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**Sanctioning Framework of the World Anti-Doping Code 2021:  
A Proportionate Response to Doping?**

JUDr. Jan Exner

Doktorský studijní program: Teoretické právní vědy – Evropské právo  
Právnická fakulta Univerzity Karlovy, Katedra evropského práva

Prohlašuji, že jsem esej na téma *Sanctioning Framework of the World Anti-Doping Code 2021: A Proportionate Response to Doping?* zpracoval sám a uvedl jsem všechny použité prameny. Dávám souhlas s prvním zveřejněním své eseje vyhlášovateli soutěže nebo spolupracujícími institucemi v papírové či elektronické podobě.

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JUDr. Jan Exner

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## **Abstract**

In this essay, I examine the compliance of selected sanctioning parts of the new World Anti-Doping Code, which enters into force on 1 January 2021 (“Code 2021”), with the internationally recognized general legal principle of proportionate punishment. I also compare how Code 2021 evolved in terms of proportionate punishments compared to the World Anti-Doping Code currently in force (“Code 2015”). I argue that the new approach towards sanctioning of the ingestion, use or possession of substances of abuse as well as of anti-doping rule violations committed by protected persons and recreational athletes empowers hearing panels to issue a proportionate punishment better than Code 2015. On the other hand, I believe that the strict interpretation of the modified definition of intentional presence, use or possession of a prohibited substance or method would lead to disproportionate consequences for those athletes who knowingly use prohibited substances in competition, but without the intention to cheat. I also believe that hearing panels should apply the reintroduced concept of aggravating circumstances only to the most serious cases of doping in order to avoid disproportionate punishments. To conclude, I consider Code 2021 a step forward for the world-wide fight against doping in sport. On the other hand, I believe that hearing panels will bear a heavy burden to apply Code 2021 so that they always ensure one of its goals, to respect the rule law and the principle of proportionality.

## **Key Words**

World Anti-Doping Code 2021, World Anti-Doping Code 2015, doping, proportionality, sanctions, intent, substances of abuse, aggravating circumstances, protected person, recreational athlete

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# Sanctioning Framework of the World Anti-Doping Code 2021: A Proportionate Response to Doping?

*JUDr. Jan Exner*

## **Introduction**

In October 2017, the Czech swimmer Jan Šefl participated in the three-day event Pilsen Sprints. After the first day of competitions, he attended a birthday party, during which he toasted with one glass of sangria. Unfortunately, his friend, who wanted everyone to have some fun, had previously emptied a packet of cocaine into the jug of sangria from which he poured the drinks. The in-competition doping control held during the second day's competition revealed the presence of cocaine in the swimmer's sample. In August 2018, the Arbitration Commission of the Czech Olympic Committee, deciding as the final national instance, found the swimmer guilty of the presence of the prohibited substance in his body. While considering the sanction, the commission decided that the swimmer's fault and negligence were not significant and sanctioned him with a twelve-month period of ineligibility, which was the minimum penalty stipulated for these cases by the applicable World Anti-Doping Code ("Code 2015").<sup>1</sup> No entitled person appealed to the Court of Arbitration for Sport ("CAS") and the decision became final.<sup>2</sup>

Interestingly, Šefl would probably get a ban of only three or even one month if they committed the violation on or after 1 January 2021, when the new World Anti-Doping Code ("Code 2021") enters into force.<sup>3</sup> The reason is that Code 2021 introduces a new category of prohibited substances, substances of abuse, and modifies their sanctioning, especially their ingestion or use out of competition without relation to sports performance.<sup>4</sup> On the top of that, Code 2021 introduces further changes into essentially all areas of the World Anti-Doping Programme.<sup>5</sup> In this essay, I focus on the changes in

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<sup>1</sup> Code 2015 is available [here](#). Regulations for Doping Control and Sanctions in Sport in the Czech Republic implementing Code 2015 in the Czech Republic are available in Czech [here](#).

<sup>2</sup> Czech Olympic Committee Arbitration Commission, Case 2018-1, Šefl. The arbitral award is available [here](#).

<sup>3</sup> Code 2021 is available [here](#).

<sup>4</sup> Code 2021, Arts. 4.2.3, 10.2.4.

<sup>5</sup> The redlined version of Code 2021 highlighting all changes between Code 2015 and Code 2021 is available [here](#). The summary of the major changes - 2021 Code Revision - Third Draft (Following the Third Consultation Phase), Summary of Major Changes ("Code 2021, Summary of Major Changes") - is available [here](#). See also Synrem.

determining the period of ineligibility for the first anti-doping rule violation, building on my long-term research interest in the proportionality of sanctions for doping.<sup>6</sup>

The internationally recognized general legal principle of proportionate punishment applies to sanctions for doping.<sup>7</sup> Code 2021 itself provides that it was drafted considering the principles of proportionality and human rights and that its anti-doping rules are to be applied in a manner, which respects these principles. Moreover, Code 2021 and the whole World Anti-Doping Programme aim at ensuring the respect for the rule of law, including the principle of proportionality.<sup>8</sup> The principle of proportionate punishment requires that sanctions, especially their length, must be necessary and not excessive. Moreover, it comprises the principle of the individualization or personalization of sentences, which requires the sanctions not to be automatic, but to be adjustable to particular circumstances.<sup>9</sup>

Therefore, my goal is to examine those sanctioning parts of Code 2021 that are most relevant from the point of the internationally recognised general legal principle of proportionate punishment. The former President of the European Court of Human Rights (“ECHR”) and the current CAS arbitrator Jean-Paul Costa gave a favourable opinion on the compliance of selected parts of the draft Code 2021 with internationally recognised principles of law, including the principle of proportionate punishment.<sup>10</sup> Nevertheless, the parts of Code 2021 selected by the World Anti-Doping Agency (“WADA”) for Costa’s review and those parts of Code 2021 that I identified as most relevant in terms of proportionality do not entirely overlap. Moreover, even after the approval of Code 2021, there have been voices calling for WADA to emphasize human rights of athletes, including the right to a proportionate punishment.<sup>11</sup> For these reasons, my main research question in this essay is as follows: Do the selected parts of the sanctioning framework of Code

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<sup>6</sup> See, amongst others, Exner 2018a, Exner 2018b, Exner 2019a, and Exner 2019b.

<sup>7</sup> CJEU, C-519/04 P, Meca-Medina and Majcen v. Commission, ECLI:EU:C:2006:492, paras. 48 and 55. CAS 2005/A/830 Squizzato v. FINA, CAS 1999/A/246 McLain Ward v. FEI. See also Goldsworthy 2018, Petržela 2018, p. 77, Houben 2017, p. 15, Janák 2015, Costa 2013, p. 8-9, Niggli and Sieveking 2006, Rigozzi 2005, Rigozzi et al. 2003, p. 41.

<sup>8</sup> Code 2021, Introduction. Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

<sup>9</sup> See, amongst others, CJEU, C-519/04 P, Meca-Medina and Majcen v. Commission, ECLI:EU:C:2006:492, paras. 48 and 55; French Constitutional Council, Decision 248-DC dated January 17, 1989; US Supreme Court, Decision N° 01-1289 dated April 7, 2003 in State farm mutual insurance Co v. Campbell. See also Costa 2013, p. 8.

<sup>10</sup> Costa 2019.

<sup>11</sup> World Players Association (online), 10 December 2019, available [here](#).

2021 comply with the internationally recognized general legal principle of proportionate punishment?

I will analyse the selected sanctioning parts of Code 2021 following the order of the process of determining the period of ineligibility for the first anti-doping rule violation established in Code 2015, which Code 2021 builds on.<sup>12</sup> First, I will discuss how Code 2021 amends the definition of intentional presence, use or attempted use or possession of a prohibited substance or method (1). Second, I will analyse the modifications in sanctioning of the ingestion, use or possession of the newly created category of substances of abuse (2). Third, I will examine the reintroduced concept of aggravating circumstances that provides hearing panels with the possibility of increasing the basic period of ineligibility by up to two years (3). Finally, I will discuss how Code 2021 alleviates sanctioning of anti-doping rule violations committed by two new categories of protected persons and recreational athletes (4). I will conduct the abstract review of proportionality of these parts of Code 2021 as such as well as the concrete one by applying these parts to past cases rendered under Code 2015.

## **1. Definition of Intentional Presence, Use or Attempted Use or Possession of a Prohibited Substance or Method**

Code 2021 initially provides the basic period of ineligibility for intentional presence, use or attempted use or possession of a prohibited substance or prohibited method.<sup>13</sup> Athletes or other persons face a four-year ban in two cases. First, the anti-doping rule violation involves a specified substance<sup>14</sup> and the anti-doping organization can establish that the violation was intentional.<sup>15</sup> Second, the anti-doping rule violation does not involve a specified substance and the athlete or other person cannot establish that the violation was not intentional.<sup>16</sup> Therefore, on the top of the substance type, the burden of proof and the definition of the term “intentional” are crucial for determining the basic sanction for these anti-doping rule violations.

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<sup>12</sup> Code 2015, Art. 10.6.4, Comment to Art. 10.6.4. Code 2021, Art. 10.

<sup>13</sup> Code 2015, Code 2021, Art. 10.2.

<sup>14</sup> Code 2015, Code 2021, Art. 4.2.2, Comment to Art. 4.2.2.

<sup>15</sup> Code 2015, Code 2021, Art. 10.2.1.2.

<sup>16</sup> Code 2015, Code 2021, Art. 10.2.1.1, Comment to Art. 10.2.1.1.

In Code 2015, the term “intentional” is meant to identify those “athletes who cheat”. The term requires that athletes or other persons engaged in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that it might and manifestly disregarded that risk. Code 2015 further provides two rebuttable presumptions concerning violations including substances prohibited only in competition. Hearing panels shall presume these violations not to be “intentional” if first, athletes can establish that a specified substance was used out-of-competition, and second, if athletes can establish that a non-specified substance was used out-of-competition in a context unrelated to sport performance.<sup>17</sup>

Code 2021 abolishes the phrase “athletes who cheat”,<sup>18</sup> which has had no uniform interpretation and meaning within the anti-doping community.<sup>19</sup> The phrase might have been a mere political declaration of WADA to support the purpose of Code 2015 to provide longer periods of ineligibility for “real cheats”<sup>20</sup> and to target reprehensible rather than inadvertent acts.<sup>21</sup> On the other hand, Duval et al. claim that the notion “athletes who cheat” has got legal relevance and it refers to those athletes who have acted knowingly and dishonestly to gain an unfair advantage. Therefore, careless or even reckless, but otherwise honest conduct should not result in a four-year ban, which would raise concerns about proportionality.<sup>22</sup> Rigozzi et al. argue that the term serves as a brake for hearing panels to refrain from the imposition of a four-year ban if athletes did not intend to improve their performance or act in unfair manner, even though they acted with knowledge or recklessness.<sup>23</sup>

The question is what consequences the deletion of the phrase “athletes who cheat” will bring to the decision-making practice of hearing panels sanctioning the presence, use or attempted use, or possession of a prohibited substance or method. In particular, how should hearing panels deal with athletes who wilfully, thus intentionally used prohibited substances in competition, thus from 11:59 pm on the day before a competition to the end

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<sup>17</sup> Code 2015, Code 2021, Art. 10.2.3.

<sup>18</sup> Code 2021, Art. 10.2.3.

<sup>19</sup> Rigozzi et al. 2018.

<sup>20</sup> Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0, p. 1.

<sup>21</sup> Rigozzi et al. 2013, p. 21.

<sup>22</sup> Duval et al. 2016, p. 116. See also Rigozzi et al. 2015, p. 27-28.

<sup>23</sup> Rigozzi et al. 2015, p. 13, Rigozzi et al. 2013, p. 20.

of such a competition and the related sample collection process,<sup>24</sup> but in a context entirely unrelated to sport, thus without the intent to cheat?<sup>25</sup>

One possible interpretation is that hearing panels will simply assess whether the elements of the modified definition of “intentional” have been fulfilled, without exploring the intention to cheat. As such, hearing panels would examine whether athletes or other persons engaged in conduct which they knew constituted an anti-doping rule violation or manifestly disregarded the significant risk that it might. On the other hand, they would not consider whether athletes wanted to enhance their performance, risk their health or otherwise violate the spirit of sport, or not. As such, athletes would face the basic ineligibility of four years regardless of their potential intention to cheat.

On the other hand, I believe that sanctions for doping should reflect the difference between athletes who intentionally ingest prohibited substances in order to enhance their sport performance, and athletes who knowingly use such substances, but in a context not related to sport performance. Substances of abuse come to mind in this context.<sup>26</sup> In the next chapter, I will discuss the whole new sanctioning regime of the use, ingestion or possession of the substances of abuse, especially out of competition without relation to sport performance. Nevertheless, I would like to briefly look at sanctioning of their ingestion, use or possession in competition already now. If athletes or other persons establish that the context of such ingestion, use or possession was unrelated to sports performance, hearing panels shall not consider such a violation “intentional” for purposes of Article 10.2.1 of Code 2021 that provides the basic period of ineligibility for presence, use or attempted use or possession of prohibited substances or methods.<sup>27</sup>

Hypothetically, an athlete is participating in a competition held in the evening. In the morning of the same day, the athlete encounters certain personal inconvenience, for example a breakup with a partner. In reaction to such inconvenience, the athlete knowingly uses marijuana in order to come to other thoughts. A doping control held after the evening competition reveals the presence of marijuana in the athlete’s sample. Nevertheless, hearing panels will not consider such a presence “intentional” since the ingestion was unrelated to sports performance. I believe that such a rule is logical.

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<sup>24</sup> Code 2021, Appendix 1 (Definitions): In-Competition.

<sup>25</sup> Rigozzi et al. 2018.

<sup>26</sup> Rigozzi et al. 2015, p. 13.

<sup>27</sup> Code 2021, Art. 10.2.4.2.

The athlete definitely deserves a punishment because the presence of marijuana in the athlete's sample could endanger the athlete's or other persons' health and violate the spirit of sport. On the other hand, I believe that such an athlete does not deserve the same punishment compared to another athlete who would commit a straightforward anti-doping rule violation by intentionally ingesting a substance of abuse to enhance the sports performance.

Even though the abovementioned scenario is designed specifically for substance of abuse, hearing panels might apply similar construct even while sanctioning athletes who knowingly used prohibited substances in competition, but in a context entirely unrelated to sport, thus without the intent to cheat. In such cases, I believe that imposing the four year-ban on athletes who wilful ingested a prohibited substance in competition but did not intent to enhance their performance or gain another unfair advantage would not be proportionate. Even though their act might have technically fulfilled the definition of "intentional", such athletes are not "real cheats." New sanctioning framework for substances of abuse brings further interesting developments, which I will examine in the next chapter.

## **2. Substances of Abuse**

Code 2021 introduces a new category of prohibited substances, substances of abuse, and modifies sanctioning of their ingestion, use or possession, in particular out of competition without relation to sports performance. There has been no special category for recreational drugs in Code 2015. Therefore, their ingestion, use or possession has essentially been subject to general sanctioning regime.<sup>28</sup> Nevertheless, such a regime has not reflected specifics of substance abuse in the context of sport, which resulted in some controversial cases with sanctions that raised concerns as to their proportionality.<sup>29</sup> Cocaine has been a particular problem as there were 69 positive tests for cocaine world-wide in 2017<sup>30</sup> and 87 in 2018.<sup>31</sup>

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<sup>28</sup> For an exception, see Code 2015, Appendix 1 (Definitions): Comment to No Significant Fault or Negligence.

<sup>29</sup> See, amongst others, Exner 2019, Greene and Vermeer 2018 or Rigozzi and Quinn 2018.

<sup>30</sup> WADA 2017 Anti-Doping Testing Figures, p. 23. See also Code 2021, Summary of Major Changes, para. 24, p. 10-11.

<sup>31</sup> WADA 2018 Anti-Doping Testing Figures, p. 31. WADA 2019 Anti-Doping Testing Figures have not been available yet at the time of the completion of this essay.

Classification of cocaine as a non-specified substance prohibited in any amount but only in competition,<sup>32</sup> which athletes or other persons cannot challenge,<sup>33</sup> determines the sanctioning of its presence, use or attempted use or possession. It suggests that athletes are likely to consume or use cocaine to enhance their performance.<sup>34</sup> The authors of Code 2021 argued that stimulants like cocaine could clearly have a performance enhancing effect when used in competition.<sup>35</sup> On the other hand, Greene and Vermeer argue that there is no scientific consensus on the performance enhancing effect of cocaine and advocate its reclassification as a specified substance,<sup>36</sup> which is the case of the majority of recreational drugs.<sup>37</sup> In fact, there are studies showing that cocaine affects primarily the brain function for a relative short period of time, but its influence on sports performance is rather negative.<sup>38</sup> The drafting team of Code 2021 tried to come up with a reporting limit for cocaine under which it has no performance enhancing effect, but did not succeed, especially because of the difficulties of analysing urine samples.<sup>39</sup>

The classification of cocaine as a non-specified substance in Code 2015 requires athletes or other persons to demonstrate the lack of intent in order to avoid a four-year ban.<sup>40</sup> If they do, hearing panels can indeed eliminate the period of ineligibility on grounds of no fault or negligence, but they apply this possibility only exceptionally.<sup>41</sup> If the elimination is not possible, hearing panels can at least reduce the ban if athletes demonstrate that their fault or negligence was not significant. However, the minimum period of ineligibility would still be twelve months.<sup>42</sup> Nevertheless, WADA would prefer going after the real dopers instead of wasting resources on cases that athletes take forward on no significant

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<sup>32</sup> Code 2015, Art. 4.2.2. Prohibited List 2020 is available [here](#).

<sup>33</sup> Code 2015, Code 2021, Art. 4.3.3.

<sup>34</sup> Code 2015, comment to Art. 4.2.2.

<sup>35</sup> Code 2021, Summary of Major Changes, para. 24, p. 10-11. WADA EC, 15 May 2019, 10.1, p. 31.

<sup>36</sup> Greene and Vermeer 2018, Exner 2019b.

<sup>37</sup> Prohibited List 2020. See also Exner 2019b.

<sup>38</sup> Svelov et al. 2007. See also Exner 2019b.

<sup>39</sup> WADA EC, 15 May 2019, 10.1, p. 31.

<sup>40</sup> Code 2015, Art. 10.2.1.1.

<sup>41</sup> Code 2015, Art. 10.4, Comment to Art. 10.4. Code 2021, Art. 10.5, Comment to Art. 10.5. Code 2015, Code 2021, Appendix 1 (Definitions): No Fault or Negligence. CAS 2009/A/1926 International Tennis Federation ("ITF") v. Richard Gasquet & CAS 2009/A/1930 WADA v. ITF & Richard Gasquet.

<sup>42</sup> Code 2015, Art. 10.5.2. Exner 2019b.

fault.<sup>43</sup> These resources could be better spent on investigations of anti-doping rule violations which affect the level playing field of sport.<sup>44</sup>

Moreover, even though Code 2015 prohibits the presence or use of cocaine and other stimulants, but also narcotics or cannabinoids only in competition,<sup>45</sup> the quantity detected in athletes' samples often suggests that the use occurred out of competition in a social context.<sup>46</sup> Anti-doping organizations have again been wasting money on cases involving cocaine used out of competition with trace amounts detected in competition. Stakeholders alleged that the use of street drugs was a problem for society in general unrelated to sport performance. They noted that in cases where an athlete has a drug problem and not a performance enhancement problem that affects the level playing field, signatories should prioritize the athletes' and other persons' health.<sup>47</sup>

Therefore, health, which got to the top of the list of values protected by Code 2021,<sup>48</sup> also became the primary rationale for the new regime of sanctioning ingestion, use or possession of street drugs. Code 2021 introduces a new category of prohibited substances, substances of abuse, which shall include "those prohibited substances which are specifically identified as substances of abuse on the Prohibited List because they are frequently abused in society outside of the context of sport."<sup>49</sup> Therefore, the WADA List Committee and consequently the WADA Executive Committee will determine what substances they consider substances of abuse.<sup>50</sup> The classification will be final and athletes or other persons will not be able to challenge it.<sup>51</sup> I assume that the new category will include cocaine, but also cannabinoids and other drugs most often associated with substance abuse.<sup>52</sup>

Consequently, Code 2021 introduces a new framework for sanctioning violations involving substances of abuse. The period of ineligibility shall be three months,

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<sup>43</sup> Minutes of the WADA Executive Committee Meeting ("WADA EC"), 15 May 2019, 10.1, p. 31. Code 2021, Summary of Major Changes, para. 23, p. 10-11. WADA EC, 14 November 2018, 6.1.1, p. 22. Minutes of the WADA Foundation Board Meeting ("WADA FB"), 15 November 2018, 6.1.1, p. 20.

<sup>44</sup> Code 2021, Summary of Major Changes, para. 23, p. 10-11.

<sup>45</sup> Prohibited List 2020.

<sup>46</sup> Exner 2019b.

<sup>47</sup> Code 2021, Summary of Major Changes, para. 23, p. 10-11.

<sup>48</sup> Code 2021, Fundamental Rationale for the World Anti-Doping Code.

<sup>49</sup> Code 2021, Art. 4.2.3.

<sup>50</sup> Code 2021, Summary of Major Changes, para. 23, p. 11.

<sup>51</sup> Code 2021, Art. 4.3.3.

<sup>52</sup> World Health Organisation, Substance Abuse, available [here](#), retrieved 7 March 2020.

if an athlete or other person establishes that “any ingestion or use occurred out of competition and was unrelated to sport performance.”<sup>53</sup> Moreover, anti-doping organizations may further reduce the three-month ineligibility to one month if the athlete or other person verifies satisfactory completion of a substance of abuse program approved by the anti-doping organization.<sup>54</sup> This rule is an exception to the general sanctioning regime of Code 2021.<sup>55</sup> As such, the three- or one-month period of ineligibility cannot be further reduced on grounds of no significant fault or negligence argument.<sup>56</sup> The drafting team came up with “a hard, fast, one-size-fits-all sanction for cocaine cases, where the athletes could demonstrate out-of-competition use not related to sport performance (...). The sanction would be three months (one month), full stop. There would be no argument about no significant fault. It would save time and money.”<sup>57</sup>

The three- or one-month period of ineligibility would probably apply even to the case of Jan Šefl mentioned in the introduction to this essay.<sup>58</sup> Given the objective circumstances and subjective elements of the case, I believe that such a sanction would be more suitable and proportionate than the actual twelve-month ban. Nevertheless, the period of ineligibility imposed on the Czech swimmer has already expired. On the other hand, athletes who committed anti-doping rule violations before 1 January 2021 but whose cases will still be pending on this day may request hearing panels to apply “lex mitior” in Code 2021.<sup>59</sup> Those athletes who will be serving the ineligibility on 1 January 2021 may apply to the anti-doping organization with result management responsibility for a reduction of the period of ineligibility based on provisions of Code 2021.<sup>60</sup>

The abovementioned uniform three- or one-month period of ineligibility will apply only if the ingestion or use of a substance of abuse occurred out of competition, thus before 11:59 pm on the day before a competition in which the athlete is scheduled to participate.<sup>61</sup> On the other hand, the ingestion, use or possession of a substance of abuse in competition has a greater potential to enhance sports performance, endanger

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<sup>53</sup> Code 2021, Art. 10.2.4.1.

<sup>54</sup> Code 2021, Art. 10.2.4.1, Comment to Art. 10.2.4.1. WADA EC, 23 September 2019, 6.1, p. 30.

<sup>55</sup> Code 2021, Art. 10.2.4.

<sup>56</sup> Code 2021, Arts. 10.2.4.1, 10.6.

<sup>57</sup> WADA FB, 15 November 2018, 6.1.1, p. 20.

<sup>58</sup> See my explanation for the Czech Television available [here](#) (in Czech).

<sup>59</sup> Code 2021, Art. 27.2.

<sup>60</sup> Code 2021, Art. 27.3. See also CAS 2019/A/6148 WADA v. Sun Yang & FINA, para. 369, where WADA pointed out this opportunity.

<sup>61</sup> Code 2021, Appendix 1 (Definitions): Out-of-Competition, In-Competition.

the athlete's health and violate the spirit of sport. Therefore, such an athlete would face the general basic period of ineligibility for intentional presence, use or attempted use or possession of a prohibited substance ranging up to four years. In the words of the main drafter of Code 2021 Richard Young, "if an athlete intentionally used a prohibited substance that was a non-specified substance such as cocaine, the athlete would get four years."<sup>62</sup>

Nevertheless, Code 2021 provides one exception to the general regime of sanctioning the ingestion, use or possession of substances of abuse in competition, which I already mentioned while discussing the definition of "intentional". Article 10.2.4.2 of Code 2021 provides that if athletes or other persons establish that the context of the ingestion, use or possession of a substance of abuse in competition was unrelated to sports performance, hearing panels shall not consider it "intentional" for the purposes of determining the basic sanction for presence, use or attempted use of a prohibited substance.<sup>63</sup> Moreover, it would not be considered an aggravating circumstance which may lead to the increase in the basic period of ineligibility.<sup>64</sup> The reason may be that even knowing use of substances of abuse might not have anything to do with sport performance.<sup>65</sup> It brings me back to the hypothetical example of the athlete going through a breakup discussed above. The athlete used a substance of abuse in competition, but its context was unrelated to sports performance. Therefore, such use would not be considered intentional and the basic period of ineligibility would be two, instead of four years.<sup>66</sup> Moreover, hearing panels could further reduce the basic sanction based on fault or other reasons.<sup>67</sup>

To conclude, I believe that the new sanctioning framework for ingestion, use or possession of substances of abuse in Code 2021 presents a step forward for the fight against doping. Code 2015 has not taken into account the specificities of substance abuse in the context of sport. Rather, it has focused on protecting the level playing field in competition, while athletes or other persons have often ingested or used recreational drugs out of competition in a social context, without any intent to enhance their

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<sup>62</sup> WADA EC, 15 May 2019, 10.1, p. 29.

<sup>63</sup> Code 2021, Art. 10.2.4.2.

<sup>64</sup> Code 2021, Art. 10.2.4.2.

<sup>65</sup> Rigozzi et al. 2015, p. 13.

<sup>66</sup> Code 2021, Art. 10.2.2.

<sup>67</sup> Code 2021, Arts. 10.5 – 10.8.

performance. Therefore, I believe that primary focus on athletes' and other persons' health is a better option for the legitimate aim of sanctioning doping related to abuse substance.

Moreover, I believe that the new approach towards sanctioning of the ingestion, use or possession of recreational drugs in Code 2021 is more proportionate compared to that in Code 2015. Even though the new three, or eventually one-month period of ineligibility for the ingestion or use of substances of abuse out of competition without relation to sport may collide with the principle of individualization of sanctions, it is much less restrictive on athletes or other persons' rights. The same goes for athletes or other persons who indeed ingested, used or possessed recreational drugs in competition, but proved that the context did not relate to sport performance. Punishing such acts with the four-year ban would be disproportionate given the fact that the same penalty applies also to real cheaters who intent to enhance their performance. I welcome that such acts bring the basic sanction of two years, which can be further reduced or even eliminated on grounds of fault or other reasons. Moreover, such acts do not amount to aggravating circumstances, another essential novelty in the sanctioning framework of Code 2021.

### **3. Aggravating Circumstances**

Code 2021 reintroduces the concept of aggravating circumstances in order to deal with special or exceptional circumstances where the prolongation of the standard period of ineligibility is appropriate.<sup>68</sup> Subsequent versions of the Code have been gradually increasing the sanctions and extending the periods of ineligibility. The standard period of suspension in the World Anti-Doping Code 2004 ("Code 2004") was two years.<sup>69</sup> The World Anti-Doping Code 2009 ("Code 2009") empowered hearing panels to increase the standard two-year ban by up to two years when aggravating circumstances were present.<sup>70</sup> When Code 2015 increased the basic period of ineligibility for intentional presence, use or possession of a prohibited substance or method to four years, the notion of aggravating circumstances disappeared.<sup>71</sup>

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<sup>68</sup> Code 2021, Summary of Major Changes, para. 29, p. 14 and 16.

<sup>69</sup> Code 2004, Art. 1.9.2.3. Costa 2019, p. 20-22.

<sup>70</sup> Code 2009, Art. 10.6. Costa 2019, p. 20-22.

<sup>71</sup> Code 2015, Art. 10.2.1. Code 2021, Summary of Major Changes, para. 29, p. 14. See also Costa 2019, p. 20-22, Rigozzi et al. 2018.

Code 2021 continues with the trend of tightening punishments for intentional doping and reintroduces the provision on aggravating circumstances. When anti-doping organizations establish the presence of aggravating circumstances, hearing panels shall increase the basic period of ineligibility by up to two years depending on the seriousness of the violation and the nature of the aggravating circumstances, unless athletes or other persons establish that they did not commit the anti-doping rule violation knowingly. Nevertheless, the provision on aggravating circumstances does not apply to trafficking or attempted trafficking, administration of attempted administration, complicity or acts discouraging or retaliating against reporting.<sup>72</sup> The reason is that sanctions for these violations already build in sufficient discretion up to a lifetime ban to allow consideration of any aggravating circumstances.<sup>73</sup>

Code 2021 contains a non-exhaustive list of aggravating circumstances, which involve actions of athletes or other persons that may justify the imposition of a period of ineligibility greater than the standard sanction. The drafters of Code 2021 added the list of examples of aggravating circumstances following a consultation with Costa. He argued that the provision on aggravating circumstances as such was compliant with human rights, but it needed a non-restrictive list of examples similar to that in Code 2009. The reason was to ensure legal security and avoid any impression of arbitrariness by decision-makers.<sup>74</sup>

Therefore, aggravating circumstances may include, for example, use or possession of multiple prohibited substances or methods, their use or possession on multiple occasions, or multiple other anti-doping rule violations. They may also concern a normal individual who would be likely to enjoy the performance-enhancing effects of anti-doping rule violations beyond the otherwise applicable period of ineligibility. They may also include deceptive or obstructive conduct to avoid the detection or adjudication of an anti-doping rule violation or tampering during results management or hearing process.<sup>75</sup> Costa argues that this is fairly satisfactory even if the list could have been more complete and include for example cases where the anti-doping rule violation harms

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<sup>72</sup> Code 2021, Art. 10.4

<sup>73</sup> Code 2021, comment to Art. 10.4.

<sup>74</sup> Costa (2019), p. 9.

<sup>75</sup> Code 2021, Appendix 1 (Definitions): Aggravating Circumstances. See WADA EC, 16 May 2018, 10.5., p. 48. WADA FB, 17 May 2018, 10.5., p. 33. See also Exner 2018b.

a protected person.<sup>76</sup> Nevertheless, the examples of aggravating circumstances described above are not exclusive and other similar circumstances or conduct may also justify the prolongation of the basic period of ineligibility.<sup>77</sup>

I agree with Costa that the non-exhaustive nature of the list of aggravating circumstances comply with the principle of “no punishment without law” enshrined, amongst others, in Article 7 of the European Convention on Human Rights (“ECHR”) because sanctions for doping do not have a criminal nature.<sup>78</sup> The ECtHR has recently indirectly confirmed Costa’s theory in *Platini v. Switzerland* when it ruled that “the prohibition to exercise all activities related to football for four years” is not a penalty for a “criminal offence” within the meaning of Article 7 of the ECHR. On the contrary, such sanctions are rather “particular measures taken against a member of a relatively small group of individuals, given a particular status and submitted to particular rules.”<sup>79</sup> The prohibition concerned a football official and was not a consequence of an anti-doping rule violation. On the other hand, sanctions for doping, especially ineligibility, have a similar nature and fit into the reasoning of the ECtHR. Therefore, the ECtHR would probably not consider them penalties for a “criminal offence”. Even though I believe athletes and other persons deserve to know what circumstances may lead to even a six-year ban, the non-exhaustive list or aggravating circumstances in Code 2021 probably complies with human rights of athletes.

On the other hand, the period of ineligibility of even six years as such smells of disproportionate punishment. Even the four-year suspension raises concerns about its proportionality.<sup>80</sup> The six-year ban restricts athletes’ rights even more. Therefore, it puts even heavier burden on shoulders of hearing panels, which must carefully consider whether the sanction is suitable and necessary to achieve the desired goal of the fight against doping in order to avoid disproportionate punishment. I believe that the six-year period of ineligibility would comply with the principle of proportionate punishment only in the most exceptional and serious cases of doping.<sup>81</sup>

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<sup>76</sup> Costa (2019), p. 35-36.

<sup>77</sup> Code 2021, Appendix 1 (Definitions): Aggravating Circumstances.

<sup>78</sup> Costa 2013, p. 2-6, Costa 2019, p. 20-22, Rigozzi et al. 2018.

<sup>79</sup> ECtHR, *Platini v. Switzerland*, no. 526/18, 11 February 2020, ECLI:CE:ECHR:2020:0211DEC000052618, para. 48.

<sup>80</sup> See, amongst others, Exner 2018a, Duval et al. 2016, p. 108-109 or Rigozzi et al. 2015, p. 27-28.

<sup>81</sup> Exner 2018b.

#### 4. Protected Persons and Recreational Athletes

When hearing panels determine the basic sanction, and eventually extend it on the basis of aggravating circumstances, they examine whether there are conditions for elimination, suspension or reduction of the period of ineligibility. In this essay, I focus on possible elimination or reduction on grounds of fault. In case of non-intentional violations, hearing panels can eliminate the otherwise applicable period of ineligibility if athletes or other persons establish that they bear no fault or negligence.<sup>82</sup> Nevertheless, Code 2021 builds on Code 2015, provides that this provision applies only in exceptional cases and enumerates circumstances under which hearing panels may not use this possibility.<sup>83</sup>

If the elimination is not an option, hearing panels may at least reduce the period of ineligibility for presence, use or attempted use, or possession of a prohibited substance or method, if athletes or other persons establish that their fault or negligence was not significant.<sup>84</sup> Code 2021 further distinguishes between mutually exclusive and not cumulative circumstances for reductions, including specified substances and newly specified methods, contaminated products and other circumstances.<sup>85</sup> Moreover, Code 2021 newly provides hearing panels with greater flexibility while sanctioning anti-doping rule violations involving two new categories of protected persons and recreational athletes.<sup>86</sup>

First, Code 2021 creates a new category of protected persons and changes rules for their sanctioning. The reason is that athletes or other persons below a certain age or mental capacity may not be able to understand and appreciate the prohibitions against conduct contained in Code 2021.<sup>87</sup> Moreover, protected persons, either young or with disability, should not bear the same burden that one would expect from an experienced athlete.<sup>88</sup> In this regard, Code 2021 builds on Code 2015 that provides special treatment for minors, natural persons who have not reached the age of eighteen years,<sup>89</sup> while assessing their

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<sup>82</sup> Code 2015, Art. 10.4, Code 2021, Art. 10.5.

<sup>83</sup> Code 2015, comment to Art. 10.4, Code 2021, comment to art. 10.5.

<sup>84</sup> Code 2015, Art. 10.5, Code 2021, Art. 10.6.

<sup>85</sup> Code 2021, Art. 10.6.1.

<sup>86</sup> Code 2021, Art. 10.6.1.3.

<sup>87</sup> Comment to Code 2021, Appendix 1 (Definitions): Protected Person. Athletes' Anti-Doping Rights Act, Art. 10.

<sup>88</sup> WADA EC, 23 September 2019, 6.1, p. 30-31.

<sup>89</sup> Code 2015, Appendix 1 (Definitions): Minor. See also Kleiderman et al. 2019.

degree of fault,<sup>90</sup> criteria for no significant fault or negligence<sup>91</sup> as well as optional public reporting of their anti-doping rule violations.<sup>92</sup> Code 2021 keeps the definition of a minor, but only for the purposes of the newly retitled public disclosure.<sup>93</sup>

On the top of that, Code 2021 creates a new concept of protected persons that includes three categories of athletes or other natural persons who have not had certain age or legal capacity when they committed the anti-doping rule violation. As such, the concept recognizes both statutory and contextual criteria.<sup>94</sup> The first group contains athletes or other persons younger than sixteen years. The second category includes those who have not reached the age of eighteen years and who are not included in any registered testing pool and never competed in any international event in an open category, which excludes a competition that is limited to junior or age group categories.<sup>95</sup> The third category includes those athletes or other persons who have been determined to lack legal capacity under applicable national legislation for reasons other than age. This final category would include, for example, a Paralympic athlete with a documented lack of legal capacity due to an intellectual impairment.<sup>96</sup> Following questions from WADA,<sup>97</sup> Costa argues that the concept is compliant with human rights, especially with the Convention on the Rights of the Child.<sup>98</sup>

Second, Code 2021 introduces a new category of recreational athletes and modifies their sanctioning. According to Code 2015 as well as Code 2021, anti-doping organizations have discretion to apply anti-doping rules to those athletes, who are neither international nor national level athletes.<sup>99</sup> However, if anti-doping organizations decide to test recreational athletes and there is the presence of a prohibited substance or its metabolites or markers in their samples, or they evade, refuse or fail to submit to sample collection, or tamper or

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<sup>90</sup> Code 2015, Appendix 1 (Definitions): Fault.

<sup>91</sup> Code 2015, Appendix 1 (Definitions): No Fault or Negligence, No Significant Fault or Negligence.

<sup>92</sup> Code 2015, Art. 14.3.6.

<sup>93</sup> Code 2021, Appendix 1 (Definitions): Minor, Art. 14.3.7.

<sup>94</sup> Kleiderman et al. 2019.

<sup>95</sup> Code 2021, Appendix 1 (Definitions): Protected Person, Comment to Protected Person. See also WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 17 May 2018, 10.5., p. 33. WADA EC, 14 November 2018, 6.1.1, p. 23. WADA FB, 15 November 2018, 6.1.1, p. 20. WADA EC, 15 May 2019, 10.1, p. 29. WADA FB, 16 May 2019, 10.1, p. 33.

<sup>96</sup> Code 2021, Appendix 1 (Definitions): Protected Person, Comment to Protected Person. See also WADA EC, 14 November 2018, 6.1.1, p. 23. WADA FB, 15 November 2018, 6.1.1, p. 20.

<sup>97</sup> WADA FB, 17 May 2018, 10.5., p. 34-35. WADA FB, 17 May 2018, 10.5., p. 35.

<sup>98</sup> Costa (2019), p. 17-20.

<sup>99</sup> Code 2015, Code 2021, Appendix 1 (Definitions): Athlete, Comment to Athlete, Art. 4.4.5. Code 2021, Summary of Major Changes, para. 26, p. 12. WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 17 May 2018, 10.5., p. 33. WADA EC, 14 November 2018, 6.1.1, p. 23-24. WADA FB, 15 November 2018, 6.1.1, p. 20.

attempt to tamper with any part of doping control, essentially all of the consequences and sanctions apply under Code 2015.<sup>100</sup> Public reporting has been one of the most sensitive consequences of anti-doping rule violations committed by recreational athletes.<sup>101</sup> Many stakeholders argued that imposing all consequences on lower-level athletes is counter-productive, did not make much sense and is unduly harsh.<sup>102</sup>

In the context of the abovementioned reasons, WADA decided to redefine the concept of recreational athletes. In the end, Code 2021 leaves the definition of which natural persons will be considered recreational athletes to relevant national anti-doping organizations. Nevertheless, the definition shall not include any person who, within the five years prior to committing any anti-doping rule violation, has been an international or national level athlete. Code 2021 also excludes any person who has, in the past five years, 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.<sup>103</sup> Despite the nearly three-year consultation process and the evolution of the definition of recreational athletes,<sup>104</sup> the definition brings practical difficulties. First, the narrow definition creates inequalities between certain sports since it does not include some athletes considered by international federations as amateurs.<sup>105</sup> Second, the fact that different national anti-doping organizations may have different definitions of recreational athletes can result in unequal treatment amongst these athletes on grounds of nationality, residence, licence, membership of sport organizations or presence in the country.<sup>106</sup>

Following the creation of categories of protected persons and recreational athletes, Code 2021 consequently modifies their sanctioning, in particular by shortening the sanctions and providing hearing panels with greater flexibility in sanctioning non-intentional doping. If the anti-doping rule violation does not involve a substance of abuse and

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<sup>100</sup> Code 2015, Code 2021, Appendix 1 (Definitions): Athlete. Code 2021, Summary of Major Changes, para. 26, p. 12. WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 17 May 2018, 10.5., p. 33. WADA FB, 15 November 2018, 6.1.1, p. 20. Code 2021, Art. 4.4.5: Anti-doping organizations must permit these athletes to apply for a retroactive TUE.

<sup>101</sup> Code 2015, Appendix 1 (Definitions): Athlete. Code 2021, Summary of Major Changes, para. 26, p. 12.

<sup>102</sup> Code 2021, Summary of Major Changes, para. 26, p. 12. WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 17 May 2018, 10.5., p. 33. WADA EC, 14 November 2018, 6.1.1, p. 23-24.

<sup>103</sup> Code 2021, Appendix 1 (Definitions): Recreational Athlete.

<sup>104</sup> WADA EC, 14 November 2018, 6.1.1, p. 23-24. WADA EC, 15 May 2019, 10.1, p. 29. WADA FB, 16 May 2019, 10.1, p. 33.

<sup>105</sup> World Conference on Doping in Sport, Katowice, Poland, 5-7 November 2019, Intervention on behalf of the International Ice Hockey Federation ("IIHF") delivered by its legal director Ashley Ehlert, p. 2.

<sup>106</sup> Code 2021, Art. 5.2.1. Synrem 2020.

protected persons or recreational athletes establish that their fault or negligence was not significant, the period of ineligibility will be between zero and two years, depending on their degree of fault.<sup>107</sup> Therefore, hearing panels can issue a mere reprimand even in cases involving non-specified substances, instead of the minimum one-year ban in Code 2015, which will still be applicable to other athletes.<sup>108</sup> Similarly, protected persons and recreational who evade, refuse or fail to submit to sample collection, or tamper or attempt to temper with any part of doping control will serve a ban of maximum two years, depending on their degree of fault, instead of the basic sanction of four years.<sup>109</sup>

Discussing athletes' degree of fault, the factors that hearing panels shall consider include, amongst others, whether athletes or other persons are protected persons or whether they suffer from impairment. Moreover, hearing panels shall also take into account their experience, the degree of risk or the level of care and investigation regarding the level of risk,<sup>110</sup> which may apply even to recreational athletes. Second, Code 2021 builds on Code 2015 and protected persons and newly even recreational athletes do not have to establish how the prohibited substance entered their system in order to benefit from eliminated sanction based on no fault or negligence or reduced one as a result of no significant fault or negligence.<sup>111</sup> On the other hand, this modification will not relieve hearing panels of difficulties in assessing the degree of fault without the origin of the prohibited substance having been established.<sup>112</sup> Finally, the public disclosure of an anti-doping rule violation committed by a protected person or a recreational athlete will not be mandatory, but only optional and it shall be proportionate to the facts and circumstances of the case.<sup>113</sup> It can prevent them from losing their job as a result of mandatory public reporting.<sup>114</sup>

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<sup>107</sup> Code 2021, Art. 10.6.1.3.

<sup>108</sup> Code 2015, Art. 10.5.2, Code 2021, Art. 10.6.2. Code 2021, Summary of Major Changes, para. 22, p. 9-10. WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 15 November 2018, 6.1.1, p. 20. WADA EC, 23 September 2019, 6.1, p. 30-31.

<sup>109</sup> Code 2021, Art. 10.3.1.

<sup>110</sup> Code 2021, Appendix 1 (Definitions): Fault.

<sup>111</sup> Code 2015, Code 2021, Appendix 1 (Definitions): No Fault or Negligence, No Significant Fault or Negligence. See also Code 2021, Summary of Major Changes, para. 22, p. 9-10. See also WADA FB, 17 May 2018, 10.5., p. 33. WADA EC, 14 November 2018, 6.1.1, p. 23. WADA FB, 15 November 2018, 6.1.1, p. 18-20.

<sup>112</sup> Rigozzi et al. 2018, Exner 2018b.

<sup>113</sup> Code 2021, Art. 14.3.7. See also Code 2021, Summary of Major Changes, para. 22, p. 9-10. Athletes' Anti-Doping Rights Act, Art. 10. WADA EC, 14 November 2018, 6.1.1, p. 23. WADA FB, 15 November 2018, 6.1.1, p. 20. WADA FB, 16 May 2019, 10.1, p. 33. WADA EC, 23 September 2019, 6.1, p. 30-31.

<sup>114</sup> WADA EC, 16 May 2018, 10.5., p. 48-49. WADA FB, 17 May 2018, 10.5., p. 33.

I consider the creation of the special groups of protected persons and recreational athletes and modification of their sanctioning a step forward for the world-wide fight against doping as well as for its compliance with the principle of proportionate punishment. The range of the period of ineligibility between zero and two years in case of no significant fault or negligence even for non-specified substances provides hearing panels with extended flexibility to seek proportionate punishment, compared to the minimum limit of twelve months in Code 2015. I also welcome the fact that all protected persons and newly even recreational athletes do not have to establish how the prohibited substance entered their system in order to benefit from eliminated or reduced sanction in cases of non-intentional doping.<sup>115</sup> I believe that requiring protected persons or recreational athletes to bear the same burden as experienced athletes would be disproportionately harsh.

On the other hand, I regret that the drafting team dropped the original idea to shift the burden of proof in cases of intentional doping involving non-specified substances from protected persons to anti-doping organizations. Athletes or other persons have to prove that the presence, use or attempted use or possession of a prohibited substance, which is not specified, was not intentional in order to avoid a four-year ban.<sup>116</sup> Moreover, Code 2021 codifies the settled case law of the CAS and provides that while it is theoretically possible to bear such burden without showing how the prohibited substance entered one's system, it is highly unlikely that an athlete will be successful in proving that the presence of the prohibited substance was not intentional without establishing its source.<sup>117</sup> In this context, the drafting team proposed shifting the burden to anti-doping organizations to establish that protected persons' use of the prohibited substance was intentional.<sup>118</sup> However, the drafting team dropped this proposal following negative feedback from stakeholders including, interestingly, the Council of Europe, which had always been a very strong supporter of minors' rights.<sup>119</sup> I think it was a mistake.

I believe that anti-doping organizations should bear the burden to establish that the presence, use or attempted use or possession of a prohibited substance or method

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<sup>115</sup> Code 2015, Code 2021, Appendix 1 (Definitions): No Fault or Negligence, No Significant Fault or Negligence.

<sup>116</sup> Code 2015, Code 2021, Art. 10.2.1.1.

<sup>117</sup> Code 2021, comment to Art. 10.2.1.1. See also Nuriev 2019.

<sup>118</sup> WADA EC, 14 November 2018, 6.1.1, p. 23.

<sup>119</sup> WADA FB, 15 November 2018, 6.1.1, p. 20.

by protected persons and even recreational athletes was intentional. As discussed above, they do not have to establish how the prohibited substance entered their body in order to benefit from the elimination or reduction of the basic sanction for negligent doping.<sup>120</sup> The reason is that they should not bear the same burden of proof as experienced athletes since protected persons may not have as much experience or mental capacity, and recreational athletes practice sport for fun or as a matter of health. I argue that this reasoning applies to both negligent and intentional doping. Therefore, I believe that the burden of proof should have been shifted from protected persons and recreational athletes to anti-doping organizations. In the absence of that, athletes and other persons who do not establish the lack of intention will face a four-year ban that may prove to be disproportionate.<sup>121</sup>

## **Conclusion**

In this essay, I examined the compliance of selected parts of the sanctioning framework of Code 2021, which enters into force on 1 January 2021, with the internationally recognized general legal principle of proportionate punishment. I simultaneously compared Code 2021 to the currently applicable Code 2015. I conclude that Code 2021 evolved in terms of proportionality compared to Code 2015, especially thanks to the new sanctioning framework for the ingestion, use or possession of substances of abuse as well as for violations committed by protected persons or recreational athletes. On the other hand, I am concerned that the strict interpretation of the modified definition of intentional presence, use or attempted use or possession of a prohibited substance or method and the burden of proof in cases involving non-specified substances may lead to disproportionate punishments. The reintroduced concept of aggravating circumstances raises similar concerns.

I welcome that Code 2021 focuses on athletes' and other persons' health rather than on potential improvement of sports performance as the purpose of punishing doping related to abuse substance. I believe that the new three, or eventually one-month period of ineligibility for the ingestion or use of substances of abuse out of competition without

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<sup>120</sup> Appendix 1 to the Code 2021 (Definitions): No Fault or Negligence, No Significant Fault or Negligence. See also WADA FB, 15 November 2018, 6.1.1, p. 20.

<sup>121</sup> Exner 2018a.

relation to sport is suitable for achieving the legitimate aim. I also believe that it is much less restrictive on athletes' and other persons' rights compared to the sanctions in Code 2015, even though the flat sanction may collide with the principle of individualization of sanctions. Moreover, I welcome that the ingestion, use or possession of recreational drugs in competition, but in the context not related to sports performance, will not be considered intentional. I also believe that hearing panels can draw inspiration from this rule while sanctioning athletes who knowingly used a prohibited substance in competition but in the context not related to sport performance. The four year-ban for athletes who wilfully ingested a prohibited substance but did not intent to gain unfair advantage would not be proportionate.

I believe that Code 2021 brings a more suitable and proportionate approach towards sanctioning protected persons and recreational athletes compared to that in Code 2015. Code 2021 provides hearing panels with greater flexibility to seek a proportionate punishment, in particular in all cases of no significant fault or negligence. Moreover, protected persons and newly also recreational athletes do not have to establish how the prohibited substance entered their system in order to benefit from eliminated or reduced sanction for non-intentional doping, which suits better their nature. Finally, I welcome that public disclosure of their anti-doping rule violations will be only optional and should be proportionate to the facts and circumstances of the case.

On the other hand, I regret that Code 2021 does not reflect the original idea of the drafting team to shift the burden of proof in cases of intentional doping involving non-specified substances from protected persons, or even recreational athletes, to anti-doping organizations. As such, these athletes and other persons will bear a heavy burden to establish the lack of intention in order to avoid a four-year ban, which may prove to be disproportionate. Finally, I have concerns about the compliance of the reintroduced concept of aggravating circumstances with the principle of proportionate punishment. These circumstances may lead up to a six-year period of ineligibility even for the first anti-doping rule violation. I have previously argued that even the four-year ban may prove to be disproportionate. The six-year ban restricts athletes' rights even more.

On the top of the areas covered in this essay, there are other parts of Code 2021 that also deserve further attention in terms of proportionality. I welcome that Code 2021 provides hearing panels with greater flexibility in sanctioning evading, refusing of failing to submit

to sample collection and tampering or attempted tampering with any part of doping control. On the other hand, Code 2021 increases the upper limit of the basic period of ineligibility for complicity and newly even for attempted complicity to lifetime, compared to four years in Code 2015. Even the new anti-doping rule violation of discouraging or retaliating against reporting to authorities carries the sentence between two years and lifetime, depending on the seriousness of the violation. While I consider Code 2021 a step forward for the world-wide fight against doping in sport, hearing panels will bear a heavy burden to apply Code 2021 in order to always ensure one its goals, to respect the rule law and the principle of proportionality.

## **List of Abbreviations**

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
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
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FINA	Fédération Internationale de Natation International Swimming Federation
ITF	International Tennis Federation
WADA	World Anti-Doping Agency
WADA EC	World Anti-Doping Agency Executive Committee
WADA FB	World Anti-Doping Agency Foundation Board

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