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**Fixed Sanction Framework in the World Anti-Doping Code
Can Hearing Panels Go below the Limits?**

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Prohlašuji, že jsem esej na téma „Fixed Sanction Framework in the World Anti-Doping Code: Can Hearing Panels Go below the Limits?“ 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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Abstract

In this essay, I argue that hearing panels should have the flexibility to impose sanctions for anti-doping rules violations even below the limits of the current World Anti-Doping Code (Code), if the sanction set by the Code were disproportionately harsh and if the purpose of the Code could be fulfilled even by a shorter period of ineligibility. I believe that hearing panels should consider all objective elements of the case as well as subjective elements of the athlete or other person while determining the sanction. While I consider the fixed sanction regime of the Code itself a proportionate and suitable response to the legitimate aim of the fight against doping, there inevitably were, are and will be cases where the “one size fits all” solution does not work. If such an exceptional gap *de lege lata* occurs, hearing panels should have the power to patch the hole and prevent disproportionate consequences caused by the rigid application of the fixed sanctions. I simultaneously argue that such a flexibility does not necessarily compromise the harmonization of sanctions, equal treatment amongst athletes, legal certainty and other core elements of the fight against doping in sport. Conversely, I believe that such an approach would present another important step towards greater compliance of the Code and implementing regulations of sporting governing bodies with the internationally recognized principle of proportionality.

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Fixed Sanction Framework in the World Anti-Doping Code

Can Hearing Panels Go Below the Limits?

Jan Exner*

“Would it not be possible, in certain exceptional cases, to set the penalty at something less than the absolute one-year limit in order to take the personal situation of the offender into account, just as a criminal judge should do?”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 Peruvian hero and the captain of the national football team José Paolo Guerrero tested positive for the cocaine metabolite benzoylecgonine prohibited by the World Anti-Doping Code (Code)² and related FIFA Anti-Doping Regulations. The FIFA Disciplinary Committee decided that Guerrero committed an anti-doping rule violation and rendered him ineligible for twelve months. Later, the FIFA Appeal Committee reduced the sentence to six months. On 30 July 2018, a panel of the Court of Arbitration for Sport (CAS) imposed on Guerrero the period of

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¹ Rouiller (2005). Referring to the World Anti-Doping Code 2004 (Code 2004), C. Rouiller answers this question differently than I do in this essay with regard to the currently applicable World Anti-Doping Code 2015 with 2019 amendments (Code): “This way of looking at the matter is seductive. But it fails to take account of a number of factors. The Code’s aim is to completely eradicate doping, which is acknowledged as potentially fatal for the future of large sports competitions. Even if deterrence does not justify every means, the punitive system, which also takes on a general preventative role, must be in keeping with what is at stake. 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 as such, as ultimately embodied in article 27 (the Swiss Civil Code) SCC.” Rouiller (2005), p. 36-37.

² World Anti-Doping Code 2015 with 2019 amendments (Code). When using “Code” further in this essay, I refer to the currently applicable World-Anti Doping Code 2015 with 2019 amendments, if not stated otherwise.

ineligibility of fourteen months despite several mitigating factors including his clean record and the consumption of an ordinary drink out of competition, which contained, contrary to Guerrero's reasonable belief, a small quantity of the prohibited substance, which could not enhance his performance.³

On 31 May 2018, the Swiss Federal Tribunal temporarily suspended the ban of fourteen months, allowing Guerrero to participate in the 2018 FIFA World Cup in Russia. According to a 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 WADA (the World Anti-Doping Agency) have both come to the conclusion that they are not categorically opposed to the complainant’s participation in the World Cup.”⁵ Following the completion of the 2018 FIFA World Cup, the Swiss Federal Tribunal lifted the freezing order before rejecting Guerrero’s final appeal in March 2019.⁶ Especially the decision of the CAS in the matter revived the discussion about the proportionality of sanctions for anti-doping rules violations.⁷

I believe that proportionality of sanctions for anti-doping rules violations is necessary for preserving both legality and legitimacy of the fight against doping in sport. I believe that doping is fundamentally contrary to the spirit of sport as the celebration of human spirit, body and mind. Therefore, I fully support the fight against doping as a way of preserving what is intrinsically valuable about sports and protecting the athletes’ fundamental right to participate in doping-free sport and promoting health, fairness and equality for athletes worldwide.⁹ This is also why I believe that the fight against doping should never turn into a witch hunt by imposing disproportionate sanctions on athletes. Such an approach would violate many rights that athletes derive from various legal systems, which contain the principle of proportionality, and delegitimize the fight against doping in the eyes of the public.¹⁰

³ CAS 2018/A/5546 José Paolo Guerrero v. FIFA. The CAS panel came to the conclusion that the violation was not intentional. It further decided that Guerrero was guilty of fault, which was however not significant. In such a case, the Code and the FIFA Anti-Doping Regulations set a scale of 12-24 months of ineligibility.

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

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

⁶ Peru's Paolo Guerrero loses final doping appeal, can't play until April. ESPN (online), 7 March 2019.

⁷ See, amongst others, Rigozzi, Quinn (2018).

⁸ Code. Fundamental Rationale for the World Anti-Doping Code.

⁹ Code. Purpose, Scope and Organization of the World Anti-Doping Programme and the Code.

¹⁰ To this end, see also Exner (2018).

The autonomy of sporting governing bodies including the WADA to enact and enforce the Code is conditional upon compliance with national and international legal systems recognizing the principle of proportionality. European and national courts have repeatedly highlighted the importance of proportionality in cases related to sanctions for anti-doping rules violations.¹¹ Even the CAS, the sport's supreme court, recognized proportionality as a general principle of law applicable to everyone and particularly to disciplinary sanctions.¹² As such, the CAS shall consider and fully deal with any challenge to an anti-doping rule based on the principle of proportionality.¹³ In particular, the CAS shall ensure that the severity of the sanction is proportionate to the offence committed.¹⁴

Even though the WADA drafted the Code giving consideration to the principles of proportionality and human rights¹⁵ and intended its anti-doping rules to be applied in a manner which respects these principles,¹⁶ there are voices calling for reconsidering the sanctioning regime of the Code in the context of the principle of proportionality.¹⁷ The Code specifies the length of the basic period of ineligibility and provides an exhaustive list of circumstances under which the basic period of ineligibility can be reduced or suspended.¹⁸ In this regard, the drafters of the Code intended for it to be specific enough in order to advance the anti-doping effort through universal harmonization of the core anti-doping elements.¹⁹ Such limits nevertheless prevent hearing panels from fully adjusting the period of ineligibility to all objective and subjective elements of concrete cases.

In particular, the Code does not explicitly provide hearing panels with the possibility of imposing ineligibility below the scale set by the Code, even if the sanction presumed by the Code were disproportionately harsh and if the purpose of the Code could be fulfilled even by a shorter period of ineligibility. In this regard, the CAS case law provides only one example of a panel going below the borders of the previous versions of the Code and reducing a sanction

¹¹ According to the case law of the ECtHR, the principle of proportionality is incorporated in Article 6 of the ECHR, which is applicable to CAS appeal arbitration – see *Mutu and Pechstein v. Switzerland*, no. 40575/10 and 67474/10, 2 October 2018, ECLI:CE:ECHR:2018:1002JUD004057510. See also, amongst others, *Case C-519/04 P, Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492; *Costa* (2013), p. 9.; *Janák* (2015), *Rigozzi, Kaufmann-Kohler, Malinverni* (2003), p. 41, 61-64.

¹² *Houben* (2017), p. 15. *Rigozzi* (2005).

¹³ *Petržela* (2018), p. 77.

¹⁴ See, amongst other, *CAS 1999/A/246 McLain Ward v. FEI*.

¹⁵ Code. Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

¹⁶ Code. Introduction.

¹⁷ See, amongst others, *Soek* (2006), *Houben* (2007), *Janák* (2015), *Greene, Vermeer* (2018), *Petržela* (2018), *Exner* (2018).

¹⁸ Code, art. 10. See also *David* (2017), p. 328–462. I have previously claimed that the basic period of ineligibility of four years imposed for certain anti-doping rules violations does not comply with EU law – see *Exner* (2018).

¹⁹ Code. Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

despite the applicable rules. In the case of the Argentinian tennis player Mariano Puerta, the CAS pointed to a need to fill a gap in the Code 2004 and to ensure a proportionate sanction. On the other hand, the CAS stated that it would resort to such a decision only if the sanction were evidently and grossly disproportionate compared to the anti-doping rule violation. In such a case, the CAS would consider the sanction as abusive and its imposition as a violation of fundamental justice and fairness, which would be contrary to mandatory Swiss law.²⁰ On other occasion, the CAS stated that the principle of proportionality would apply only if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalized.²¹

WADA as the legislator is primarily responsible for making sure that the Code is drafted in conformity with the principle of proportionality, while hearing panels must ensure the respect for proportionality when applying the Code to concrete cases. Following this logic, the WADA should introduce a provision in the Code enabling hearing panels to impose the sanction below the limits of the Code in cases when the sanction presumed by the Code were disproportionately harsh and if even a shorter period of ineligibility could fulfil the purpose of the Code. The absence of such a provision in the Code does not relieve hearing panels of the responsibility to apply sanctions for anti-doping rules violations in compliance with the principle of proportionality. In the light of the abovementioned, I ask: Should the principle of proportionality be interpreted as meaning that hearing panels have the discretion to apply sanctions for anti-doping rules violations more flexibly and go even below the limits of the Code, if the sanction set by the Code were disproportionately harsh and if the purpose of the Code could be fulfilled even by a shorter period of ineligibility?

While seeking the answer to this essay's core question, I will briefly introduce the sanctioning regime of the Code paying special attention to the discretion that hearing panels have to reflect circumstances of particular cases. Simultaneously, I will underline the crucial role of the internationally recognized principle of proportionality in the fight against doping. Most importantly, I will consider whether hearing panels should be allowed to go even below the limits of the Code in special cases in order to fill gaps *de lege lata* in the Code and to impose proportionate sanctions for anti-doping rules violations. While doing so, I will consider other legitimate elements inherent to the Code, especially harmonization of sanctions, equal treatment

²⁰ CAS 2006/A/1025 Puerta v. ITF.

²¹ CAS 2004/A/ 690 H. v. Association of Tennis Professionals (ATP), para 52, CAS 2005/A/830 Squizzato v. FINA, para 50.

of athletes worldwide and legal certainty. While focusing on the current Code, I will also consider relevant provisions of the Draft Code 2021, which is currently being drafted and which should come into force on 1 January 2021.

1. Determining the Period of Ineligibility for an Anti-Doping Rule Violation

In this part, I will briefly present the four-step test which hearing panels use to determine the appropriate sanction for doping. The Code defines doping as the occurrence of one or more of the anti-doping rules violations set forth in article 2.1 through article 2.10 of the Code.²² While determining a consequence of an anti-doping rule violation, the hearing panel originally assesses which of the basic sanctions apply to the particular anti-doping rule violation according to articles 10.2, 10.3, 10.4 or 10.5 of the Code. Second, if the basic sanction provides for a range of sanctions, the hearing panel determines the applicable sanction within that range according to the athlete or other person's degree of fault. In the third step, the hearing panel considers a basis for elimination, suspension, or reduction of the sanction under article 10.6 of the Code. Finally, the hearing panel decides on the commencement of the period of ineligibility under article 10.11 of the Code.²³ The authors of the Draft Code 2021 intend to provide hearing panels with the possibility of increasing the sanction in the presence of aggravating circumstances.²⁴

Before diving into a deeper analysis, I would like to highlight the meaning and consequences of the strict liability principle when it comes to proportionality of sanctions for anti-doping rules violations. Strict liability principle, a long-standing anti-doping cornerstone, means that an anti-doping organization does not have to demonstrate intent, fault, negligence or knowing use on the athlete's part in order to establish a 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.²⁵ The Code explains that it is 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.²⁶

²² Code, arts. 1 and 2. See also David (2017), p. 167-273.

²³ Code, art. 10.6.4. See also comment to art. 10.6.4. Annex 2 to the Code provides several examples of how article 10 of the Code is to be applied. See Rigozzi, Haas, Wisnosky, Viret (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 the Code as a response to different possible interpretations of the sanctioning regime of the Code.

²⁴ Draft Code 2021, art. 10.4.

²⁵ Appendix 2 to the Code (Definitions): Strict liability.

²⁶ Code, arts. 2.1.1, 2.2.1.

Therefore, hearing panels cannot take an athlete's fault into consideration when establishing an anti-doping rule violation. Conversely, they can only do so while determining the consequences of such a violation under article 10 of the Code.²⁷ According to CAS, the strict liability principle is necessary to fight doping in an effective manner, notwithstanding a certain degree of hardship.²⁸ Such a hardship is in my opinion a strong argument in favour of putting even more energy in pursuing proportionate sanctions. If athletes cannot refer with success to their fault when hearing panels decide on the existence of the violation, such panels should emphasize athletes' fault and other circumstances of particular cases when determining the punishment.

Once a hearing panel establishes the existence of an anti-doping rule violation, it turns to determining appropriate consequences.²⁹ For the purposes of this essay, I will focus on sanctions on individuals,³⁰ namely ineligibility for the first anti-doping rule violation. Ineligibility means that an athlete or other person is barred from participating in any competition or other activity as provided in article 10.12.1 of the Code for a specified period of time.³¹ I will also consider other consequences connected to ineligibility which highlight its negative effect for athletes, namely possible withholding of financial support³² as well as related personal, social and other consequences.

As the first step, the hearing panels determine the basic period of ineligibility, which can go up to four years depending on the anti-doping rule violation.³³ In the case of trafficking or attempted trafficking³⁴ or administration or attempted administration of any prohibited substance or prohibited method,³⁵ the period of ineligibility can go up to lifetime, depending on the seriousness of the violation. The Code consequently specifies the ineligibility for multiple violations, which can go to double period of ineligibility in case of the second violation and lifetime in case of the third violation.³⁶ According to the Draft Code 2021, hearing panels can impose the period of ineligibility from one to three months in the case of substances of abuse.³⁷ As already mentioned before, the Draft Code 2021 newly empowers the hearing panels

²⁷ Comment to art. 2.1.1 of the Code. See also Rigozzi, Kaufmann-Kohler, Malinverni (2003), p. 41.

²⁸ See, amongst others, CAS 95/141, V. v FINA; CAS 99/A/239, UCI v. Moller.

²⁹ Code, arts. 10-12.

³⁰ Code, art. 10.

³¹ Appendix 2 to the Code (Definitions): Consequences - Ineligibility). See art. 10.12.1 of the Code for an athlete's or other person's status during ineligibility.

³² Code, art. 10.12.4.

³³ Code, art. 10.

³⁴ Code, art. 2.7.

³⁵ Code, art. 2.8.

³⁶ Code, art. 10.9.

³⁷ Draft Code 2021, art. 10.2.4.

to increase the sanction by an additional period of ineligibility of up to two years in the presence of aggravating circumstances.³⁸

When a hearing panel determines the basic sanction, it establishes whether there are conditions for the elimination of the period of ineligibility under article 10.4 of the Code. If athletes or other persons establish in an individual case that they bear no fault or negligence,³⁹ then the otherwise applicable period of ineligibility shall be eliminated.⁴⁰ Nevertheless, the Code specifies that the provision applies only in exceptional circumstances and enumerates conditions under which athletes or other persons cannot rely on this possibility.⁴¹ Moreover, athletes or other persons cannot invoke this provision when they commit certain anti-doping rules violations, simply because these violations are intentional by nature.

If a hearing panel cannot eliminate the basic period of ineligibility under article 10.4 of the Code, it can nevertheless reduce it under article 10.5 of the Code if the athlete or other person establishes that the fault or negligence were not significant.⁴² In such a case, the Code further distinguishes between specified substances,⁴³ contaminated products⁴⁴ and other circumstances. Where the anti-doping rule violation involves a specified substance or a substance coming from a contaminated product, a hearing panel shall impose, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years of ineligibility, depending on the athlete's or other person's degree of fault.⁴⁵

In case of non-specified substances, a hearing panel may reduce the otherwise applicable period of ineligibility based on the athlete or other person's degree of fault, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period may be no less than eight years.⁴⁶ The draft Code 2021 contains specific sanctioning regime for recreational athletes or persons protected on grounds of age or other reasons, who can be awarded a period of ineligibility of up to two years without distinguishing between specified and non-specified substances.⁴⁷

³⁸ Draft Code 2021, art. 10.4.

³⁹ Appendix 2 to the Code (Definitions): No fault or negligence.

⁴⁰ Code, art. 10.4.

⁴¹ Comment to art. 10.4 of the Code.

⁴² Code, art. 10.5. Appendix 2 to the Code (Definitions): No significant fault or negligence.

⁴³ Code, art. 4.2.2.

⁴⁴ Appendix 2 to the Code (Definitions): Contaminated product.

⁴⁵ Code, art. 10.5.1.1.

⁴⁶ Code, art. 10.5.2. Article 10.5.2 See also comment to articles 10.4 and 10.5.2 of the Code.

⁴⁷ Draft Code 2021, art. 10.6.3.1.

Finally, the hearing panel establishes whether there is a basis for elimination, suspension, or reduction of the sanction under article 10.6 of the Code.⁴⁸ Pursuant to this provision, an anti-doping organization may, under certain conditions, suspend a part of the period of ineligibility when the athlete or other person has provided substantial assistance to the organization, criminal authority or professional disciplinary body which results in discovering or bringing forward an anti-doping rule violation by another person. If an athlete or other person voluntarily admits the commission of an anti-doping rule violation before having received notice of a sample collection or before receiving first notice of the admitted violation and that admission is the only reliable evidence of the violation at the time of admission, then the period of ineligibility may be reduced, but not below one-half of the period of ineligibility otherwise applicable.⁴⁹

The authors of the Draft Code 2021 newly intent to enable hearing panels to reduce the otherwise applicable period of ineligibility for presence, use or attempted use or possession of a prohibited substance or prohibited method, if the athlete or other person admits the asserted violation no later than 10 calendar days after receiving notice of the B sample analysis or its waiver or after notice of another asserted anti-doping rule violation.⁵⁰ Case resolution agreement newly enshrined in the Draft Code 2021 offers athletes or other persons another possibility to reduce the otherwise applicable period of ineligibility, if they admit an anti-doping rule violation after being confronted with it and agree to consequences acceptable to the anti-doping organization and WADA.⁵¹

In the last step, the hearing panel decides on the commencement of the period of ineligibility. As a rule, the period of ineligibility shall start on the date of the final hearing decision. Exceptionally, the period of ineligibility can start earlier based on delays not attributable to an athlete or other person, thanks to timely admission, credit for provisional suspension or period of ineligibility served.⁵² On the previous lines, I presented the current fixed sanction regime of the Code, within which hearing panels impose sanctions for anti-doping rules violations. I will now turn into examining what hearing panels can and should do in case of gaps *de lege lata* where the “one size fits all” solution does not work.

⁴⁸ Code, art. 10.6.4.

⁴⁹ Code, art. 10.6.2 and 10.6.3.

⁵⁰ Draft Code 2021, art. 10.8.1.

⁵¹ Draft Code 2021, art. 10.8.2.

⁵² Code, art. 10.11.

2. Can Hearing Panels Go below the Limits of the Code When a Gap Occurs?

In this chapter, I will discuss whether hearing panels have the flexibility to go below the limits of the Code when overall circumstances of a case and gaps *de lege lata* in the Code call for it. At the outset, I will argue that sanctions for anti-doping rules violations should be harmonized as the Code states,⁵³ not unified as the Code in fact does. Thereafter, I will seek a way which would enable hearing panels to comply with the internationally recognized principle of proportionality by considering properly all circumstances of a case when imposing sanctions for anti-doping rules violations. In other words, I will examine how the application of the Code by hearing panels can conform its intention to be applied in a manner which respects the principles of proportionality and human rights.⁵⁴

I will simultaneously seek a balance with other core anti-doping elements and fundamental principles of the Code, in particular the uniform application of the Code, effectiveness of the fight against doping in sport, legal certainty and equality amongst athletes worldwide. I will assess the margin of appreciation of hearing panels from *de lege lata* point of view, looking at the current wording and practical application of the Code. At the same time, I will discuss certain modifications *de lege ferenda*, which would, in my opinion, improve the current fixed sanction framework of the Code in terms of proportionality.

2.1. Harmonization, not Unification of Sanctions

WADA refuses the flexibility of hearing panels to go below the limits of the Code referring to the need for universal harmonization of sanctions as the core anti-doping elements in order to ensure the equality for athletes worldwide.⁵⁵ Harmonisation of sanctions is recognized as a legitimate aim of the Code⁵⁶ and the reason for the mandatory fixed sanction regime.⁵⁷ The comment to article 10 of the Code provides that “a primary argument in favour of 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.”⁵⁸ In this context, some authors argue that “the need for harmonization is the most important objective and should prevail over any interest in

⁵³ Code, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

⁵⁴ Code, Introduction.

⁵⁵ Code, Purpose, Scope and Organization of the World Anti-Doping Programme and the Code.

⁵⁶ European Commission, COMP /38158, Meca Medina+Majcen/Comité International Olympique, 1 August 2002, para. 45; Rigozzi, Kaufmann-Kohler, Malinverni (2003), p. 64-65.

⁵⁷ Rigozzi, Kaufmann-Kohler, Malinverni (2003), p. 64.

⁵⁸ Code, comment to art. 10.

allowing flexibility to consider objective differences that may exist between sports.”⁵⁹ Duffy suggests that the CAS must apply proportionality in a restricted fashion, so that the harmonization is not jeopardized.⁶⁰

While I agree that the sanctions for anti-doping rules violations should be harmonized, the Code unifies them instead. Harmonization and unification are two different legal concepts with different goals, measures and effects. Using the EU as an example, it unifies the laws of the member states through regulations, which are binding in their entirety and directly applicable.⁶¹ In essence, regulations set unique rules applicable throughout the whole EU and do not leave member states with much flexibility. The same applies to the Code, which keeps anti-doping organizations and their hearing panels within the fixed borders of its sanctioning system and does not allow them to go below the limits in order to seek proportionate sanctions. Therefore, “if there should be no flexibility allowed, one cannot speak of harmonization, but of unification.”⁶²

I would argue that sanctions for anti-doping rules violations should rather be harmonized, not unified. 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.⁶³ The EU harmonizes the laws of 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.⁶⁴ Therefore, directives prescribe certain minimal requirements and effects, but leave member states to adjust implementing regulations to the specificities of their national legal orders. I believe that this is exactly what rules governing anti-doping sanctions should constitute. Soek claims that the effects of the sentences should be the same in all sports, not the sentences themselves.⁶⁵ Harmonization means that the consequences of sanctions for anti-doping rules violations should be identical in all sports. However, it does not necessarily mean that the sanctions themselves must always be identical.

The consequences of anti-doping rules violations may in practice differ substantially considering particularities of the sport which the doped athlete practices as well as other relevant elements. The comment to the Code itself provides that a standard period of

⁵⁹ Houden (2007), p. 15. See also Kaufmann-Kohler, Malinverni, Rigozzi (2003), para. 171-174.

⁶⁰ Duffy (2013).

⁶¹ TFEU, art. 288.

⁶² Houden (2007), p. 15.

⁶³ Menski (2006), p. 39.

⁶⁴ TFEU, art. 288.

⁶⁵ Soek (2006), p. 252.

ineligibility has a much more significant effect in sports where an athlete's career is short.⁶⁶ Assessing the Code 2004, Soek highlights that “in some sports, a two-year ban is not a problem, while in other sports a two-year ban means the end of a career.”⁶⁷ Furthermore, the Code also mentions differences between sports, where athletes as professionals make a sizable income and sports, where athletes are usually true amateurs.⁶⁸ Nevertheless, the Code prescribes fixed sanctions for anti-doping rules violations without regard to a particular sport. As such, the Code does not provide hearing panels with enough flexibility and possibility to take into account objective differences between various sports and disciplines.

Moreover, the fixed sanction framework of the Code seems to contradict the equal treatment of athletes since anti-doping rules violations occurring under different circumstances often lead to the same results. In this regard, hearing panels sanction long-lasting, straightforward or typical anti-doping rules violations in the same manner as those committed under very special circumstances deserving milder treatment. Dealing with the case of the Czech handball player, Josef Pohlmann,⁶⁹ Janák argues that the lack of flexibility leads to the 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.”⁷⁰ Such a scenario leads to unequal treatment amongst athletes, which hearing panels could prevent by using the discussed flexibility and adjusting the consequences of anti-doping rules violations to all particularities of the case.

On the other hand, I accept that equality for athletes worldwide is a coin with two sides. Janák points out that the discussed flexibility “could lead to uneven sanctions being imposed in similar cases, and a lack of consistency.”⁷¹ Moreover, the comment to the Code provides that flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers.⁷² Greater flexibility may lead to more lenient sanctions for high-profile athletes since international federations could start talking all kinds of irrelevant factors into account, or even add odds with the very purpose of the anti-doping rules.⁷³ Lastly, the lack of harmonization of sanctions has also frequently been the source of

⁶⁶ Code, comment to art. 10.

⁶⁷ Soek (2006), p. 252. Houden (2007), p. 16.

⁶⁸ Code, comment to art. 10.

⁶⁹ COC Arbitration Commission, Case 2015-1, Josef Pohlmann against the CHF and the ADCCR. See also Janák (2015).

⁷⁰ Janák (2015).

⁷¹ Janák (2015).

⁷² Code, comment to art. 10.

⁷³ Houden (2007), p. 15. Kaufmann-Kohler, Malinverni, Rigozzi (2003), paras. 182-183. Houlihan (2003), p. 215.

jurisdictional conflicts between international federations and national anti-doping organizations.⁷⁴

The question is whether the abovementioned problems prevail over the effort to secure a proportionate sanction by considering all relevant elements of a case. Discussing the alleged lack of consistency caused by the flexibility of hearing panels, Janák asks: „But is it still not better to rely on the guided judgement of a qualified panel to determine whether the specific facts of a case warrant a deviation from the sanction otherwise specified under the (Code) based upon established principles of proportionality, than it is to risk giving sanctions that seem *prima facie* grossly disproportionate and that result in very significant, real life consequences for the athlete involved?“⁷⁵ I believe that CAS, other higher or appeal hearing panels as well as WADA itself could be helpful in this regard.

The CAS and other higher or appeal hearing panels have the power to prevent the abovementioned problems by harmonizing anti-doping case law and setting an example for lower hearing panels. They should harmonize anti-doping case law in a similar manner that higher courts harmonize case law of lower levels of a judicial system. Especially CAS plays a leading role in the interpretation and application of the Code since its panels have the mission of coming to a cohesive interpretation of the provisions of the Code and achieving their application in a fair and harmonious fashion.⁷⁶ 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.⁷⁷

In this regard, I argue that CAS should be more consistent in their approach to the proportionality of sanctions for anti-doping rules violations. The CAS panels have recognized the need for an overarching principle of proportionality to be applied by panels when imposing sanctions.⁷⁸ On other occasions, however, the CAS panels have stated that the principle is already fairly embedded within the Code and sanctions cannot be reduced otherwise than as stipulated under the Code.⁷⁹ All panels agree that the severity of the sanction imposed must be

⁷⁴ Code, comment to art. 10.

⁷⁵ Janák (2015).

⁷⁶ Rigozzi, Haas, Wisnosky, Viret (2015), p. 42.

⁷⁷ Petržela (2018), p. 77. On the other hand, Houlihan correctly points out the risk of costly litigation not only from the innocent but also from the guilty who appear increasingly willing to initiate legal proceedings to defend their income, if not their innocence – Houlihan (2003), p. 191-192.

⁷⁸ See, in particular, CAS 2005/C/976 FIFA, WADA; CAS 2005/A/830 Squizzato v. FINA; CAS 2007/A/1252 FINA v Mellouli and FTN; CAS 2006/A/Puerta v. ITF.

⁷⁹ See, in particular, CAS 2004/4/690 Hipperdinger v. ATP or CAS 2005/A/847 Knauss v. FIS. See also Janák (2015).

proportionate to the offence committed, but their approaches towards the implementation of the principle differ.⁸⁰ Given my abovementioned thoughts and taking into account my arguments on next lines, I believe that the CAS panels could use the principle of proportionality in order to impose fair sanctions even below the limits of the Code considering all circumstances of a particular case.

In this respect, I believe that the CAS should become 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 ones⁸¹ as it systematically publishes less than 30% of its awards.⁸² Nevertheless, in the light of the judgment of the European Court of Human Rights (ECtHR) in *Mutu and Pechstein v. Switzerland*,⁸³ the CAS should be compared to national and international courts, of which the publicity of judgments is the norm, and confidentiality an exception reserved to cases in which the security or the privacy of an individual might call for it.⁸⁴ If the CAS publishes a higher number of its awards, hearing panels around the world could analyse them and learn from the CAS case law, therefore preventing unjustified differences in their decisions.

WADA could help harmonizing anti-doping case-law by continuing and broadening the publication of awards of the CAS and other hearing panels dealing with the application of the Code or related anti-doping rules.⁸⁵ With the exception regarding the protection of privacy or personal data, such a database could be available to all hearing panels, which could consult it and see how other hearing panels deal with similar situations. Such a database could also be open to the public. Kaufmann-Kohler, Malinverni and Rigozzi argue that “the imposition of different sanctions could have a negative impact on the perception of the public of the fairness of anti-doping actions.”⁸⁶ Such a public database could help to overcome such a perception by ensuring more transparency of the fight against doping, therefore strengthening its legality as well as legitimacy amongst the public. Furthermore, I believe that a witch hunt, within which hearing panels impose disproportionate sanctions on athletes, is a much bigger threat for the public perception of the fight against doping compared to the discussed sanctioning flexibility.

⁸⁰ Janák (2015).

⁸¹ Duval (2018).

⁸² Spera (2017).

⁸³ *Mutu and Pechstein v. Switzerland*, no. 40575/10 and 67474/10, 2 October 2018, ECLI:CE:ECHR:2018:1002JUD004057510.

⁸⁴ Duval (2018).

⁸⁵ 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>.

⁸⁶ Houden (2007), p. 15. Kaufmann-Kohler, Malinverni, Rigozzi (2003), para 177.

2.2. Considering Proportionality below the Limits of the Code

I believe that hearing panels should have the flexibility to go below the limits of the Code when overall circumstances of a case require such an action. At the outset, I argue that the principle of strict liability calls for such a flexibility. Pursuant to the strict liability principle, athlete's fault is not taken into consideration while establishing an anti-doping rule violation. Rather, it is only assessed while determining the consequences of such a violation under article 10 of the Code.⁸⁷ According to the CAS, the strict liability principle is a necessary element of the fight against doping, which bears a certain degree of hardship.⁸⁸ In my opinion, such a hardship is a strong argument in favour of providing hearing panels with wider flexibility in sanctioning. If athletes cannot refer with success to the existence or the degree of their fault when hearing panels decide on violation, such panels should emphasize athletes' fault and other circumstances of particular cases when determining the punishment.

WADA, CAS as well some authors believe that the fixed sanction framework of the current Code essentially complies with the internationally recognized principle of proportionality. The Code itself provides that it has been drafted giving consideration to the principles of proportionality and human rights.⁸⁹ Since the Code came into effect, the CAS panels have repeatedly held that the Code is proportional to its approach to sanctions.⁹⁰ In the case of the Russian tennis player Maria Sharapova, the CAS panel ruled that the Code "sought itself to fashion in detailed and sophisticated way a proportionate response in pursuit of a legitimate aim."⁹¹ In this respect, Kaufmann-Kohler, Malinverni and Rigozzi argue that "articles 10.2, 10.3, and 10.5 (of the Code) pursue a legitimate aim and satisfy the requirement of proportionality."⁹² The wording of the Draft Code 2021 does not significantly depart from the Code regarding proportionality of sanctions. Therefore, the abovementioned conclusions would probably apply even to the current as well as the newly prepared legislation.

While I agree that the provisions of the Code as such conform the principle of proportionality, the Code is not perfect and contains gaps *de lege lata*, as any other piece of legislation. The drafters of the Code could not predict all possible scenarios and articles 10.4, 10.5 and 10.6 of

⁸⁷ Comment to art. 2.1.1 of the Code.

⁸⁸ See, amongst others, CAS 95/141, V. v FINA; CAS 99/A/239, UCI v. Moller.

⁸⁹ Code. Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

⁹⁰ 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 & NIF, CAS 2017/A/5110 Therese Johaug v. NIF. CAS 2016/A/4643 Maria Sharapova v. ITF.

⁹¹ CAS 2016/A/4643 Maria Sharapova v. ITF, para. 51.

⁹² Kaufmann-Kohler, Malinverni, Rigozzi (2003), para. 185.

the Code “cannot have foreseen, and so cannot cover, all possible situations that could arise.”⁹³ Even the CAS panel admitted in *Puerta* that “there are inevitably going to be instances in which the “one size fits all” solution does not work.”⁹⁴ In fact, no piece of legislation can *ex ante* cover all possible scenarios, which is why we have courts and other authorities, which interpret and apply the rules. The CAS panel further noted in *Puerta* that in the rare cases in which the Code 2004 do not provide a just and proportionate sanction, the “gap or lacuna must be filled by the Panel.”⁹⁵ In such cases, hearing panels should apply certain overarching, universally accepted principles, including proportionality.⁹⁶

The Code itself predicts further application of the principle of proportionality. The Code provides that its anti-doping rules are intended to be applied in a manner which respects the principles of proportionality and human rights.⁹⁷ Moreover, the nature of the Code cannot exclude further application of the principle of proportionality. Referring to the Code 2004, the CAS panel recognized in *Squizzato* 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.”⁹⁸ Therefore, hearing panels should be allowed to consider the principle of proportionality while interpreting the Code and related anti-doping regulations and applying them to particular cases.

In this respect, I would argue that the principle of proportionality requires hearing panels to conduct a case by case assessment and to fully consider all objective and subjective elements of particular cases. Nevertheless, the fixed sanction regime of the Code significantly limits the margin of appreciation of hearing panels. While assessing athletes’ fault, the Code enumerates elements which should not be taken into account. These elements include the stage and the remaining time left in an athlete’s career, the timing of the sporting calendar or potential loss of the opportunity to earn money during ineligibility.⁹⁹

I would also argue that the principle of proportionality requires hearing panels to ensure that the severity of the sanction is proportionate to the offence committed.¹⁰⁰ In this respect,

⁹³ Janák (2015).

⁹⁴ CAS 2006/A/1025 *Puerta v. ITF. Houden* (2007), p. 16.

⁹⁵ CAS 2006/A/1025 *Puerta v. ITF*.

⁹⁶ Janák (2015).

⁹⁷ Code. Introduction.

⁹⁸ CAS 2005/A/830 *Squizzato v. FINA*, para 48. CAS 2007/A/1252 *FINA v Mellouli and FTN*, para. 37.

⁹⁹ Appendix 2 to the Code (Definitions): Fault. CAS 2018/A/5546 *José Paolo Guerrero v. FIFA*, CAS 2018/A/5571 *WADA v. FIFA & José Paolo Guerrero*, para. 85.

¹⁰⁰ See, amongst other, CAS 1999/A/246 *McLain Ward v. FEI*.

I believe that the principle of proportionality empowers hearing panels to impose sanctions even below the lower limits set by the Code, if the sanction set by the Code would be disproportionately harsh. When considering reducing the sanction below the lower limits of the Code, the hearing panels should carefully consider all objective elements of the case as well as subjective elements of the athlete or other person. In this regard, Janák puts forward that “in certain cases when the facts merit it, panels should have the discretion to apply sanctions more flexibly so as to avoid disproportionately punishing athletes who have otherwise acted in conformity with anti-doping rules during their careers.”¹⁰¹

I understand that the flexibility of hearing panels to impose sanctions below the limits of the Code cannot be unconditional and unlimited. In this regard, I would argue that the CAS jurisprudence provides for these conditions and limits, which stem from the principle of proportionality. The CAS panel stated in Squizzato that the a mere “uncomfortable feeling” is not enough.¹⁰² On the contrary, the otherwise applicable sanction set by the Code would have to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalized.¹⁰³ In Puerta, the CAS panel ruled that the sanction would have to be evidently and grossly disproportionate in comparison to the anti-doping rule violation, and considered as a violation of fundamental justice and fairness.¹⁰⁴ If hearing panels consider these conditions fulfilled, they could reduce the sanction even below the lower limits of the sanction fixed by the Code.

WADA and CAS refuse any critique of the current fixed sanction framework of the Code by invoking a consultation of athletes and other sporting actors in the process of drafting the Code. The CAS panel noted in Sharapova that the Code “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.”¹⁰⁵ In his legal opinion on the Code, C. Roullier writes 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 (...).”¹⁰⁶ WADA adds that “quite a number of athletes, some even in the form of an open letter, have expressed their support for a regime of sanctions that is even stricter than that implemented by the Code.”¹⁰⁷

¹⁰¹ Janák (2015). For a contrary opinion, see CAS 2003/A/447, Stylianou v. FINA.

¹⁰² CAS 2005/A/830 Squizzato v. FINA, para 50.

¹⁰³ CAS 2004/A/ 690 H. v. Association of Tennis Professionals (ATP), para 52, CAS 2005/A/830 Squizzato v. FINA, para 50.

¹⁰⁴ CAS 2006/A/1025 Puerta v. ITF.

¹⁰⁵ CAS 2016/A/4643 Maria Sharapova v. ITF, para. 51.

¹⁰⁶ Roullier (2005), p. 36-37.

¹⁰⁷ Niggli, Sieveking (2006), p. 11.

Nevertheless, no official survey has been done to my knowledge. Moreover, I believe that the participation of athletes on the wording of the Code is far from being equal to WADA and other sporting governing bodies. Furthermore, I have already expressed doubts whether athletes considered carefully all possible consequences of harder punishments.¹⁰⁸

Another argument refusing the critique of the Code on grounds of proportionality points to the free consent of athletes to the Code, in particular to sanctions for anti-doping rules violations. C. Roullier stipulates that an athlete “agrees, in a deliberate manner, that he or she may be the subject of an abrupt sanction”¹⁰⁹ and that “the scale of sanctions has been accepted by all and applies to all.”¹¹⁰ On the other hand, I would argue that the consent of athletes to the Code is not as free as it might seem. Dealing with athletes’ consent to the CAS arbitration, the ECtHR concluded in *Mutu and Pechstein v. Switzerland* that athletes have no other choice than to accept the arbitral clause if they want to compete on a top level.¹¹¹ Since the acceptance of the Code is a condition for participating in many high-level sporting activities and competitions including the Olympic Games,¹¹² athletes have no other choice that to accept the Code if they want to pursue their professional sporting careers.

On the top of athletes’ involvement in the drafting of the Code and their consent to the Code, the CAS panels have invoked legal certainty as an argument against the flexibility in sanctioning. CAS panels have stated that sanctions for anti-doping rules violations cannot be reduced otherwise than as stipulated under the Code.¹¹³ In *Guerrero*, the CAS panel initially noted the injustice caused by the twelve-month doping ban. Highlighting the importance of the principle of legal certainty, the panel nevertheless concluded that it could not cross the boundaries of the Code because its application in a particular case may bear harsh on a particular individual. The panel noted that departing from the Code 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.”¹¹⁴ In the panel’s view, it is better, indeed necessary, for it to adhere to the Code. “If change is required, that is for a legislative

¹⁰⁸ Exner (2018), p. 129.

¹⁰⁹ Roullier (2005), p. 33.

¹¹⁰ Roullier (2005), p. 33, Niggli, Sieveking (2006), p. 11.

¹¹¹ *Mutu and Pechstein v. Switzerland*, no. 40575/10 and 67474/10, 2 October 2018, ECLI:CE:ECHR:2018:1002JUD004057510.

¹¹² Olympic Charter (2018), rule 43.

¹¹³ See, in particular, *CAS 2004/4/690 Hipperdinger v. ATP or CAS 2005/A/847 Knauss v. FIS*; see also Janák (2015).

¹¹⁴ *CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero*, para. 89.

body in the iterative process of review of the (Code), not an adjudicative body which has to apply the *lex lata*, and not some version of the *lex ferenda*.”¹¹⁵

Nevertheless, I believe that the discussed flexibility of hearing panels does not necessarily compromise legal certainty. The principle of legal certainty is an internationally recognized 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. The possibility for hearing panels to fill the lacuna in the Code and to impose a sanction below the scale would not jeopardize legal certainty for it would still protect athletes and other persons, who are addressees of the Code. Moreover, the flexibility of hearing panels would not open the Pandora’s Box as they could use it only if the sanction fixed by the Code would be evidently and grossly disproportionate compared to the anti-doping rule violation, and it would therefore constitute an attack on personal rights and a violation of fundamental justice and fairness.¹¹⁶

Conclusion

In this essay, I argued that hearing panels should have the flexibility to impose the ineligibility for anti-doping rules violations even below the limits of the current Code, if the sanction set by the Code were disproportionately harsh and if the purpose of the Code could be fulfilled even by a shorter period of ineligibility. I believe that hearing panels should consider all objective elements of the case and subjective elements of the athlete or other person while determining the sanction. While I consider the fixed sanction regime of the Code itself a proportionate and suitable response to the legitimate aim of the fight against doping, there inevitably were, are and will be cases where the “one size fits all” solution does not work. If such a gap *de lege lata* occurs, hearing panels should have the power to patch the hole and prevent disproportionate consequences caused by the rigid application of the fixed sanctions. Such an approach would present another important step towards greater compliance of the Code and implementing regulations of sporting governing bodies with the internationally recognized principle of proportionality.

Moreover, I believe that the abovementioned sanctioning flexibility of hearing panels does not necessarily compromise the harmonization of sanctions and other core elements of the fight against doping. Harmonization means that the sanctions should have the same effects within

¹¹⁵ CAS 2018/A/5546 José Paolo Guerrero v. FIFA, CAS 2018/A/5571 WADA v. FIFA & José Paolo Guerrero, para. 90.

¹¹⁶ CAS 2006/A/1025 Puerta v. ITF, CAS 2004/A/ 690 H. v. ATP, para 52, CAS 2005/A/830 Squizzato v. FINA, para 50.

various sports. However, it does not necessarily mean that the sanctions must always be identical since there exist objective differences between sports justifying a slightly different attitude. While the flexibility might lead to different sanctions within different sports, the current fixed sanction framework of the Code may lead to the same sanction being imposed for a violation occurring under different circumstances even within one sport, which effectively compromises equal treatment of athletes. Furthermore, the flexibility does not compromise legal certainty, since hearing panels could use it only in exceptional cases when overall circumstances of the case and personal circumstances of the athlete or other person call for it. Finally, hearing panels, especially CAS and other higher or appeal bodies have the power to prevent potential negative consequences of such flexibility by coherent, consistent and transparent decisions.

If hearing panels could not impose the ineligibility below the limits of the Code in exceptional cases, the fixed sanction framework of the Code leaves us with decisions such as that of the CAS in case of José Paolo Guerrero. Who was happy about it? Certainly not the football player himself who almost lost his hope to play at the 2018 FIFA World Cup. His teammates and fans of the Peruvian national football team, which qualified for the tournament after having absented for 36 years, could nearly not field one of its leaders. Captains of Australia, France and 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 is allowed to play in the tournament.¹¹⁷ While FIFA did not comply with the request, it could not be entirely satisfied with the possible absence of such a player in its World Cup. The fixed sanction framework of the Code led the CAS to a decision perceived by a large part of the public as disproportionate and unjust. It was only after a Swiss judge suspended the ineligibility that Guerrero could play in Russia. Is this the fight against doping that we want?

¹¹⁷ Rival teams ask Fifa to lift Paolo Guerrero ban for positive cocaine test. Guardian (online), 22 May 2018.

List of abbreviations

ADCCR	Anti-Doping Committee of the Czech Republic
ATP	Association of Tennis Professionals
CADR	Czech Anti-Doping Regulations
CAS	Court of Arbitration for Sport
CHF	Czech Handball Federation
CHL	Czech Handball League
CJEU	Court of Justice of the European Union
COC	Czech Olympic Committee
Code	World Anti-Doping Code 2015 with 2019 amendments
Code 2004	World Anti-Doping Code 2004
Czech Anti-Doping Regulations	Regulations for Doping Control and Sanctions in Sport in the Czech Republic
Draft Code 2021	Draft World Anti-Doping Code 2021
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
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)
ITF	International Tennis Federation
NIF	Norwegian Olympic and Paralympic Committee and Confederation of Sports
TFEU	Treaty on the Functioning of the European Union
WADA	World Anti-Doping Agency

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