 2015, art. 10.5.2, Code 2021, art. 10.6.2.

[85] Code 2015, arts. 10.5.1.1,10.5.1.2, Code 2021, arts. 10.6.1.1,10.6.1.2.

[86] Code 2021, Appendix 1 (Definitions): Protected Person. Protected person is an athlete or other natural person who at the time of the anti-doping rule violation: (i) has not reached the age of 16 years; (ii) has not reached the age of 18 years and is not included in any registered testing pool and has never competed in any international event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation.

[87] Code 2021, Appendix 1 (Definitions): Recreational Athlete. Recreational athlete is a natural person who is so defined by the relevant national anti-doping organization; however, the term shall not include any person who, within the 5 years prior to committing any anti-doping rule violation, has been an international-level athlete (as defined by each international federation consistent with the International Standard for Testing and Investigations) or national-level athlete (as defined by each national anti-doping organization consistent with the International Standard for Testing and Investigations), has represented any country in an international event in an open category or has been included within any registered testing pool or other whereabouts information pool maintained by any international federation or national anti-doping organization.

[88] Code 2021, art. 10.6.1.3.

[89] Code 2021, Appendix 1 (Definitions): No Fault or Negligence, No Significant Fault or Negligence.

[90] Code 2021, art. 10.3.1.

[91] Code 2021, art. 14.3.7.

[92] Code 2015, art. 10.5.2, Code 2021, art. 10.6.2.

a normal degree of fault equals a sanction of 16–20 months; and (3) a light degree of fault may lead to a sanction of 12–16 months.[93] Therefore, the shortest period of ineligibility possible is still 12 months, which may seem disproportionate in particular cases.[94]

In the third step, hearing panels establish whether there is a basis for elimination, suspension, or reduction of the period of ineligibility for reasons other than fault under Article 10.6 of Code 2015 or 10.7 of Code 2021.

An anti-doping organization may suspend, under certain conditions, a part of the period of ineligibility when the athlete or other person has provided substantial assistance in discovering or establishing an anti-doping rule violation, criminal offense, breach of professional rules, or a case of non-compliance with Code 2021.[95] The reduction of the otherwise applicable period of ineligibility may also result from admission of an anti-doping rule violation in the absence of other evidence[96] or, in the case of Code 2015, from the prompt admission of certain anti-doping rule violations after being confronted with the violation.[97] Code 2021 abolishes the latter option.

On the other hand, Code 2021 newly provides an athlete or other person with the possibility to enter into a case resolution agreement with the anti-doping organization and the WADA.[98] Moreover, an athlete or other person can provide the above-mentioned substantial assistance or enter into a case resolution agreement under the newly introduced without prejudice agreement. If the athlete or other person and the anti-doping organization do not agree on the terms of the agreement within a defined time limit, the anti-doping organization cannot use the information provided so far against the athlete or other person.[99] Lastly, the results management agreements include the possibility of a 1-year reduction or ineligibility for certain anti-doping rule violations based on early admission and acceptance of sanction.[100] As much as I welcome the flexibility that these newly introduced results management agreements bring to athletes, other persons and anti-doping organizations, I believe that they contradict WADA's aim to harmonize anti-doping sanctions worldwide, which I will analyse in more detail further in this paper.

In the context of the foregoing, Code 2021 provides additional reasons for potential reduction of the basic period of ineligibility compared to those in Code 2015. In this regard, Article 27.3 of Code 2021 provides athletes or other persons with the possibility to apply for a reduction of the period of ineligibility rendered before 1 January 2021 if the athlete or other person is still serving the ban after this date. Such an athlete or other person shall apply for the reduction to the anti-doping organization with result management responsibility before the period of ineligibility has expired. On the other hand, Code 2021 does not apply to any anti-doping rule violation case where the hearing panel rendered the final decision and the period of ineligibility has already expired.[101]

In the light of the aforementioned, I accept that the sanctioning frameworks of both Code 2015 and Code 2021 provide hearing panels with substantial flexibility in the pursuit of proportionate sanctions. The modularity of sanctions stems from the consideration of several circumstances including the nature of the prohibited substance, the gravity of the individual fault, behaviour during the procedure or even age.[102] On the other hand, I am still concerned about rare cases with circumstances that are somehow out of ordinary, including for example those of Puerta or Walilko, where not even the use of a full range of tools within Code 2015 or Code 2021 can ensure a proportionate sanction. Do these exceptional circumstances call for exceptional treatment? Do they call for hearing panels to impose proportionate sanctions even below the limits of Code 2015 or Code 2021? In order to analyse such a possibility, I will initially address the alleged harmonization of sanctions ensuring equality of athletes worldwide, which seems to be the strongest argument against excessive sanctioning flexibility of hearing panels.[103]

[93] CAS 2017/A/5015 FIS v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports, CAS 2017/A/5110 Therese Johaug v. Norwegian Olympic and Paralympic Committee and Confederation of Sports. See also Czech Olympic Committee Arbitration Commission 2018-1 Anti-Doping Committee of the Czech Republic v. Jan Šefl, para 9.16.

[94] See, amongst others, CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero; Czech Olympic Committee Arbitration Commission 2018-1 Anti-Doping Committee of the Czech Republic v. Jan Šefl. See Exner 2019, pp. 1–2; Greene and Vermeer 2018.

[95] Code 2015, art. 10.6.1, Code 2021, art. 10.7.1.

[96] Code 2015, art. 10.6.2, Code 2021, art. 10.7.2.

[97] Code 2015, art. 10.6.3.

[98] Code 2021, art. 10.8.2.

[99] Code 2021, arts. 10.7.1.1 and 10.8.2., Appendix 1 (Definitions): Without Prejudice Agreement.

[100] Code 2021, art. 10.8.2.

[101] Code 2021, art. 27.3. See also CAS 2019/A/6148 WADA v. Sun Yang & FINA, para 368–369.

[102] Costa 2013, p. 8.

[103] Code 2015, comment to art. 10. See also Duffy 2013.

3 Harmonization of sanctions ensuring equality for athletes worldwide as an argument against greater flexibility of hearing panels

Harmonization of sanctions for doping ensuring equality for athletes and other persons is the main goal of the mandatory fixed sanction regime.[104] According to Code 2015 and Code 2021, harmonization means that "the same rules and criteria are applied to assess the unique facts of each case".[105] In addition, too much flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers.[106] Finally, imposing different sanctions could allegedly have a negative impact on the public opinion on the fairness of the fight against doping.[107] I will address these arguments on the following lines, and I will focus primarily on the influence of possible flexibility of hearing panels to impose sanctions below the limits of Code 2015 and Code 2021 on the core of harmonization of sanctions for doping and its goal to achieve equality for athletes worldwide.

3.1 Harmonization, or unification of sanctions for doping?

Harmonization of sanctions for anti-doping rule violations is a legitimate goal of the fight against doping. Main goals of Code 2015, Code 2021 and the whole World Anti-Doping Programme include harmonized, coordinated and effective anti-doping programs at the international and national level. The purpose of Code 2015 and Code 2021 is to advance the anti-doping effort through universal harmonization of core anti-doping elements with the aim of achieving complete harmonization on issues where uniformity is required.[108] Even the Court of Justice of the European Union and the European Commission recognized harmonization of sanctions for anti-doping rule violations as a legitimate aim of the fight against doping and a potential justification of a restriction to EU law.[109]

Before addressing how Code 2015 and Code 2021 attempt to harmonize sanctions, I would like to express my doubts about practical attainability of this legitimate aim. Harmonization requires approximation of the rules, but also of the decision-making practice. As to the rules, Code 2015 and Code 2021 require its signatories to fully adapt their anti-doping rules to certain provisions of Code 2015 and Code 2021, including sanctions.[110] Regarding the decision-making practice, a dispute resolution mechanism consisting of hearing panels of sporting governing bodies and anti-doping organizations worldwide with CAS as the sport's supreme court is in place. CAS and other higher hearing panels approximate anti-doping case law by setting examples for other hearing panels. In this regard, especially CAS plays a leading role in the interpretation and application of the Code as its panels aim at cohesive interpretation as well as at fair and harmonious application of its provisions.[111] Anti-doping organizations and their hearing panels on both international and national level seek guidance from CAS with the aim of interpreting anti-doping rules and policies consistently.[112]

In this regard, I agree with Duval that CAS should be more transparent. While being one of the, if not the most covered and publicly discussed international courts in the media, it is also one of the most secretive ones[113] as it systematically publishes less than 30% of its awards.[114] Nevertheless, in the light of the judgment of the ECtHR in Mutu and Pechstein v. Switzerland,[115] CAS should be compared to national and international courts, which publish their judgments as the norm, while confidentiality is an exception reserved to cases in which security or privacy of an individual might call for it.[116] If CAS published more of its case law, hearing panels around the world could learn from it, adapt their decision-making practice correspondingly and prevent unjustified differences in their own decisions.

WADA could also help approximating anti-doping case law by continuing and broadening the publication of decisions of CAS and other hearing panels applying Code 2015,

[104] Rigozzi et al. 2003, p. 64; Duffy 2013.

[105] Code 2015, Code 2021, comment to art. 10.

[106] Code 2015, Code 2021, comment to art. 10. The comment also provides that the lack of harmonization has also frequently been the source of conflicts between international federations and national anti-doping organizations. Nevertheless, this argument concerns rules on jurisdiction, rather than on sanctions. The flexibility of hearing panels does not influence their jurisdiction. See also Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, paras 182–183; Houlihan 2003, p. 215.

[107] Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, para 177.

[108] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[109] European Commission, COMP /38158, Meca Medina and Majcen/Comité International Olympique, 1 August 2002, para 45, Rigozzi et al. 2003, pp. 64–65.

[110] Code 2015, Code 2021, art. 23.2.

[111] Rigozzi et al. 2015, p. 42.

[112] Petržela 2018, p. 77.

[113] Duval 2018.

[114] Spera 2017.

[115] ECtHR, Mutu and Pechstein v. Switzerland, no. 40575/10 and 67474/10, 2 October 2018, ECLI:CE:ECHR:2018:1002 JUD004057510.

[116] Duval 2018.

or later Code 2021, and implementing anti-doping regulations.[117] With the exception for the protection of privacy or personal data, such a database could be available to anyone including hearing panels, which could consult it and see how other hearing panels deal with similar situations. Increased transparency of WADA and CAS could also help to mitigate any negative impact of imposing different sanctions on the public opinion on the fairness of the fight against doping.[118] In the context of this paper, I believe that imposing disproportionate sanctions on athletes is also a great threat for the public perception of the fight against doping that the anti-doping community should address.[119]

While approximation of anti-doping case law is desirable, I am afraid that there is no tool to achieve complete and effective harmonization of the case law of CAS and other hearing panels. On the one hand, hearing panels worldwide draw arguments from decisions of CAS and other higher hearing panels. On the other hand, CAS panels and other hearing panels of sporting governing bodies and anti-doping organizations do not operate under a formal precedent system since they do not have to formally follow either their or another panel's decisions. Therefore, such a dispute resolution mechanism cannot completely and effectively ensure uniform interpretation and application of Code 2015 or Code 2021 and the universal harmonization of core anti-doping elements.[120]

Even if CAS and other hearing panels could harmonize anti-doping case, I am afraid that neither Code 2015 nor Code 2021 harmonize sanctions for doping since they unify them instead. While unification and harmonization both constitute the process of approximating several systems of rules, they have substantially different characteristics, goals and effects. In order to explain this difference, I will borrow the law of the European Union ("EU"), of which harmonization and unification form core parts. Of course, the legal framework of the worldwide fight against doping and that of the EU are very different in many aspects. On the other hand, I believe that the analogy is appropriate since EU law is a great example of how unification and harmonization work.

The goal of unification is the complete unity in substance and detail.[121] The EU unifies the laws of its member states primarily through regulations, which are binding in their entirety and directly applicable.[122] In essence, regulations set unique rules applicable throughout the whole EU, which leave member states with nearly no flexibility, except on those issues specified by the regulations.[123] The same principle applies to Code 2015, Code 2021 and implementing anti-doping regulations, which keep anti-doping organizations within the fixed borders of its sanctioning framework and limit the extent of flexibility that their hearing panels possess. If there is no further flexibility allowed, "one cannot speak of harmonization, but of unification".[124]

As opposed to unification, harmonization is a process of ascertaining the admitted limits of unification, which does not necessarily amount to a vision of total uniformity.[125] The EU harmonizes the laws of its member states through directives, which are binding as to the result that must be achieved, but leave to the national authorities the choice of form and methods.[126] As such, directives prescribe certain minimal common requirements and effects, but leave member states to adjust implementing regulations to the specificities of their national legal orders. In other words, the effects of national laws implementing directives should be identical in all member states, which does not necessarily mean that the national laws themselves must always be identical. As such, harmonization can work amongst different member states of the EU, which shall abide by the minimal requirements set by directives but can adapt the form and methods to their particular national laws.[127]

Applying the above-mentioned characteristics of harmonization to sanctions for doping in sport, the effects of the sentences should be the same in all sports, not the sentences themselves.[128] In practice, however, the fixed sanction frameworks of Code 2015 and Code 2021 result in the same sentences while their effects differ because there are objective differences between various sports. For example, athletes practising different sports have careers of different length. Code 2015 and Code 2021 themselves admit that a standard period of ineligibility has a much more significant

[117] WADA publishes decisions resulting from appeals by WADA as well as decisions of some anti-doping organizations on its website: https://www.wada-ama.org/en/what-we-do/legal/case-law.

[118] Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, para 177.

[119] For example, the case of the Czech swimmer Jan Šefl, which I refer to above (Czech Olympic Committee Arbitration Commission 2018-1 Anti-Doping Committee of the Czech Republic v. Jan Šefl), raised many negative reactions amongst experts as well as the public in the Czech Republic due to the alleged disproportionate sanction.

[120] I am thankful to Marjolaine Viret for this idea, which came up during our discussion over my draft paper at the Common Law Society Summer School 2019: Global Law of Sport, View from a Mountain, which was held in Špindlerův Mlýn, Czech Republic, from 30 June to 14 July 2019.

[121] Andenas and Andersen 2012, p. 309.

[122] Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012, pp. 47–390 ("TFEU"), art. 288.

[123] For the nature and meaning of regulations in EU law see, amongst others, Craig and de Búrca 2015, p. 107.

[124] Houben 2007, p. 15.

[125] Andenas and Andersen 2012, p. 309; Menski 2006, p. 39.

[126] TFEU, art. 288.

[127] For the nature and meaning of regulations in EU law see, amongst others, Craig and de Búrca 2015, p. 108.

[128] Soek 2006, p. 252.

effect in sports where an athlete's career is short.[129] In this regard, Soek highlights that "in some sports, a 2-year ban is not a problem, while in other sports a 2-year ban means the end of a career".[130]

Except from the average length of athletes' careers, there are other objective differences between sports, for example their individual or team nature. The representative of the International Ice Hockey Federation ("IIHF") intervened during the World Conference on Doping in Sport in Katowice, Poland, in November 2019, where Code 2021 was approved, and acknowledged that Code 2021 and International Standards must be drafted to take into consideration all sports. IIHF admitted that flexibility can be a slippery slope, but also affirmed that it will continuously push WADA to take into consideration the real difference between team and individual sports so as to ensure both parties can have effective anti-doping programs.[131] On top of that, the Code itself mentions differences between sports where athletes as professionals make a sizable income and sports where athletes are usually true amateurs.[132]

Nevertheless, WADA prefers what it considers to be harmonization, resists calls for more flexibility and does not allow hearing panels to take objective differences between various sports into consideration while imposing sanctions for doping.[133] Both Code 2015 and Code 2021 prescribe fixed sanctions for all signatories and limit the flexibility of hearing panels with the aim of achieving complete uniformity. As such, Code 2015 and Code 2021 unify sanctions instead of harmonizing them. As a result, the sanctions are often the same while their effects might substantially differ amongst various sports, athletes or other persons. This practically contravenes the purpose of the Code and the World Anti-Doping Programme to harmonize sanctions in order to promote equality for athletes and other persons worldwide.

3.2 Equality, or inequality for athletes and other persons worldwide?

The harmonization of sanctions for doping aims at preserving "equality for athletes worldwide".[134] Code 2015 and Code 2021 provide that the reason for harmonization is that "it is simply not right that two athletes from the same country who test positive for the same prohibited substance under similar circumstances should receive different sanctions only because they participate in different sports".[135] In his legal opinion on the draft Code 2015, Costa argues that "it is not possible to increase too significantly the consideration given to individual circumstances, since athletes have to be treated equally at the international level, and it would be unjust to treat athletes who have used the same prohibited substance differently, merely because they practice different sports".[136]

Furthermore, too much flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers,[137] which would compromise equity of athletes across sports. Greater flexibility may also lead to more lenient sanctions for high-profile athletes since international federations could start taking all kinds of irrelevant factors into account, or even be at odds with the very purpose of the anti-doping rules.[138] As such, imposing different sanctions could have a negative impact on the public opinion on the fairness of the fight against doping.[139] Finally, the discussed flexibility of hearing panels to go even beyond the limits of Code 2015 could lead to uneven sanctions being imposed even in similar cases.[140]

The question is whether the fixed sanction frameworks of Code 2015 and Code 2021 truly ensure the "equality for athletes" and other persons worldwide. Costa argues in his opinion on the draft Code 2015 that "the equality of treatment of all athletes is guaranteed by the system envisaged in the revised draft, since the criteria applicable to the duration of the period of ineligibility are objective, and do not result in discriminatory distinctions being made between athletes".[141] Addressing the increase in the basic period of ineligibility for intentional violations from 2 to 4 years,

[129] Code 2015, Code 2021, comment to art. 10.

[130] Soek 2006, p. 252; Houben 2007, p. 16.

[131] World Conference on Doping in Sport, Katowice, Poland, 5–7 November 2019, Intervention on behalf of the International Ice Hockey Federation delivered by its legal director Ashley Ehlert, p. 2. All the interventions are available on the conference website: https://wada2019.org.

[132] Code 2015, Code 2021, comment to art. 10.

[133] Code 2015, Code 2021, Appendix 1 (Definitions): Fault. See also Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, para 171–174.

[134] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code. See also Code 2015, Code 2021, comment to art. 10.

[135] Code 2015, Code 2021, comment to art. 10.

[136] Costa 2013, p. 8.

[137] Code 2015, Code 2021, comment to art. 10.

[138] Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, paras 182–183; Houlihan 2003, p. 215.

[139] Houben 2007, p. 15; Kaufmann-Kohler et al. 2003, para 177.

[140] Janák 2015.

[141] Costa 2013, p. 8.

Costa further argues that "there does not seem to be any breach of the equality of treatment of athletes. Indeed, the difference in the proposed durations, besides not being particularly significant, is based on objective criteria and not on subjective differences liable to be characterised as arbitrary (…)".[142]

Nevertheless, equal treatment is relative. The same circumstances should lead to the same results, while different circumstances should not lead to the same results. However, hearing panels possess certain flexibility within the limits fixed by Code 2015 and Code 2021, which may lead to different sanctions even in the same circumstances. On the other hand, the limited flexibility resulting from the fixed sanction framework may lead hearing panels to impose the same fixed sanction even in cases with different circumstances.[143] In other words, hearing panels may sanction long-lasting, straightforward or typical anti-doping rule violations in the same manner as those committed under very special circumstances deserving milder treatment.[144]

Analysing the case of the Czech handball player, Josef Pohlmann,[145] Janák argues that the lack of flexibility results in an athlete whose case is somewhat out of the ordinary "suffering the same sanction as an athlete who commits a more straightforward or normal case of evasion, refusal, or failure to submit a sample without taking any further actions to try to rectify the situation".[146] It is fair to point out that Code 2021 extends the flexibility of hearing panels and enables them to consider exceptional circumstances in order to reduce of the period of ineligibility from 4 years to the range of 2–4 years, depending on the athlete or person's degree of fault. Moreover, if the case involves a protected person or a recreational athlete, the period of ineligibility shall be in a range between a maximum of 2 years and, at a minimum a reprimand and no period of ineligibility.[147] In this regard, I wonder why hearing panels cannot consider exceptional circumstances also when imposing ineligibility for other anti-doping rule violations.

Furthermore, I believe that the concept of results management agreements introduced by Code 2021 does not entirely follow the purpose of Code 2021 to harmonize sanctions for doping ensuring equality for athletes and other persons. The results management agreements include the 1-year reduction for certain anti-doping rule violations based on early admission and acceptance of sanction[148] and the case resolution agreement.[149] In essence, these results management agreements allow an athlete or other person on the one hand, and an anti-doping organization and WADA on the other hand, to agree on the duration or the commencement of the period of ineligibility. Therefore, even the same circumstances can result in different sanctions depending on the content of the agreement, which contradicts equity of athletes or other persons.

In the light of the foregoing, I believe that Code 2015 and Code 2021 do not entirely fulfil their aim to harmonize anti-doping sanctions and to ensure equality for athletes worldwide, which seem to be the strongest arguments against extended sanctioning flexibility of hearing panels. The lack of formal precedent system ensuring the harmonization of anti-doping case law makes the effective and complete harmonization of sanctions impossible. Moreover, Code 2015 and Code 2021 rather unify sanctions, instead of harmonizing them. Consequently, hearing panels may impose the same sanctions even in different circumstances, as well as different sanctions even in the same circumstances as a result of their flexibility within the limits of Code 2015 and Code 2021, which compromises equity of athletes or other persons.

Furthermore, I believe that the purpose of Code 2015 and Code 2021 to harmonize anti-doping sanctions ensuring the

[142] Costa 2013, p. 10.

[143] I am thankful to Marjolaine Viret for this idea, which she shared with me during our discussion over my draft paper at the Common Law Society Summer School 2019: Global Law of Sport, View from a Mountain, which was held in Špindlerův Mlýn, Czech Republic, from 30 June to 14 July 2019.

[144] Janák 2015.

[145] Janák 2015. Czech Olympic Committee Arbitration Commission, Case 2015-1, Josef Pohlmann against the Czech Handball Federation and the Anti-Doping Committee of the Czech Republic. The case involved Mr. Pohlmann, an athlete competing in the major Czech Handball League. After a game, Mr. Pohlmann, together with five other athletes, followed doping control officers to a room for the doping control. The doping control was problem-free for the other athletes (all of whom tested negative). However, Mr. Pohlmann was not able to produce a urine sample that would meet the specific gravity requirements under the Regulations for Doping Control and Sanctions in Sports in the Czech Republic implementing Code 2015, as his urine was too diluted. He tried to produce a valid sample six times over a period of 4 h, but none of the samples met the gravity requirements. He had earlier asked the doping control officers if he could leave sooner, as he needed to be at work and the whole team was waiting outside the hall for him in the bus. The doping control officers denied his request and insisted that he had to give them the required sample, and if did not, he would commit an anti-doping rule violation. After the six futile attempts, Mr. Pohlmann got desperate, lost his nerve, tore the doping control form into pieces, and left the doping control room without permission. The next day, the athlete, after realizing that he could have committed the violation, immediately apologized for his behaviour and offered his assistance to try to rectify the situation. He eventually underwent a voluntary toxicological control in the hospital, proving the presence of no banned substances in his body.

[146] Janák 2015.

[147] Code 2021, art. 10.3.1. 2021 Code Revision—Third Draft (Following the Third Consultation phase), Summary of Major Changes, para 7, p. 4.

[148] Code 2021, art. 10.8.1.

[149] Code 2021, art. 10.8.2.

equality for athletes and other persons worldwide does not preclude the possibility for hearing panels to impose sanctions for doping even below the limits of Code 2015 or Code 2021. Such flexibility does not compromise the approximation of sanctions since hearing panels could only use it only in those rare cases with extraordinary circumstances, when the otherwise applicable sanction would be disproportionate. Furthermore, WADA and other eligible stakeholders may appeal hearing panel's decision to CAS, which has the power to review them and correct any excesses. As such, CAS can also prevent sporting governing bodies from being possibly lenient with dopers, which Code 2015 and Code 2021 cite as an argument against greater sanctioning flexibility of hearing panels.[150] Finally, there is even the Swiss Federal Tribunal that may review CAS awards from the perspective of the fair trial and public policy, including the principle of proportionality.[151]

On the contrary, I believe that such sanctioning flexibility of hearing panels could partially correct the above-mentioned shortcomings of the fixed sanction frameworks of Code 2015 and Code 2021. It could fully adapt sanctions to circumstances of particular cases and mitigate the inequity of athletes and other persons caused by the rigid application of fixed sanctions. Therefore, I will further analyse the possibility of hearing panels to go below the limits of Code 2015 and Code 2021. I will elaborate on the nature and the wording of Code 2015 and Code 2021, focusing on further application of the principle of proportionality. Consequently, I will analyse the criteria which hearing panels should take into account when considering imposing sanctions below the limits set by the fixed sanction framework. Since the sanctioning of doping cannot be arbitrary, I will propose the conditions of such flexibility. I will simultaneously seek balance of extended flexibility with other important anti-doping elements, including the effectivity of the fight against doping, legal certainty and related consistency of the decision-making practice of hearing panels applying Code 2015 or Code 2021.

4 Considering proportionality below the limits of Code 2015 and Code 2021

In this chapter, I will discuss whether hearing panels possess the flexibility to impose sanctions for doping below the limits of Code 2015 or Code 2021. Rouiller notes that such flexibility is seductive but fails to take account of a number of factors. He argues that the aim of Code 2004 is to completely eradicate doping, which is acknowledged as potentially fatal for the future of large sports competitions. He follows that the punitive system, which also takes on a general preventative role, must match what is at stake. Nevertheless, Rouiller himself admits that deterrence does not justify every means.[152] If it did, the fight against doping would turn into a witch-hunt during which hearing panels would punish athletes with disproportionate sentences referring to the higher principle of eradication of doping. Deterrence must always be in balance with other preventive elements, including the rule of law, which contains the principle of proportionality.[153]

WADA, CAS panels as well as some authors argue that the sanctioning frameworks of Code 2015 and Code 2021 essentially comply with the general principle of proportionate punishment. Code 2015 and Code 2021 themselves state that they have been drafted giving consideration to the principles of proportionality and human rights.[154] In this regard, CAS panels have repeatedly held that Code 2015 is proportional in its approach to sanctions.[155] CAS panels argue that Code 2015 "sought itself to fashion in detailed and sophisticated way a proportionate response in pursuit of a legitimate aim".[156] Kaufmann-Kohler et al. claim that "articles 10.2, 10.3, and 10.5 (of Code 2015) pursue a legitimate aim and satisfy the requirement of proportionality".[157]

Moreover, WADA, CAS and some authors defend the compliance of the Code with the principle of proportionality invoking the consultation process leading to the approval of Code 2015 and the alleged free consent of athletes and other persons with the provisions of the Code. CAS panels have repeatedly noted that Code 2015 "was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end.[158] According to the representatives of WADA, "quite a number of athletes, some even in the form

[150] Code 2015, Code 2021, comment to art. 10.

[151] Swiss Private International Law Act, art. 190(2)(a)–(e). FIFA & WADA, CAS 2005/C/976 & 986, para 143. See also Baddeley 2019.

[152] Rouiller 2005, pp. 36–37.

[153] Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[154] Code 2015, Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[155] See, amongst others, CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 87, CAS 2017/A/5015 FIS v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports, CAS 2017/A/5110 Therese Johaug v. Norwegian Olympic and Paralympic Committee and Confederation of Sports, CAS 2016/A/4643 Maria Sharapova v. ITF.

[156] CAS 2016/A/4643 Maria Sharapova v. ITF, para 51, CAS 2018/A/5739 Cadogan v. NADCB, para 80.

[157] Kaufmann-Kohler et al. 2003, para 185.

[158] See, amongst others, CAS 2016/A/4643 Maria Sharapova v. ITF, para 51, CAS 2018/A/5739 Cadogan v. NADCB, para 80.

of an open letter, have expressed their support for a regime of sanctions that is even stricter than that implemented by (…) Code (2015)".[159] In his legal opinion on Code 2004, Roullier adds that "if the athletes themselves think, rightly, that this system is appropriate and necessary, that hardly leaves any room for criticizing it from the angle of proportionality (…)".[160] Roullier follows that an athlete "agrees, in a deliberate manner, that he or she may be the subject of an abrupt sanction"[161] and that "the scale of sanctions has been accepted by all and applies to all".[162]

Nevertheless, the consent of athletes or other persons to be bound by Code 2015 or Code 2021 is not free. Dealing with athletes' consent to the CAS arbitration, the ECtHR concluded in Mutu and Pechstein v. Switzerland that the consent is not free since athletes have no other choice than to accept the arbitral clause if they want to compete on a top level.[163] Following the same logic, athletes have to accept Code 2015 and Code 2021 if they want to pursue their professional sporting careers because such acceptance is a condition for participating in many high-level sporting activities and competitions, including the Olympic Games.[164] Therefore, their consent is not free. Regarding athletes' support for harsher punishments, I have previously expressed my doubts as to whether athletes have all the information to make such a call and whether they have considered carefully all possible consequences, especially how easy it is to fall into a doping trap.[165] Finally, as much as I appreciate the consultation process that accompanied drafting of both Code 2015 and Code 2021, stakeholder's comments themselves cannot ensure their compliance with the internationally recognized general legal principle of proportionate punishment.

Final texts of Code 2015 and Code 2021 are one thing, and their application in practice is the other. Just like in the case of harmonization, Code 2015 and 2021 themselves cannot ensure their compliance with the internationally recognized general legal principle of proportionate punishment. Even though they lay down the anti-doping rules, hearing panels must bring these rules into practical life and apply them in a manner which respect the principle of proportionality.[166] Code 2021 itself provides that its purpose as well as the purpose of the World Anti-Doping Programme is, amongst others, to ensure the rule of law, meaning that all measures taken in application of anti-doping programs of all relevant stakeholders respect Code 2021, the International Standards, and "the principles of proportionality (…)".[167]

Except from the text of Code 2015 and 2021, their nature is the foundation of the possibility to apply proportionality beyond their limits. Referring to Code 2004 and Code 2009, the CAS panels recognized that the Code and related regulations of sporting governing bodies are still "regulations of an association which cannot, directly or indirectly, replace fundamental and general principles like the doctrine of proportionality a priori for every thinkable case".[168] Moreover, the CAS panel admitted in Puerta that there are inevitably going to be instances in which the solution provided by Code 2004 does not work.[169] The CAS panel followed that in the rare cases in which Code 2004 does not provide a just and proportionate sanction, the "loophole or lacuna must be filled by the Panel".[170] As much as Code 2015 and Code 2021 evolved in terms of proportionality, their nature has not changed. Therefore, CAS and other hearing panels should consider proportionality while dealing with particular cases, no matter what Code 2015 or Code 2021 say.[171] Even beyond their limits.

4.1 Criteria, conditions and limits of imposing sanctions below the limits of Code 2015 and Code 2021

For the sake of legal certainty, I believe that WADA should introduce a provision in the Code empowering hearing panels to impose ineligibility below the minimum set scale in order to pursue a proportionate punishment.[172]

As such, WADA would use the opportunity to specify the conditions and limits of such flexibility in order to make sure that the pursuit of proportionate sanctions is in balance with other core anti-doping elements, including the effectiveness of the fight against doping and the alleged harmonization of sanctions and equality for athletes and other persons worldwide. Nevertheless, WADA did not use this opportunity neither in Code 2015 nor in Code 2021. An

[159] Niggli and Sieveking 2006, p. 11.

[160] Rouiller 2005, pp. 36–37.

[161] Rouiller 2005, p. 33.

[162] Rouiller 2005, p. 33; Niggli and Sieveking 2006, p. 11.

[163] ECtHR, Mutu and Pechstein v. Switzerland, no. 40575/10 and 67474/10, 2 October 2018, ECLI:CE:ECHR:2018:1002 JUD004057510.

[164] Olympic Charter 2019, rules 40, 43.

[165] Exner 2018, p. 129.

[166] Code 2015, Code 2021, Introduction.

[167] Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

[168] CAS 2005/A/830 Squizzato v. FINA, para 48, CAS 2007/A/1252 FINA v Mellouli and FTN, para 37, CAS 2010/A/2268 I v. FIA, para 138.

[169] CAS 2006/A/1025 Puerta v. ITF. Houben 2007, p. 16.

[170] CAS 2006/A/1025 Puerta v. ITF.

[171] See also Petržela 2018, p. 77.

[172] CAS Panel stated in Guerrero that if a change is required, it should be done by WADA. CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 90.

amendment introducing this provision into Code 2021 is feasible but practically complicated at the moment as Code 2021 has already been approved following nearly a 3-year consultation process. Therefore, I propose to codify such sanctioning flexibility of hearing panels in the future version of the Code.

Nevertheless, the current absence of such a provision in both Code 2015 and Code 2021 does not relieve hearing panels of their duty to ensure proportionate punishments for doping. What criteria should hearing panels take into account when considering reducing the length of the period of ineligibility below the fixed limits? In Puerta, when the CAS panel issued a 2-year ban instead of 8 years fixed by Code 2004, those elements included the athlete having accidentally drunk from a glass which he perceived as empty but which his wife had previously used by as a vessel for premenstrual tension medicine containing a negligible amount of prohibited substance which could not have any performance enhancing effect. Moreover, the sanction applicable under Code 2004 would result from the player having sustained a previous positive test for an asthma medication for which he could have but had not obtained a therapeutic use exemption.[173] In Walilko, the CAS panel reduced the otherwise applicable sanction of 2 years fixed by Code 2009 to 18 months having regard to the driver's young age, youth category and the timing of the sporting calendar.[174]

In general, I believe that hearing panels should base their decision to impose the sanction below the limits of Code 2015 or Code 2021 on careful consideration of all objective criteria of the particular case as well as subjective criteria of the athlete or other person. In 2006, the CAS panel rendered its advisory opinion requested by FIFA and WADA regarding the implementation of Code 2004 into the FIFA Disciplinary Code. The panel ruled that each body must consider the proportionality of imposed sanctions for doping cases, which is limited by the mandatory prohibition of excessive penalties embodied in several provisions of Swiss law. In order to find out whether a sanction is excessive, a judge must review "the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender".[175] Therefore, hearing panels must consider all objective and subjective elements of particular cases.

The objective criteria may include, for example, exceptional factual circumstances, the stage of the anti-doping rule violation, meaning preparation, an attempt or accomplished violation, objective differences between sports or the timing of the sporting calendar.[176] The subjective criteria may cover, amongst others, the effect of the prohibited substance on the athlete's performance, the gravity of the athlete's fault influenced by age, education and his or her general situation, or the athlete's previous clean sheet.[177] They could also include the effect of the sanction on the athlete's career, especially its stage and the remaining time left, and therefore on his or her personal and professional development.[178] The subjective mitigating criteria could also cover the athlete or other person helping to prevent or reveal another anti-doping rule violation or a case of non-compliance with Code 2015 or Code 2021. Another important criterion may be the consent of all the parties to reduce, or suspend the ineligibility, as was the case of José Paolo Guerrero.[179]

When hearing panels consider all objective criteria of the case and the subjective criteria of the athlete or other person, their consequent flexibility to impose the sanction below the limits of Code 2015 or Code 2021 cannot be arbitrary and must have certain conditions. Hearing panels cannot reach for such an option if they have mere "uncomfortable feeling" about the fixed sanction.[180] In its above-mentioned advisory opinion regarding the implementation of Code 2004 into the FIFA Disciplinary Code, the CAS panel concluded that it would regard fixed sanction as abusive and, thus, contrary to mandatory Swiss law, only if the sanction "is evidently and grossly disproportionate in comparison to the proved rule violation and if it is considered as a violation of fundamental justice and fairness".[181] Other CAS panels would use such flexibility only if the otherwise applicable sanction set by Code 2004 would constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalized.[182]

Therefore, hearing panels must decide whether the sanction fixed by Code 2015 or Code 2021 is excessive and disproportionate and, thus, whether to impose the sanction below the fixed limits on a case-by-case basis considering all objective and subjective elements. First, hearing panels should follow the four-step test and decide which of the sanctions fixed by Code 2015 or Code 2021 applies to a particular case. Thereafter, they must consider whether the otherwise applicable sanction complies with the general

[173] CAS 2006/A/1025 Puerta v. ITF.

[174] CAS 2010/A/2268 I v. FIA, para 142.

[175] FIFA & WADA, CAS 2005/C/976 & 986, para 143, CAS 2006/A/1025 Puerta v. ITF, para 11.7.13.

[176] CAS 2010/A/2268 I v. FIA, para 142.

[177] Janák 2015. For the opposite opinion, see CAS 2003/A/447 Stylianou v. FINA.

[178] Baddeley 2019, p. 13.

[179] Statement of the Swiss Federal Tribunal, 31 May 2018.

[180] CAS 2005/A/830 Squizzato v. FINA, para 50.

[181] FIFA & WADA, CAS 2005/C/976 & 986, para 143, CAS 2006/A/1025 Puerta v. ITF, para 11.7.13.

[182] CAS 2004/A/ 690 H. v. Association of Tennis Professionals (ATP), para 52, CAS 2005/A/830 Squizzato v. FINA, para 50.

legal principle of proportionate punishment, or whether it is excessive and disproportionate. In other words, they must decide whether the otherwise applicable sanction is "evidently and grossly disproportionate in comparison to the proved rule violation", whether it amounts to "a violation of fundamental justice and fairness"[183] or it is "an attack on personal rights which (is) serious and totally disproportionate to the behaviour penalized".[184] If it is, they should reduce the period of ineligibility below the lower limit stipulated by Code 2015 or Code 2021 and impose a sanction which would be proportionate with regard to all objective and subjective elements of the case.

For example, I believe that the 14-month ineligibility that the CAS panel imposed on Guerrero was excessive and, thus, disproportionate, given all objective circumstances of the case and subjective elements concerning the football player. The CAS panel concluded that the violation was not intentional. It further decided that Guerrero was guilty of fault, which was however not significant. In such a case, Code 2015 sets a fixed scale of 12–24 months of ineligibility.[185] The panel concluded that "the appropriate sanction for Mr Guerrero is a period of ineligibility of 14 months".[186] Unfortunately, the CAS panel did not explain why it picked the 14-month ban, instead of the lower limit of 12 months or any other length within the scale of 12–24 months. In the context of all objective and subjective elements of the case, I believe that the 14-month ban was disproportionate and I would have suggested no more than 6 months, like FIFA had done.[187] I also believe that is why the Swiss Federal Tribunal suspended the ban allowing Guerrero to participate in the 2018 FIFA World Cup in Russia,[188] even though it rejected Guerrero's final appeal in March 2019.[189]

Moreover, I believe that the discussed flexibility of hearing panels to impose sanctions below the limits fixed by Code 2015 or Code 2021 respects legal certainty, which prevented the CAS panel from using such flexibility in Guerrero. The CAS panel initially noted the injustice caused by otherwise applicable ban. Referring to the principle of legal certainty, the panel nevertheless concluded that it could not cross the boundaries of Code 2015 even if its application in a particular case may bear harsh punishment for a particular individual. The panel argued that departing from Code 2015 would be destructive and involve an endless debate as to when in future such departure would be warranted. "A trickle could thus become a torrent; and the exceptional mutate into the norm".[190] In the panel's view, it is better, indeed necessary, to adhere to Code 2015. "If change is required, that is for a legislative body in the iterative process of review of the (Code 2015), not an adjudicative body which has to apply the *lex lata*, and not some version of the *lex ferenda*".[191]

First, I do not agree with the CAS panel that it would have to apply "some version of the *lex ferenda*"[192] in order to impose the sanction on Guerrero below the limit fixed by Code 2015. On the contrary, I believe that the panel would be filling loopholes in Code 2015 while using the internationally recognized general legal principle of proportionate punishment, which both form part of *lex lata*. Code 2015 is the existing law, in other words "what the law is" or *lex lata*.[193] Therefore, the loopholes in Code 2015 are the loopholes in the existing law, in *lex lata*. Moreover, the principle of proportionate punishment belongs amongst existing internationally recognized general principles of law and therefore, proportionality is *lex lata*, not *lex ferenda* as the CAS panel argues. Therefore, the CAS panel, or any other hearing panel, would be applying the existing law while imposing sanctions below the limits of Code 2015 or Code 2021.

Second, I believe that the discussed flexibility of hearing panels to impose sanctions below the limits of Code 2015 or Code 2021 does not necessarily compromise legal certainty. Like proportionality, the principle of legal certainty is an internationally recognized general principle of law, which requires legal norms to provide their subjects with the ability to regulate their conduct and to protect them from arbitrary use of power. In other words, legal certainty requires that decisions are made according to legal rules, that they are lawful.[194] Hearing panels would make the decision to reduce the sanction below the limits of Code 2015 or Code 2021 using the general legal principle of proportionate punishment, therefore according to legal rules.

Moreover, I believe that such flexibility of hearing panels would not open the Pandora's Box as suggested by the CAS

[183] FIFA & WADA, CAS 2005/C/976 & 986, para 143, CAS 2006/A/1025 Puerta v. ITF, para 11.7.13.

[184] CAS 2004/A/ 690 H. v. Association of Tennis Professionals (ATP), para 52, CAS 2005/A/830 Squizzato v. FINA, para 50.

[185] Code 2015, art. 10.5.2.

[186] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 91.

[187] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 84.

[188] Statement of the Swiss Federal Tribunal, 31 May 2018.

[189] Peru's Paolo Guerrero loses final doping appeal, cannot play until April. ESPN (online), 7 March 2019.

[190] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 89. See also Petržela 2018, p. 77.

[191] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 90.

[192] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 90.

[193] For a comprehensive theory of loopholes in law, see, amongst others, Kramer 2019.

[194] See, amongst others, Maxeiner 2008, pp. 28–46.

panel in Guerrero because hearing panels could use it only in rare cases when the imposition of the fixed period of ineligibility would be excessive and disproportionate. Moreover, hearing panels could impose sanctions only below the limits, not above them, in accordance with the principle *nulla poena sine lege*. Therefore, athletes or other persons would not suffer from arbitrary use of power. Furthermore, WADA and other eligible stakeholders may appeal hearing panel's decision to CAS, which has the power to review them and correct any excesses. Finally, there is even the Swiss Federal Tribunal that may review CAS awards from the perspective of the fair trial and procedural and substantive public policy.[195]

Furthermore, I believe that the flexibility of hearing panels to impose sanctions below the limits of Code 2015 or Code 2021 does not compromise even the efficiency of the fight against doping in sport. Referring to Code 2004, Rouiller invokes the complete eradication of doping as an argument against such flexibility. He argues that the punitive system, which includes general preventative role, must correspond to what is at stake.[196] Nevertheless, Rouiller himself admits that deterrence does not justify every means.[197] I believe that it cannot justify excessive and disproportionate punishments. Moreover, I believe that there are other important strategies how to prevent doping in sport, especially anti-doping education. The importance of anti-doping education keeps growing, but the ratio between education, deterrence and other preventive strategies is still far from perfect. I am convinced that if there is at least as much focus on education in the anti-doping world as there is on deterrence, many cases of especially inadvertent doping would have never existed.[198]

Moreover, examples that I showed in this paper, namely Puerta, Walilko or Guerrero, show that the discussed flexibility of hearing panels comes into consideration in those rare cases, of which circumstances are somehow out of ordinary and which do not present the typical or the most serious forms of doping. Therefore, as opposed to the CAS panel in Guerrero,[199] I do not believe that departing from Code 2015 or Code 2021 in these cases would be destructive for the fight against doping as such. On the contrary, I believe that the flexibility of hearing panels to replace the excessive and disproportionate period of ineligibility fixed by Code 2015 or Code 2021 with a proportionate sanction does not pose a threat to the efficiency, but rather brings Code 2015 and Code 2021 closer to the internationally recognized legal principle of proportionate punishment.

5 Conclusion

I argue that hearing panels have the discretion to impose the period of ineligibility for the first anti-doping rule violation below the limits fixed by Code 2015 or Code 2021 in order to pursue a proportionate punishment. Looking at the texts of both Code 2015 and Code 2021, none of them explicitly provides hearing panels with such discretion. Code 2015 and Code 2021 limit the sanctioning flexibility of hearing panels by fixing the basic sanctions and their range as well as by the exhaustive list of options for their elimination, reduction or suspension. Nevertheless, there inevitably were, are and will be cases with extraordinary circumstances where the solution provided by Code 2015 or Code 2021 cannot work.

In such cases, where the texts of Code 2015 or Code 2021 do not provide a proportionate sanction, hearing panels should patch the loophole with general principles of law, including the principle of proportionate punishment. Hearing panels must initially consider all objective criteria of the case and all subjective criteria of the athlete or other person. If they come to the conclusion that the sanction fixed by Code 2015 or Code 2021 would be excessive and thus disproportionate, they should impose a proportionate sanction below the fixed limits, despite the lack of explicit empowerment in the Code.

Moreover, I believe that the flexibility of hearing panels to impose sanctions below the limits of Code 2015 or Code 2021 does not necessarily contravene the efficiency of the fight against doping, the purpose to harmonize sanctions and ensure equality for athletes and other persons, legal certainty and other core anti-doping elements. Such sanctioning flexibility does not compromise the goal to eradicate doping, the approximation of sanctions or legal certainty, since hearing panels would only use it in rare cases, when the otherwise applicable sanction would be excessive and disproportionate. On the contrary, I believe that such flexibility enables them to fully adapt sanctions to circumstances of particular cases and mitigate the inequity of athletes and other persons caused by the rigid application of the fixed sanctions.

If hearing panels could not impose ineligibility below the limits of Code 2015 or Code 2021, the fixed sanction frameworks leave us with decisions such as that of the CAS panel in the case of José Paolo Guerrero. The restrictive interpretation of the fixed sanction framework of Code 2015 led the CAS panel to a decision perceived by many as disproportionate and unjust. Captains of Australia, France and

[195] Swiss Private International Law Act, art. 190(2)(a)–(e).

[196] Rouiller 2005, pp. 36–37.

[197] Rouiller 2005, pp. 36–37.

[198] In this regard, I greatly appreciate putting education first amongst the preventive strategies in Code 2021 (see Code 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code) and the introduction of the International Standard for Education as a part of Code 2021.

[199] CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para 89.

Denmark, the teams that were drawn to face Peru in the basic group, wrote to FIFA saying that the ban was disproportionate and asking that Guerrero be allowed to play in the tournament.[200] Nevertheless, it was only after a Swiss judge suspended the period of ineligibility that Guerrero could play in Russia.[201]

For the sake of legal certainty, WADA should ideally introduce a provision in the Code explicitly empowering hearing panels to impose sanctions below the fixed lower limits. As such it would specify conditions and limits of such flexibility in order to make sure that the pursuit of proportionate sanctions is in balance with other core anti-doping elements. Nevertheless, WADA did not introduce such a provision in either Code 2015 or Code 2021. At the moment, an amendment introducing this provision into Code 2021 is not practically feasible as Code 2021 has already been approved following nearly a 3-year long consultation process. Therefore, I propose to seize this opportunity by introducing such a provision in the future version of the Code. Until then, I believe that hearing panels can still reduce the period of ineligibility below the lower limits fixed by Code 2015 or Code 2021 if they deem the otherwise applicable sanctions excessive, in order to pursue a proportionate punishment.

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