

Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code

authored by Jean-Paul Costa

1. Purpose of the consultation:

At the request of the World Anti-Doping Agency (WADA), represented by Maître Olivier NIGGLI, attorney-at-law in Lausanne, I have examined the issue of the compatibility of several provisions of the draft revision of the World Anti-Doping Code (“the Code”) with the accepted principles of international law and human rights. I received this request in January 2013. Working sessions took place with Maître Niggli and Professor Ulrich Haas on January 8 and 31, March 7, May 6 and June 13, 2013, in Strasbourg, Paris and Lausanne.

2. Qualifications of the consultant:

I am a legal expert with known and recognized competence and I have held high-level judicial positions. After a career as a member of the French State Council, the highest French administrative court (I am now an honorary State Councillor), I served as a judge at the European Court of Human Rights (“ECHR”) in Strasbourg for thirteen years and for nearly five of which I served as the Court’s President. I left the Court on November 3, 2011 due to the age limit (I am currently the President of the International Institute of Human Rights).

I wish to clarify that I have given this legal opinion in a strictly personal capacity and under my own responsibility. The opinions expressed are solely my own and thus are only binding on me.

3. Questions asked:

The legal opinion addresses eight questions¹, set out in summary below:

a) Compatibility of the new provisions pertaining to sanctions, in particular the provisions in draft Article 10.2 of the Code, with the aforementioned principles²;

¹ Six at the time of the original request for the opinion. The seventh, suggested by several States, was added following a meeting on March 7, 2013 between the author of this opinion, Maître Olivier Niggli and Professor Ulrich Haas. The eighth, suggested by one State in particular, was added following a meeting between the same three persons on May 6, 2013.

² These are the recognized principles of international law and human rights. As we shall see, the European Convention for the Protection of Human Rights (“the Convention”) will serve as the main reference. The European Union and the Treaties of the Union, however, are also relevant inasmuch as according to the Court of Justice of the European Union (CJEU) – formerly the Court of Justice of the European Communities (CJEC) - anti-doping rules may potentially conflict with certain provisions of European Union law, namely Articles 81 and 82 of the EC Treaty, which have become Articles 101 and 102 of the Treaty on the Functioning of the EU since the coming into force of the Lisbon Treaty on December 1, 2009. These articles prohibit obstacles to free competition and abusive practices regarding competition. The freedom to provide services might also be affected, perhaps even obstructed. Furthermore, since the coming into force of the Lisbon Treaty on December 1, 2009, the Charter of Fundamental Rights of the European Union (“the Charter”), which was declared at the Nice

- b) applicability of Article 6 § 1 of the European Convention for the Protection of Human Rights to draft Article 8.1 of the Code on disciplinary anti-doping procedures;
- c) compatibility of the principle of prohibited association in draft Article 2.10 of the Code with the aforementioned principles;
- d) compatibility of draft Article 10.12 of the Code with the aforementioned principles, in the light of the decision of the Swiss Federal Court in the Matuzalem case;
- e) compatibility of the publication of sanctions, in particular of draft Article 14.3.4 of the Code with the aforementioned principles;
- f) compatibility of the statute of limitations under draft Article 17 of the Code with the aforementioned principles.
- g) is it compatible or incompatible with human rights and the aforementioned principles to render an athlete or any other person ineligible for life for a second or third violation?
- h) in view of the international standards regarding human rights, may anti-doping controls be performed on athletes anywhere, including at the athlete's "residence", for example in a hotel room, and at any time including at night between 9 p.m. and 9 a.m.?

4. Some very important general considerations:

Inasmuch as several Code provisions, and in particular the provisions for which this legal opinion has been sought, refer to *sanctions*, it is of crucial importance to define the legal system that governs these sanctions: are they civil, criminal, or *sui generis* in nature?

Indeed, the applicable legal system will differ from case to case. By virtue of the most relevant³ international instruments, criminal sanctions afford the accused the greatest level of safeguards; civil sanctions provide fewer safeguards, whereas *sui generis* sanctions in principle offer few safeguards.

One can conclude without too much difficulty that the nature of sports sanctions applied to anti-doping rule violations is civil, which brings them under the scope of application of Article 6 § 1 of the Convention. The Convention is considered as being, if not the most universal international instrument, at least

Summit in December 2000, has become legally binding. It is true that the provisions of the Charter, with regard to the issues examined in this legal opinion, are close to those of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, the Charter is only intended to apply to the Member States of the European Union (27 at present, 28 as of July 1, 2013, date of the accession of Croatia). Lastly, there are international conventions, such as the Council of Europe's Anti-Doping Convention, adopted in 1989, and the International Convention against Doping in Sport adopted by UNESCO in 2005. Whilst not underestimating their importance, they are not very helpful when it comes to sanctions or safeguards for individuals liable to sanctions.

³ Universal Human Rights Declaration (Article 10), European Convention for the Protection of Human Rights (Article 6), International Covenant on Civil and Political Rights (Article 14). Article 13 of the European Convention for the Protection of Human Rights (right to an effective remedy) must also be considered, as necessary.

the most relevant⁴ one in material terms and will therefore be used in this legal opinion as the chief reference point.

The relevance of the reference to the ECHR and its case law is also justified *ratione loci*: the Court of Arbitration for Sport (CAS), which has its seat in Switzerland (Lausanne) comes under the appeal jurisdiction of the Swiss Federal Court by virtue of Articles 176 and 190 of the Swiss Law on Private International Law. In addition, the decisions of the latter fall under the jurisdiction of the ECHR for two reasons. In terms of jurisdiction and substance, the Swiss Federal Court's decisions are binding on Switzerland as it is a State Party to the European Convention on Human Rights (Article 1 of the Convention⁵) despite not being a member of the European Union. In procedural terms, they stand as the final domestic decision within the meaning of Article 35 of the Convention. Indeed, Article 35 stipulates as a condition of admissibility of applications made to the Court that all domestic legal remedies must have been exhausted and that a period of six months from the date on which the final decision was taken must have elapsed.

The sanctions provided for by the Anti-Doping Code currently in force as well as those envisaged in the draft revision have sufficiently significant, if not to say grave, professional and/or financial consequences affecting the athletes, and other related persons, for the subject matter to be deemed "civil" within the meaning of Article 6 § 1 of the Convention concerning the right to a fair trial within the context of challenges regarding rights and obligations of a civil nature⁶.

Sports anti-doping sanctions might, however, by way of exception, escape the "civil" characterization because of their *sui generis* nature. However, the tendency in international law and human rights law is clearly toward extending the civil nature of rights and obligations and toward reducing disputes lacking this character. According to the case law of the ECHR, only a few measures are still of a non-civil and *sui generis* nature: fiscal sanctions that are not criminal in nature⁷; measures, such as expulsion, taken against foreigners⁸; certain sanctions of a political nature, in particular ineligibility⁹; or sanctions imposed on certain civil servants, which are an exception when compared with the general public service regime¹⁰. It would be artificial to assert that sports sanctions, in particular anti-doping sanctions, are by analogy capable of forming part of this category, which is in the process of being gradually reduced. In fact, whichever way one looks at it, they do not materially come under any of the sub-categories I have just enumerated.

⁴ The United Nations Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, has a universal mandate but is a quasi-jurisdiction without the authority to enforce its decisions.

⁵ The State Parties to the Convention (the "High Contracting Parties") recognize vis-à-vis everyone within their jurisdiction the rights and freedoms defined in the Convention (and in its Protocols).

⁶ For disciplinary sanctions, refer to the significant body of case law of the Court in Strasbourg, *Le Compte et al. v. Belgium*, judgement of the ECHR dated June 23, 1981.

⁷ *Ferrazzini v. Italy*, judgement dated July 12, 2001.

⁸ *Maaouia v. France*, judgement dated October 5, 2000.

⁹ *Pierre-Bloch v. France*, judgement dated October 21, 1997.

¹⁰ *Vilho Eskelinen v. Finland*, judgement dated April 19, 2007.

We are left with the most difficult issue: Are anti-doping sanctions of a criminal nature?

In my opinion, a certain hesitation is certainly justified, but I do not believe that this is the case. The case law of the ECHR has long since developed an “autonomous interpretation” of the notions of criminal sanctions and violations¹¹. Nonetheless, not every disciplinary or administrative sanction is by any means a criminal sanction¹². The number and variety of the ECHR’s decisions of inadmissibility, as referred to in footnote 12, show that the range of sanctions, which have a civil, but not a criminal nature remains vast. Contrary to sanctions *sui generis*, this is not a category facing extinction.

More generally, several arguments, when taken together, speak for denying a criminal character to the anti-doping sanctions that can be imposed in the framework of the World Anti-Doping Code:

- i) they are free from any criminal prosecution, even though within a given country, such as France or Italy for example, sanctions of this type [such as those that the French Anti-Doping Agency (AFLD – Agence Française de Lutte contre le Dopage) has the authority to impose] may serve as a basis for criminal prosecution and, if necessary, give rise to actual – but subsequent and distinct - criminal sanctions;
- ii) their gravity, like the gravity of anti-doping rule violations by athletes and other persons, is irrefutable, although in principle not sufficiently so in order to assimilate them with criminal sanctions (which more often than not may extend to the deprivation of liberty, which does not apply here);
- iii) they do not apply to the public at large as criminal sanctions do, but to groups (albeit sizeable ones) with a specific status, such as athletes¹³, physicians, coaches, etc.¹⁴. The provisions in fact do not apply *eo ipso* but only on condition that the person is subject to the disciplinary authority of the sports organization, whether by contract or by granting his/her consent;
- iv) with regard to the competent jurisdiction, the CAS considers, based in particular on qualifications in domestic law – a criterion which is only indicative in a general way according to the ECHR – that cases coming under its jurisdiction are not criminal but civil cases;
- v) so far, the Swiss Federal Court has never decided in the opposite way; in fact, it is the only national court that, provided certain conditions are met, has the jurisdiction to rule on the awards made by the CAS;

¹¹ Since the judgement in *Engel v. the Netherlands* dated June 8, 1976, upheld by a significant body of case law, although not without certain nuances: see for example the judgement in *Escoubet v. Belgium* dated October 28, 1999.

¹² Thus, the following are not criminal sanctions: disciplinary sanctions imposed on teachers (*Costa v. Portugal*, judgement in 1999); those imposed on soldiers (*Linde Falero v. Spain*, judgement in 2000), or on policemen (*Banfield v. UK*, judgement in 2005), or on civil servants (judgement in *Moulet v. France* in 2007); professional sanctions imposed on lawyers (judgement in *Tabet v. France* in 2005); a disciplinary fine imposed on a solicitor (judgement in *Brown v. United Kingdom* dated 24 November 1998); or further, the professional disqualification order against a bankrupt person (judgement in *Storbraten v. Norway* in 2007).

¹³ See the restrictive definition of “Athlete” in the draft Code.

¹⁴ See Prof. Ulrich Haas’ article “Role and application of Article 6 of the European Convention on human rights in CAS procedures”, *Sweet and Maxwell’s International Sports Law Review*, 2012, p.47.

vi) Lastly, regarding the ECHR and its rulings on appeals (normally involving Switzerland, in view of the jurisdiction the CAS and the Swiss Federal Court have) in cases involving anti-doping sanctions, it has to date made only two decisions. In one of them, the Court refused the application made by two female Russian cross-country skiing champions who had been sanctioned for doping at the Winter Olympic Games in Salt Lake City; the sanctions were upheld by the CAS and subsequently by the Swiss Federal Court¹⁵. Certainly, the applicability of Article 6 § 1 was only admitted implicitly by the Court (and even then not in a clear fashion), but it is noteworthy that the applicants had not invoked Article 6 from a criminal angle, which does have at least some indicative significance.

The same situation arose in a horse doping case¹⁶: the coach making the application also did so exclusively from a civil and not from a criminal perspective.

Furthermore, in a recent case communicated to the parties, the *Pechstein v. Switzerland* case (application N° 67474/10), in which the applicant, a female speed-skating champion, put forward several complaints, the one alleging a violation of the presumption of innocence, within the meaning of Article 6 § 2 of the Convention (which only applies to criminal matters), was not communicated to the parties by the Court. This is a strong indication that, at the time the application was lodged, the Court did not feel that the complaint would be admissible *ratione materiae*.

One objection could, however, be based on the fact that the financial sanctions that *Sports Federations* are empowered to inflict can be onerous, indeed very onerous. Even if they do not derive directly from the provisions of the World Anti-Doping Code, might that not be a sign that the severity of these sanctions “contaminates” the subject matter, thereby shifting it into the criminal domain?

I do not believe so. In a large number of countries, Federations have the authority to impose not only disciplinary sanctions, but also financial ones, by virtue of their jurisdiction over the organization of sport in general and over competitions in particular; this confers upon them – in marked contrast to sports clubs – certain public authority prerogatives, such as the authority to sanction. These sanctions can naturally be imposed in instances of doping, one of the most serious violations of sports ethics. However, these sanctions do not derive from the World Anti-Doping Code. Even if the Code did not exist, the Sports Federations would or could hold such powers by virtue of national legislation. This consideration seems to me to suffice to set aside the argument according to which the severe nature of the sanctions imposed by the Federations could, by implication, cause anti-doping sanctions to come down on the criminal side.

Another objection might be based on the possible link between the effects of the sanctions and the interference with fundamental freedoms. As we shall see

¹⁵ Decision to strike out the application from the list of cases dated July 3, 2008 in *Lazutina and Danilova v. Switzerland*.

¹⁶ Decision of inadmissibility for non-exhaustion of all domestic remedies dated October 18, 2001, in *Antikainen v. Finland*.

later (see footnote 22 below), the ECHR holds that sports sanctions can, for example, distort competition and therefore, as the case may arise, infringe free competition and the freedom of trade and industry (or economic freedom). I do not, however, consider this objection as being a decisive one either. Many sanctions can interfere with fundamental rights and freedoms, but this has no influence on their criminal civil or even *sui generis* nature. In other words, the severity of a measure (or its proportionality) may influence its juridical qualification, but the fact that a fundamental freedom might be interfered with has no bearing on whether the sanction is of a civil, criminal or even *sui generis* nature.

Overall, the nature of the sanctions under the World Anti-doping Code is not criminal, in my opinion.

This opinion must however be qualified (although moderately) on two counts: on the one hand, the ECHR has never *explicitly* voiced its opinion on this issue (at least one case is still pending currently and has been communicated to the parties¹⁷); however, this does not give me reason to think *prima facie* that we are faced with a criminal matter. On the other hand, as we shall see later, increasing the severity of sanctions could, if the increase is significant, be such as to push them over the edge into the criminal realm, in view of the ECHR's case law in general.

Having expressed these general considerations, we can examine the eight questions set out above.

5. Regarding the first question:

The new provisions applicable to sanctions according to the Revised Draft Code Version 3.0 are as follows :

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

¹⁷ Bakker v. Switzerland, application communicated on September 7, 2012 (n°7198/07). This is an appeal on the grounds that the Swiss Federal Court dismissed the applicant's public law appeal of a CAS arbitral award. On the one hand, this award dismissed his request to lift the suspension imposed on him by the Anti-Doping Committee of the Royal Dutch Cycling Union; on the other hand, it banned the rider for life from participating in any sports competition.

10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” means that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk.

There follows the draft comment:

[Comment to Article 10.2: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short a two-year period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor 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. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.]

Draft Article 10.2 (Version 3.0) thus concerns *ineligibility* (“suspension” in French) for presence, for use, or for attempted presence or use of a prohibited substance or method.

According to the current Code, the period of ineligibility is two years for a first anti-doping rule violation, unless the conditions for reducing or increasing the period, as provided in Articles 10.4 and 10.5 on the one hand, and in Article 10.6 on the other hand, are met.

According to draft Article 10.2, the period of ineligibility for a first violation would be increased from two to four years (subject to the application of reduction clauses) for certain classes of substances, such as anabolic agents and others, unless the athlete or other person is able to prove the absence of his/her fault or negligence (10.4). Otherwise, if there is intention, it would be four years (10.2.1.1 and 10.2.1.2). It would remain two years in the other cases (10.2) and the mechanisms allowing for reduction provided for by the current Code remain applicable (10.5).

The revised Code proposes an increase in the period of ineligibility for classes of substances or agents hypothetically assumed to be more serious/dangerous. There is no doubt that this increase is significant, but it remains *moderate*, even when considering the consequences thereof for the

athletes; one must refer here to Article 10.12 of the Code, which speaks about the status of the athlete.

Now, one must recall that the principle of the *necessity* of sanctions, or the *proportionality* of the sanctions to the violations, has a wider scope of application than just to criminal subject matter; this is reasonable bearing in mind the risk of curtailing personal freedom, and in particular, professional freedom arbitrarily or disproportionately, and hence unfairly. In the same way, sanctions (or sentences) must not be *automatic* and they must be adjustable depending on the circumstances: this is a consequence of the principle of the individualization or personalization of sanctions and sentences. This is precisely what we are dealing with here: not only are sanctions not automatic, they are *adjustable/scalable*. The modularity of sanctions stems from the consideration of several circumstances: the nature of the prohibited substance, the gravity of the individual fault, behaviour during the procedure ("prompt admission"), or even age (minors). Moreover, it is not possible to increase too significantly the consideration given to individual circumstances, since athletes have to be treated equally at the international level, and it would be unjust to treat athletes who have used the same prohibited substance differently, merely because they practice different sports.

Furthermore, the modularity of sanctions works in many ways in favour of *reduction*. Everything works as if the new length of sanctions envisaged in the revised draft were capped, which clearly shows the moderate nature of their increase compared with the current system. Lastly, the equality of treatment of all athletes is guaranteed by the system envisaged in the revised draft, since the criteria applicable to the duration of the period of ineligibility are objective, and do not result in discriminatory distinctions being made between athletes.

Regarding the *proportionality* of the sanctions to the violations, the CAS itself has for a long time accepted that anti-doping sports sanctions must respect this principle¹⁸.

One does have to verify, however, whether this position is also in conformity with the international human rights principles.

Indeed, the case law of the Strasbourg Court does not offer absolute clarity on this point. It is true that neither Article 6 §§ 2 and 3 of the Convention regarding a fair trial in criminal cases, nor even Article 7, which sets forth the principles of legality and non-retroactivity of sentences, explicitly mention the severity of sanctions or their necessity, or even their proportionality to the fault¹⁹. Seen, however, from the angle of Article 5 of the Convention, which guarantees the right to liberty, the Court has had the opportunity to rule that detaining a prisoner, when he had been granted conditional release was an infringement of Article 5, due to the disproportionality of the length of the new

¹⁸ See in *Jusletter* as early as February 20, 2006, the article by Olivier Niggli and Julien Sieveking "Éléments choisis de jurisprudence rendue en application du Code mondial antidopage".

¹⁹ One might even derive from the judgement in *Göktan v. France* dated July 2, 2002, the principle - although it is an isolated one, it has not been invalidated to date, according to which the Convention does not prohibit automatic or non-adjustable sanctions.

period of detention to the breaches of the conditions fixed at the time of his release²⁰.

Conversely, several national constitutional courts and international courts have clearly ruled that a disproportionate sentence, in particular regarding the length of the sentence (or regarding its *quantum*), is unlawful. This is the position of the French Constitutional Council²¹. The Court of Justice of the European Union has also ruled in this way²². The Supreme Court of the United States has also given its opinion regarding this question and it essentially goes in the same direction²³. The individualization of sentences, and hence the prohibition of sanctions of an automatic and non-adjustable nature is also a traditional principle in German law; this applies for example to fines imposed for infringement of competition law. Lastly Article 49 § 3 of the Charter of Fundamental Rights of the European Union, which has had binding legal force since December 1, 2009 (date on which the Lisbon Treaty came into force) goes further than the Convention inasmuch as it explicitly asserts the principle of the proportionality of penalties²⁴. The application of this article, which has apparently not yet given rise to any judgements of the CJEU, should be a further reason for the CJEU to uphold the principle of proportionality, which is no longer merely a general principle of law, but now enjoys the backing of a legal text in Article 49 § 3. Of course, it only pertains to criminal subject matter *stricto sensu*, but it would be unsafe to contend that it should not be applied to sanctions in general, including sports sanctions in the case of anti-doping rule violations.

One can therefore conclude that the internationally recognized principles of law encompass the notions of proportionality of sanctions and prohibition of excessively severe sanctions.

In the present case, however, the increase in the level of sanctions envisaged by the revised draft of the Code remains, I repeat, *moderate* in relative terms and the outcome itself is, in my opinion, not excessive. The increase does not seem to me to be sufficient to shift the sanctions into the area of criminal subject matter.

²⁰ Judgement in *Gatt v. Malta* dated July 27, 2010.

²¹ Decision 248-DC dated January 17, 1989 on the freedom of audio-visual communication. According to this decision, an *administrative* authority (and not just a judicial authority) has the right to inflict sanctions. These administrative sanctions, however, in the same way as criminal sentences, must be necessary and proportionate, in particular with regard to their length. This position is founded in Article 8 of the Declaration of Human and Civic Rights 1789, which has constitutional force and contains numerous provisions similar to those of the Convention. See also a more recent decision of the Constitutional Council No 20107-6/7 QPC dated June 11, 2010.

²² Judgement of the CJEU in *Meca Medina et al. v. Commission* (C-519/04) (ruling on an appeal from the Court of First Instance of the EU), dated July 18, 2006: the Court of Justice recalled that anti-doping rules (in this instance applied to long-distance swimmers) did not infringe the rules of free competition as long as they pursued a legitimate objective and were *proportionate*.

²³ US Supreme Court, Decision N° O1-1289 dated April 7, 2003 in *State farm mutual insurance Co v. Campbell*. The Supreme Court of the USA held that a financial sanction, such as “punitive damages” inflicted by the jurors in a trial must not be disproportionate with the harm suffered by the victims and should normally not exceed 9 times the amount of the damage caused. More recently, but in a criminal case, the Supreme Court decided that an automatic sanction violated the Constitution: *Decision Miller v. Alabama* and *Jackson v. Hobbs* dated June 25, 2012.

²⁴ “The severity of penalties must not be disproportionate to the criminal offence”

In addition, in my opinion, there does not seem to be any breach of the equality of treatment of athletes. Indeed, the difference in the proposed durations, besides not being particularly significant, is based on objective criteria and not on subjective differences liable to be characterised as arbitrary (see my comment above under section 5).

In conclusion, it is my opinion that the revised draft Article 10.2 (Version 3.0) is compatible with the principles of international law and human rights.

6. Regarding the second question:

The new provisions envisaged with regard to fair hearings are as follows (Version 3.0):

8.1 Fair Hearings.

For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be publicly reported.

[Comment to Article 8.1: This Article requires that at some point in the results management process, the Athlete or other Person shall be provided the opportunity for a timely, fair and impartial hearing. These principles are also found in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are principles generally accepted in international law. This Article is not intended to supplant each Anti-Doping Organization's own rules for hearings but rather to ensure that each Anti-Doping Organization provides a hearing process consistent with these principles.]

The revised draft of Article 8.1 does indeed pertain to the issue of fair hearings. According to the current Code, which is far more detailed than the proposed revised version, the Anti-Doping Organizations with responsibility for the management of test results must guarantee that any person suspected of having committed an anti-doping rule violation be granted the due process of a fair hearing and, in particular, abide by a certain number of principles, which are those generally enshrined in the relevant international human rights instruments²⁵.

The elements that make up a fair trial vary. I recall that the most important ones are as follows:

- The right to an effective appeal, and in particular the right to appeal to a tribunal, and the right of access to such a tribunal which is not impeded by excessive limitations;

²⁵ See footnote 2 above.

- The independence and impartiality of the tribunal and of the member or members composing it;
- The guarantee of equal means for all parties;
- Public nature and transparency of the proceedings ;
- Reasonable length of the proceedings;
- The possibility to appeal the tribunal's decision, subject to certain exceptions;
- Prompt and complete enforcement of the tribunal's decision.

Other safeguards are, for their part, particular to criminal subject matter, such as the presumption of innocence, the right to defence or legal assistance; but they do not come into consideration if the subject matter, as is the case here, is truly civil and not criminal.

Draft Article 8.1 (Version 3.0) retains in substance the same safeguards, though much more briefly and concisely, which is no problem in itself.

My opinion :

Bearing in mind the above (under section 4, "Some very important general considerations"), the answer to this question is a simple one. Whenever disciplinary anti-doping procedures concern rights and obligations of a civil nature, they fall under the scope of application of Article 6 § 1 of the Convention regarding the right to a fair trial. In contrast to §§ 2 and 3 of the same Article, which applies only to persons "charged with a violation", which has always been understood in case law as meaning "charged with a criminal offence", § 1 of Article 6 is of general scope, which encompasses these persons (i.e. those charged with a violation) as well as any person who raises a challenge with regard to their civil rights and obligations. The new wording suggested in Article 8.1, although less detailed than the version currently in force, contains all the safeguards required by Article 6 § 1, and it grants them to the persons subject to the Code.

This wording did however fall short on one point: not only does the hearing have to take place within a reasonable time limit, the reasoned decision handed down thereafter must also be made within a reasonable time limit. If an excessive period of time were to pass between the hearing and the decision, the well-known requirement set forth in Article 6 § 1 of the Convention – to be heard within a reasonable time – would be disregarded. Indeed, according to the Strasbourg Court, this provision must be applied to the entire procedure, including to the period of time following the decision on the merits²⁶.

The following minor editorial clarification has however been inserted in the most recent version, dated June 10, 2013: the new wording now reads: **"a timely reasoned decision specifically including an explanation of the reason(s) for any period of ineligibility shall be publicly reported"**.

²⁶ The case law is time-honoured and constant: see for example *Robins v. United Kingdom*, judgement dated September 23, 1997.

This wording allays the concern I expressed above regarding the previous version ²⁷. Therefore, I espouse the version dated June 10, 2013.

My opinion therefore is that draft Article 8.1 (Version 3.0) is compatible with the principles of international law and in particular with Article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair trial (provision which is applicable in the instance)²⁸.

7. Regarding the third question:

The principle of *prohibited association*, which has to be examined as to its compatibility with the recognized principles of international law and human rights, is set forth in draft Article 2.10 and was worded as follows as of May 6, 2013:

2.10 Prohibited Association.

Association by an Athlete in a professional or sport-related capacity with any Athlete Support Personnel who:

(i) is serving a period of Ineligibility; or

(ii) has been found in a criminal, disciplinary or professional proceeding within the previous eight years to have been involved in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person.

In order for this provision to apply, it is necessary that the Athlete has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete, or by WADA, of the Athlete Support Personnel's disqualifying status.

Followed by the draft comment:

[Comment to Article 2.10: For example, Athletes should not be working with coaches or trainers who are Ineligible on account of an anti-doping rule violation. Similarly, they should not be associated with physicians or other Persons who have been criminally convicted or professionally disciplined in relation to doping.]

This draft Article 2.10 is new. It introduces a new anti-doping rule and a new anti-doping rule violation, i.e. that of prohibited association.

All athletes are to be prohibited from associating with any person among their support personnel (coach, trainer, physician, agent or other), who is suspended or who in the eight preceding years acted in a way that would have violated anti-doping rules if the relevant Code rules applied to such a person. For this provision to be applicable to an athlete, however, the Anti-Doping Organization with jurisdiction over such an athlete, or WADA, would have had to

²⁷ May 6, 2013.

²⁸ See Section 4 above, "Some very important general considerations"

inform the athlete previously in writing about the disqualifying status of the member of his support personnel.

For this draft rule to be compatible with the applicable international principles, it is necessary, in my opinion, for:

- the rule to be sufficiently *predictable*, which implies that it must be clear;
- the burden of proof on the athlete not to be too heavy and such that it makes it impossible for him/her to disprove the allegation.

Indeed, the predictability of a law and the prohibition of having to bring an impossible proof (which is one of the elements of equal means) are part of the safeguards of a fair trial within the meaning of Article 6 § 1 of the Convention. Advising the athlete in writing and in advance proffers sufficient safeguards to the athlete. Conversely, it does not appear that the draft revised Code foresees a provision – either in Article 2.10, or anywhere else - for analogous information to be communicated to the other persons, i.e. to the athletes' support personnel. It does seem unfair for such personnel, who run the risk of suffering similarly serious consequences from the new violation of prohibited association – even though this is in principle right –, not to be entitled to receive previous written information, if only for the purpose of refuting the allegations made against him/her if necessary.

In fact, the rule itself seems to be sufficiently clear, provided that the notion of *association* itself be specified, namely by defining it as resorting to the services of a person or persons referred to in the Article in question, regardless of the nature of the transaction (and whether for a fee or free of charge). The absence of any clarification could well give rise to the criticism of an absence of predictability.

However in the most recent version – dated June 10, 2013 – draft Article 2.10 and its three sub-clauses 2.10.1, 2.10.2 and 2.10.3, allay these fears, as on the one hand the notion of association is specified, and on the other hand the support personnel now is given the same safeguards as the athletes themselves with respect to information being furnished in advance²⁹.

On these terms, I am able to support this most recent version, which incorporates the recommendations I expressed on these two issues.

Lastly, I feel that the period of eight years is somewhat long. In many legal systems, in terms of criminal sanctions, such a length is close to that of the statute of limitation in the area of criminal subject matter. Particularly in Europe, however, there is a tendency to lengthen the criminal limitation period, and thus by analogy or a fortiori also the limitation period for non-criminal sanctions. But overall, the length of eight years could in these circumstances appear too strict.

²⁹ With respect to support personnel, the Anti-Doping Organization must at the very least use all reasonable efforts to inform them and they have a period of 15 days to appear before the Anti-Doping Organization to assert that the criteria disqualifying them from associating with an athlete do not apply to them.

Lastly, in the most recent version of draft Article 2.10.2 (Version 3.0), the length has been reduced to six years, so my comments above have been duly considered.

My opinion on the whole, regarding draft Article 2.10 (and 2.10.1, 2.10. 2 and 2.10.3) is favourable.

The wording in its entirety is as follows:

Article 2.10, version 3.0

2.10 *Prohibited Association.*

Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support Personnel who:

2.10.1 is serving a period of Ineligibility; or

2.10.2 where Ineligibility has not been addressed in a results management process pursuant to the Code has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person (the prohibited status of such Person shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed); or

2.10.3 is serving as a front or intermediary for an individual described in Article 2.10.1 or 2.10.2.

In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Personnel's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person cannot reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Personnel who is the subject of the notice to the Athlete or other Person that the Athlete Support Personnel may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her.

The burden shall be on the Athlete or other Person to establish that any association with Athlete Support Personnel described in Articles 2.10.1 or 2.10.2 is not in a professional or sport-related capacity.

Anti-Doping Organizations that are aware of Athlete Support Personnel who meet the criteria described in Articles 2.10.1, 2.10.2, or 2.10.3 shall submit that information to WADA.

And the comment:

[Comment to Article 2.10: Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Personnel to serve as an agent or representative. Prohibited association need not involve any form of compensation.]

8. Regarding the fourth question:

The wording of the draft was as follows:

10.12 Payment of CAS Cost Awards.

Athletes and other Persons shall not be allowed to participate in Competition until any CAS cost awards against them have been paid, unless fairness requires otherwise.

And the wording of the related comment:

[Comment to Article 10.12: The determination of whether fairness requires that a period of Ineligibility be extended for non-payment of a CAS cost award shall be initially made by the Anti-Doping Organization which has jurisdiction over the Athlete or other Person's return to eligibility. Such decision may be appealed pursuant to Article 13.]

Draft Article 10.12 prohibits athletes and other persons from taking part in competitions for as long as they have not paid the costs arising from a CAS award relating to them.

The decision of the Swiss Federal Court dated March 27, 2012 in the Matuzalem case (1st Civil Law Division)³⁰ may serve as a reference, although it does not relate to doping. In this case, the appellant, a professional football player, had unilaterally and illegally terminated his contract with an Ukrainian club and had been hired by a Spanish club, which had accepted to bear the consequences of the breach of contract. The Disciplinary Committee of the International Football Federation (FIFA) ruled that both the football player and the Spanish club were obliged to settle their debt owed to the Ukrainian club within 90 days, as ordered by the CAS failing which the football player, Mr Matuzalem, would be banned from all football activity. The Swiss Federal Court

³⁰ Swiss Federal Court - 4A_558/2011.

overturned this decision on grounds that it interfered excessively with the football player's economic freedom, and his private and professional life. The Federal Court held furthermore that to deprive a professional athlete of all sporting activity, hence of all income, made it impossible for him to settle his debts.

Does such a draft Article not run the risk of bringing about similar situations against which the Swiss Federal Court reacted?

This is indeed possible, even likely.

As far as the Convention is concerned, certainly in the case where a contractual obligation is not fulfilled – such as a debt – it only prohibits the act of depriving the debtor of his liberty³¹ (Article 1 of Protocol N° 4 to the Convention). However, the prohibition to practice a sporting activity, even professionally, regardless of its severity for the person concerned, cannot be placed on the same footing as a deprivation of liberty *stricto sensu*. Nonetheless, the ECHR is very sensitive when it comes to inflicting excessive pecuniary sanctions, not in this instance with regard to the asserted violation, but in absolute terms, in view of the consequences for the rights and freedoms of the sanctioned person. It has thus held that excessively restricting the right of access to a procedure of enforcement by ordering the applicant to pay the legal costs, which were disproportionate to the latter's means, infringed Article 6 § 1³². It has also held in the case of an applicant, a football club engaged in a dispute with the International Football Federation (FIFA) following the transfer of a professional player, that requiring the player to pay excessive legal costs, by obstructing his right to appeal to the country's Supreme Court, violated the right of access to a tribunal, guaranteed by Article 6 § 1³³.

In the absence of a more pertinent case law emanating from the ECHR, it would in any event seem prudent to seek guidance in the recent Matuzalem decision of the Swiss Federal Court - the "natural judge" with respect to anti-doping sanctions under the Code - and to abstain from introducing in the Code an article such as the proposed Article 10.12. Indeed, the Swiss Federal Court, and possibly the ECHR, might view this as introducing an additional *disproportionate* sanction.

Conversely, the sanction included in the draft could not fall under the rule *non bis in idem* laid down in Article 4 of Protocol N° 7 to the Convention, which applies only in criminal cases (see the aforementioned decision in Göktaş, and more specifically the decision in Zolotoukhine v. Russian Federation dated February 10, 2009³⁴). In the same way, placing such a prohibition to exercise an activity on the same footing as forced labour within the meaning of Article 4 of the Convention does not seem possible either.³⁵

³¹ Commonly known as debtor's prison.

³² Judgement in *Apostol v. Georgia* dated November 28, 2006.

³³ Judgement in *Football club of Mretebi v. Georgia* dated July 31, 2007.

³⁴ See also the decision of the CJEU in *Norma Kraaijenbrink (C-367/05)* dated July 18, 2007.

³⁵ In a recent case at the ECHR, which has reached the stage of communication to the parties, *Mutu c. Switzerland* (application N°40575/10), the complaint lodged by the applicant football player based on Article 4

Nevertheless, the non-conformity of the proposed sanction with the Convention, and in particular with its Article 8 regarding the right to respect for private and family life, in my opinion seems to suffice to make it suspect from a legal perspective.

My opinion, therefore, was to drop this element of the revised draft of the Code. To my mind, it seemed of dubious legality and, if one accepts the rationale of the Matuzalem decision as being reasonable, the proposed revision was, in addition, not particularly advisable : the sporting career of professional athletes is not very long in most cases. To prevent them from earning their living by participating in competitions for a period which, conversely, can be long, is to render them incapable of settling the amounts they are required to pay (albeit legitimately) and hence it is a counter-productive measure.

However, Version 3.0 of draft Article 10.12, re-numbered 10.9, seems to set aside most of my previous objections, which were inspired in particular by the Matuzalem decision. This new version *specifies in detail* the amounts the athlete must pay back before being allowed to continue his/her sporting activity. Now there are more safeguards. The athlete, who can prove that the payment of such sums would create a manifestly excessive financial burden, will be able to seek authorisation to pay back a *reasonable* portion of the debt owed and to submit a payment plan to the CAS for approval. The related comment also considers the possibility of reaching an out-of-court settlement with the relevant Anti-Doping Organization without having to resort to the CAS.

Nevertheless, I persist in the belief that this is still not sufficiently in line with the reasoning of the Matuzalem decision to which I subscribe, whilst acknowledging that the principle of enforcing judgements is also one of the components of a fair trial³⁶. In this respect, I note – merely by analogy – that the Strasbourg Court has held that it was in breach of Article 6 of the Convention for a party to have been deprived of his right of appeal against the decision of a court of appeal as a result of not having paid the amount of the debt he was ordered to pay by such decision in circumstances where payment would have caused him manifestly excessive consequences.³⁷

Furthermore, even if these are pragmatic considerations rather than being based juridical arguments strictly speaking, I believe that the “procedural” efforts made in the new draft Article (10.9) are needlessly complex considering the intended objective. In other words, I revert to my original reticence regarding provisions making the right to participate in sports competitions conditional on payment in full of a financial sanction.

My opinion, therefore, is that draft Article 10.9 (formerly Article 10.12), as reproduced below including the related comment, is not compatible, or not sufficiently compatible, with the principles of international law and human rights.

was not communicated, which is, as I have pointed out, a strong indication from the Court as to the remote probability of the applicability of Article 4.

³⁶ See decision in *Hornsby v. Greece* dated March 19, 1997.

³⁷ *Annoni di Gussola et al. v. France*, decision dated November 14, 2000.

Article 10.12, replaced by 10.9 in Version 3.0

10.9 Repayment of CAS Cost Awards and Forfeited Prize Money.

As a general principle, Athletes and other Persons shall not regain eligibility until CAS cost awards and forfeited prize money imposed upon them on account of anti-doping rule violations have been paid. However, where an Athlete or other Person can demonstrate that this general rule would create a financial burden that is manifestly excessive, then the Athlete or other Person may submit a payment plan to CAS for approval. Failure to comply with an approved payment plan will automatically result in Ineligibility.

The priority for repayment of CAS cost awards and forfeited prize money shall be: first, payment of costs awarded by CAS; second, reallocation of forfeited prize money to other Athletes if provided for in the rules of the applicable International Federation; and third, reimbursement of the expenses of the Anti-Doping Organization that conducted results management in the case.

[Comment to Article 10.9: Without going to CAS, the Athlete or other Person can always reach agreement on a payment plan with the relevant Anti-Doping Organizations.]

9. Regarding the fifth question:

Draft Article 14.3.4 reads as follows:

14.3.4 For purposes of Article 14.2, publication shall be accomplished at a minimum by placing the required information on the Anti-Doping Organization's website and leaving the information up for the longer of one month or the duration of any period of Ineligibility imposed.

This draft Article 14.3.4 of the Code is also new. Public dissemination, or publication, of sanctions is already provided for by the current Code and is a long-standing, seemingly effective, practice. It serves as a strong deterrent, so *a priori* it is appropriate from the point of view of the Code and of the ongoing review process.

The modification added to the draft is technical more than anything else, i.e. to post the information (at a minimum) on the website of the Anti-Doping Organization and to keep it there during the longer of the two periods: either for one month or during the length of the ineligibility period (if the latter exceeds one month). At present, the duration is for at least one year. Moreover, certain safeguards have already been built into Article 14.2 of the Code and the proposed modification does not seem to affect them. Furthermore, draft Article 14.3.2 also offers the athletes safeguards, as does CAS case law.

It is, therefore, rather a question of compatibility of the *current* rules of publication of sanctions with international standards. It must be recalled that

these sanctions are not criminal; this means that, as such, they are not subject to the rules and safeguards prevailing everywhere with regard to a person's criminal record.

For their part, the institutions of the European Union, the Commission and the Court of Justice, have taken the opportunity to recall that anti-doping rules must respect the principles of personal data protection – which also exist, according to the case law of the ECHR³⁸, under the aforementioned Article 8 of the Convention. Other international instruments have similar provisions, such as Article 8 of the Charter of Fundamental Rights of the European Union³⁹.

On the whole, however, the publication provision set forth in the current Code and proposed in the revised draft does not appear to interfere excessively with the respect for athletes' private (and family) life. It has a legitimate objective and does not seem to be disproportionate. There is however a dual *reservation*:

On the one hand, if the athlete's ineligibility period is long, the duration of publication can also last for a long period. At present, publication can be maintained for at least one year, without fixing a maximum. The revised draft renders the ineligible person's situation more serious. One may not, however, mistake the length of ineligibility for that of the publication of such ineligibility, which may be perceived as an additional, or subsidiary, "sentence" (but in any case as a sanction). Publication may indeed have negative repercussions on the private, professional and even family life of the ineligible athlete, for example in terms of the athlete's ability to find employment (again). It would be preferable, if the wish is to preserve the equivalence between the length of ineligibility and of publication, to give the person concerned the possibility to request that the publication of his/her ineligibility be terminated before the ineligibility has expired. The question is, of course, as of when. It is difficult to answer this question categorically, since it depends on the length of ineligibility. In my opinion, the longer the ineligibility, the more the request to terminate the publication would be helpful, even desirable. At any rate, it would be up to the body with the sanctioning authority to accept or refuse such a request depending on all the circumstances. The request for termination of the publication would not be automatic; it is not enough to simply ask in order to obtain the termination.

On the other hand, the case law of the ECHR vigorously protects the confidentiality of private data relating to the *health* of the person in question⁴⁰. A provision must, therefore, be added to the revised Code stipulating that the publication of information about the health of a person (which is of a particularly sensitive nature in the area of doping) without the latter's consent is prohibited.

My opinion, therefore, is that draft Article 14.3.4 (and the related rules) are compatible with the principles of international law and human rights, subject to giving the ineligible person the possibility to request that the publication of

³⁸ Decision in *Leander v. Sweden* dated April 26, 1987 and abundant subsequent case law.

³⁹ See the judgement of the ECJ in *Schecke* (C-92/09) dated November 9, 2010 regarding the application of the principles set out in Article 8 of the Charter – though in a very different subject area (that of subsidies paid by the European Agricultural Fund).

⁴⁰ See for example *Z. v. Finland*, judgement dated February 25, 1997 and several subsequent judgements.

his/her ineligibility be terminated prior to its expiry, in cases of long periods of ineligibility.

10. Regarding the sixth question:

The previous version of draft Article 17 reads as follows:

No anti-doping rule violation proceeding may be commenced against an Athlete based on Article 2.1 (Presence) or Article 2.2 (Use) unless such action is commenced within ten (10) years from the date the violation is asserted to have occurred. Actions based on any other anti-doping rule violation must be commenced within fourteen (14) years from the date when the violation is asserted to have occurred.

Essentially, the objective of draft Article 17 was to increase the length of the statute of limitation – which in the current Code is eight years from the date on which it has been asserted that an anti-doping rule violation was committed – to ten years from this date, when an athlete has violated the rule regarding the presence or use (of prohibited substances or methods) and to fourteen years in all other cases (trafficking, tampering, administration etc.).

As mentioned already in part under Section 6 above (regarding the third question) the main difficulty lies in the significant increase in the length of the limitation period.

The ECHR expressed its position on the principle in the *Stubbings* case⁴¹, and has reasserted it several times subsequently⁴². Limitation periods are not necessarily an insurmountable obstacle to the right of access to a tribunal (guaranteed by Article 6 § 1), which according to the Court's case law is not an unlimited right and contains implicit limitations. These limitation periods promote legal certainty, but they also protect potential defendants against tardy complaints and avoid legal actions being brought a very long time after the alleged facts have taken place in which the provision of evidence would be arbitrary or even impossible. In the first cited case (*Stubbings*), a case of physical harm, the Court deemed the six years' limitation period to be reasonable, as it did with the twelve years in the second case (*J.A. Pye Oxford*), which concerned conflicts of ownership and property.

In general, applicants complain about periods being too short, but based on the same jurisprudential criteria, one can also imagine that litigants could well complain about the opposite, i.e. too much time, in the name of a kind of "right to finality" (similar to an entry in a person's criminal record and the deletion thereof). This is paradoxical only in appearance, since legal certainty and the reliability of evidence must also benefit persons who have violated or are accused of having violated anti-doping rules. Recently, the Strasbourg Court censured the retention of records of individuals (true, it concerned persons who had been acquitted at the criminal level or against whom prosecution had been discontinued) indefinitely or for too long a period in public fingerprint and genetic

⁴¹ Judgement in *Stubbings v. United Kingdom* dated October 22, 1996.

⁴² See recent judgement in *J.A. Pye Oxford (Ltd) v. United Kingdom* dated June 30, 2007.

databases⁴³. In short, in so doing, it laid down the principle of *deletion* and, having done so with regard to criminal subject matter, it should apply it a fortiori to the area of administrative sanctions.

A long limitation period in itself is not particularly shocking in this instance, especially since it is a matter of taking legal action against, and sanctioning, serious cheating. Nevertheless, whilst being able to accept a change from eight to ten years – a moderate increase in relative terms bringing the duration to a not unreasonable level in absolute terms – one may and should well wonder whether shifting from eight to fourteen years – nearly doubling the period to one which is very long - would not be judged excessive in the event of litigation. Moreover, the difference between the two categories of violations (ten years and fourteen years) is itself very significant and the rational justification thereof is not obvious.

Nonetheless, the wording of draft Article 17 (Version 3.0) below takes account of my comments and lowers the statute of limitation to ten years for all cases. Thus, I no longer have cause to make any reservations regarding this article.

Article 17, version 3.0

No anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless such action is commenced within ten years from the date the violation is asserted to have occurred.

My opinion:

Draft Article 17 (Version 3.0) of the revised Code is compatible with the principles of international law and human rights.

11. Regarding the seventh question:

The compatibility of a *life ban* or *ineligibility for life* of an athlete in the event of recurrent violation (second or third violation) with the principles of international law and human rights is a sensitive issue calling for an answer, which it is not easy to give. One certainly cannot make a comparison with a sentence of irreducible life imprisonment, which, ever since the abolition of the death penalty (which – by the way – is not yet universal, though nearly so in Europe⁴⁴), is increasingly deemed as being incompatible with human rights. The analogy is ill-advised, for imprisonment and deprivation of liberty are, quite obviously, more serious than ineligibility.

Ineligibility or exclusion for life in disciplinary or professional areas exists in many national legal systems, for example as applied to medical doctors or lawyers. The ECHR has often admitted the legitimacy of such sanctions,

⁴³ Judgement in *S. and Marper v. United Kingdom* dated December 4, 2008.

⁴⁴ Ever since Protocol N° 6 to the Convention came into force, all the Member States of the Council of Europe have ratified it except for the Russian Federation, but the latter has been applying a moratorium since 1996.

acknowledging implicitly their non-disproportionate nature. It accepted the legitimacy for example in the case of the life disbarment of a lawyer⁴⁵, of a medical doctor⁴⁶ and of a chartered accountant⁴⁷.

Life ineligibility or life bans are even more frequent⁴⁸ in the area of anti-doping sanctions. These are grave decisions, but are they necessarily disproportionate to the rule violation or are their consequences excessive in absolute terms?

Absent, to my knowledge, any case law on this subject emanating from the human rights courts, namely from the ECHR, I would be inclined to answer both questions in the negative. Even though this is not a decisive argument, it is a fact that the majority of athletes, at least in certain disciplines, have to end their sports career at a relatively young age so that the "for life" aspect of their ineligibility is frequently theoretical rather than real.

In addition, two further arguments come down on the side of the legitimacy, or legality, of life ineligibility: the fact that it cannot be applied to sanction an isolated act or conduct and the fact that suspension or exclusion for life also exists in many other professions, without it being considered unlawful.

There is of course no doubt, given the serious and (in some ways) shameful nature of an athlete's life ban, that especially rigorous disciplinary safeguards and a subsequent judicial appeal should be in place in such cases and that this measure should be applied with moderation.

My opinion therefore is that ineligibility for life of an athlete is not incompatible with the principles of international law and human rights.

12. Regarding the eighth question:

5.2 Scope of Testing.

Any Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her. Subject to the jurisdictional limitations for Event Testing set out in Article 5.3:

The problem relating to the place and the time testing can be performed on athletes by the organization with testing authority raises the issue of establishing whether this place and time are in conformity with the relevant international standards, namely Article 8 of the European Convention for the

⁴⁵ Judgement in *Tropkins v. Latvia* dated May 3, 2001.

⁴⁶ Judgement in *Gubler v. France* dated July 27, 2006.

⁴⁷ Judgement in *Djaoui v. France* dated October 4, 2007.

⁴⁸ For recent cases we can cite the life suspension pronounced by the United States Anti-Doping Agency (USADA) dated August 24, 2012 against the famous rider Lance Armstrong or the one imposed by the Athletics Federation of Russia dated December 18, 2012 against the Russian race walker Sergei Morozov. There is also the even more recent case of a life ban of the Jamaican sprinter Steve Mullings, which was upheld by the CAS on March 13, 2013.

Protection of Human Rights and Fundamental Freedoms (which reflects Article 12 of the Universal Declaration). Article 8 of the Convention guarantees the right to respect for private and family life, which includes the *place of residence (domicile)*.

Indeed, the draft of Article 5.2 of the revised Code proposes that any athlete may be obliged to provide a sample at any time or any place by any organization with testing authority over him or her. This obligation is explained in, and further strengthened by, Article 4.5.5 of the International Standard for Testing. Indeed, these standards are just as binding as the Code itself on the organizations and States who accept to implement the World Anti-Doping Program.

The provisions of this article have raised queries, in particular by the French National Anti-Doping Agency (AFLD). In certain national legislation⁴⁹, testing may not be carried out at the athlete's *domicile* during the night between 9 p.m. and 6 a.m.

The case law of the European Court of Human Rights first of all holds that the notion of place of residence (*domicile*) is an autonomous notion⁵⁰ and it gives it a wide interpretation⁵¹. It could even encompass the hotel room in which an athlete resides, in particular during a competition in which he/she participates⁵², although the issue around *domicile* goes beyond the remit of a hotel room.

The issue of the time of testing is a delicate one. In several countries (see footnote 49), in accordance with the tradition of respecting a person's private sphere and sleep, nocturnal house searches are prohibited, except in the case of emergency or *in flagrante delicto* – and this may be relevant to the present legal opinion, as we will see later – or in the case of grave offences such as those involving drugs in particular. National tribunals are inclined to find quite readily that the rules makers may extend the range of cases in which a private home may be searched at night, despite criticism from academic commentary⁵³.

⁴⁹ For example in France (Sports Code amended by decree dated April 14, 2010 – see in particular Article L. 232-14 of this Code), in Germany (section 758a (4) of the Code of Civil Procedure) and in Austria (§ 30(2) of the Law on the Enforcement of Judgements).

⁵⁰ See *Buckley v. United Kingdom*, judgement dated October 25, 1996.

⁵¹ The Court of Justice of the EU has modified its case law in this area regarding certain points in order to take into account the Strasbourg Court's case law: see for example the ruling of the CJEU in *Roquette frères SA* dated October 22, 2002 (with regard to the notion of private premises extended to commercial premises).

⁵² The Court did not explicitly rule on the question of hotel rooms. In its decision dated June 26, 2001 in *O'Rourke v. UK*, it did not address the question because the complaint based on interference with the inviolability of the home was inadmissible for a different reason. Nonetheless, the effort already undertaken by the Strasbourg Court to interpret "domicile" extensively, in particular by assimilating the home with company head offices and commercial premises, leads one to believe that a temporary residence, such as a hotel on the occasion of competitions, (or the "Olympic Village"), could be brought under the scope of the protection granted by Article 8 of the Convention.

⁵³ See for example the decision of the French Constitutional Council dated March 4, 2004 N° 2004-492 DC regarding the law adapting justice to the evolution of crime or the ruling of the French State Council dated February 24, 2011 in *Union nationale des footballeurs professionnels*, in which the appeal lodged by this union dated April 14, 2010 against the aforementioned decree was rejected (see footnote 49 above).

The Strasbourg Court's case law on these questions is not very abundant. Certainly, the Court has ruled in many cases that searches or house searches were in contravention of the Convention, for lack of sufficient procedural safeguards⁵⁴. Cases specifically involving the infringement of the inviolability of the home during night-time are more rare. In all, there are only two in which the Court ruled that Article 8 had been violated by a house search during the night, in both cases on the ground that there was no case of *in flagrante delicto*⁵⁵. In another case, the argument put forward by the applicant based on the fact that the house search had taken place during the night at 6 a.m. was deemed "pertinent" by the Court, even though the applicant was absent at the time (which demonstrates the objective nature of respect for the home)⁵⁶.

As to the procedural safeguards, the Court holds that they need to be such as to prevent abuse and the risk of arbitrariness and to ensure that searches and visits of a person's residence (*domicile*) remain *proportionate*⁵⁷. The notion of "*adequate safeguards*" figures prominently in its case law. The Court holds in particular that under the national legislation of a country, visits and searches are authorized *without a prior warrant* issued by a judge, but subject to effective ex post judicial review⁵⁸. Moreover, the serious (or conversely, minor) nature of the violation supposedly committed by the person being controlled (i.e. searched or visited) is a component which is also part of the analysis when assessing the proportionality of the challenged intervention⁵⁹. Lastly, emergency (or *in flagrante delicto*) may legitimize the performance of a doping control, for example at the person's *domicile*.

This eighth question is thus a delicate one. On the one hand, it is important to guarantee the right to respect for private life, and in particular for the place of residence (*domicile*). On the other hand, the possibility of testing at night is crucial for the fight against doping: indeed, in many sports, it is very often at night-time that the acts of cheating are perpetrated. It may well be – and the testimony of "repented cheats" has borne this out – that anti-doping rule violations are committed shortly after 9 p.m. and become undetectable in practice if testing is conducted after 6 a.m., i.e. nearly nine hours later.

How can one reconcile this provision, which is essential for the fight against doping, with the principles of proportionality and respect for human rights, which the World Anti-Doping Code recalls in its introduction?

As I explained above, the Court's case law does not completely discard the possibility of testing during the night even when it involves an interference with the respect for the *domicile*.

⁵⁴ See for example the judgements in *Van Rossem v. Belgium* dated December 9, 2004 and in *André v. France* dated July 24, 2008 and in *Rossiot v. France* dated June 28, 2012 (relating to the Cofidis case, hence the fight against doping in cycling races)

⁵⁵ This is the *Damian-Buruena and Damian v. Romania* case dated May 26, 2009 and the *Bisir and Tulus v. Moldova* case, judgement dated May 17, 2011.

⁵⁶ *Zubal v. Slovakia*, judgement dated November 9, 2010.

⁵⁷ *Camenzind v. Switzerland* judgement dated December 16, 1997.

⁵⁸ *Smirnov v. Russia*, judgement dated June 7, 2007 ; *a contrario*, *Harju c. Finland*, judgement dated February 15, 2011.

⁵⁹ See for minor infringements and violations of Article 8, judgement in *Buck v. Germany* dated April 28, 2005.

Indeed, the Court has accepted it in the case of "*in flagrante delicto*" (within the non-strictly criminal meaning of the term, since anti-doping procedures are not criminal as we saw above). In this respect, where *grave and matching suspicions* give reason to believe that a night-time doping control is indispensable to uncover the truth, such a control could be admitted, in my opinion. The test is more stringent than mere "plausible reasons to suspect" that a person has committed a violation within the meaning of Article 5 § 3c) of the Convention on the right to liberty and security. Nevertheless, this is justified. Whilst "plausible reasons to suspect" under this Article 5 permits the lawful arrest and detention of a person, an arrest warrant must nevertheless be issued beforehand or an equivalent procedure must be put in place; this is not necessary in the case of searches or visits of a person's residence, precisely because they curtail liberty less than arrests.

Furthermore, when defining the *duration* of "night-time", one could accept such duration from 11 p.m. (and no longer from 9 p.m.) to 6 a.m. (for all seasons). Thus, a seven hour period of inviolability (relatively speaking) of the home – and no longer 9 hours - would constitute an acceptable compromise between respect for sleep and private life on the one hand and the concern of making cheating less easy, on the other.

Indeed, other criteria by way of additional safeguards would still have to be added:

- the *gravity* of the suspected infringements, since interfering with the inviolability of the *domicile* and/or of private life in the case of minor infringements becomes disproportionate (see the aforementioned case *Buck*);
- the existence of adequate procedural safeguards, in particular the possibility of conducting effective reviews of sanctions, which may result from the testing of athletes. In this respect Article 13 of the Code on appeals (whether to the CAS, as the case may be, or to a national organization) is satisfactory, in my opinion.
- the absence of excessive, hence disproportionate, consequences, but this might well be covered by the preceding criterion.

In my opinion, it is not absolutely necessary to supplement Article 5.2 along these lines, but this should be mentioned in a comment, since the Code states (Article 24.2) that the comments should be used to interpret the Code.

My opinion:

In view of the real importance of testing, including during the night-time, for the fight against doping, the possibility of testing athletes at their *domicile* (and regardless of the type of such *domicile*) must be accepted. It is, however, necessary to recapitulate in a comment to the future Article 5.2 the criteria emanating from the case law of the Strasbourg Court (as recalled above), in order to ensure that the testing authorities do not abuse the controls; avoid arbitrariness; limit doping controls to cases of "*in flagrante delicto*"; perform controls only if there is suspicion of grave anti-doping rule violation; and that effective subsequent reviews guarantee the possibility of reviewing possible sanctions on appeal. The meaning of "night-time" could also be specified in such

a comment: I would suggest defining night (in all seasons) as the time between 11 p.m. and 6 a.m.

Version 3.0 of Article 5.2 and its comment:

5.2 Scope of Testing.

Any Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her. Subject to the jurisdictional limitations for Event Testing set out in Article 5.3:

And the related comment:

[Comment to Article 5.2: Additional authority to conduct Testing may be conferred by means of bilateral or multilateral agreements among Signatories. Before Testing an Athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organization should have serious and specific suspicion that the Athlete may be engaged in doping.]

13. Summary:

In summary, my opinion regarding the various issues is thus as follows:

- 1) The entirety of the subject matter of sports sanctions is civil and not criminal;
- 2) My opinion on draft Article 10.2 is favourable;
- 3) My opinion on draft Article 8.1 is favourable;
- 4) My opinion on draft Article 2.10 (and 2.10.1, 2.10.2 and 2.10.3) is favourable;
- 5) After due consideration, my opinion on draft Article 10.9 (former Article 10.12) is unfavourable;
- 6) My opinion on draft Article 14.3.4 is favourable, subject to ensuring that the ineligible person has the possibility to request the termination of the publication of ineligibility before such ineligibility has expired;
- 7) My opinion on draft Article 17 is favourable;
- 8) My opinion on life ineligibility of athletes is in principle favourable, but I insist on the need for additional and reinforced safeguards – both procedural and in substance – in support of this measure (proportionality of the sanction with the asserted anti-doping rule violation);
- 9) My opinion is favourable, with similar reservations, regarding the possibility of conducting visits in certain cases to the *domicile* of athletes for the purpose of

testing, including during the night, subject to a comment specifying in detail the definition of “night-time” as well as the testing conditions and the procedural safeguards thereof.

Done at Strasbourg, June 25, 2013.

Jean-Paul Costa

Please note that the original version of this opinion is in French; this English translation is provided only for the purposes of comprehension.