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*The Europeanisation of Clean
Sport: How the Council of Europe
and the European Union Shape the
Proportionality of Ineligibility in the
World Anti-Doping Code*

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Anti-doping rules ‘could indeed prove excessive by virtue of (...)
the severity of (...) penalties’.¹

IN 2006, THE Court of Justice (ECJ) ruled that sanctions for doping must be proportionate to comply with the law of the European Union (EU).² Similarly, the European Court of Human Rights (ECtHR) decided in 2018 that whereabouts requirements must respect the principle of proportionality to comply with the European Convention on Human Rights (ECHR) of the Council of Europe (CoE).³ Therefore, respect for the principle of proportionality under EU law and the ECHR is essential for anti-doping rules and sanctions, including ineligibility. In essence, ineligible athletes or other persons may not participate in any capacity in a competition or a sporting activity for a certain period of time. The prohibited competitions or activities include all

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¹ CJEU, C-519/04 P *Meca-Medina and Majcen v Commission* [2006] EU:C:2006:492, para 48.

² *ibid.*

³ ECtHR, 18 January 2018, *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v France*, CE:ECHR:2018:0118JUD004815111. See also J-P Costa, ‘Legal Opinion 2019 (expert opinion) on the World Anti-Doping Code’ (2019) *World Anti-Doping Agency* 38, 3–5.

those authorised or organised by any signatory to the World Anti-Doping Code (WADC), its member organisations or a club, any professional league, any event organisation or any elite or national-level sporting activity funded by a government agency.⁴ As such, ineligibility limits the freedom of action of both athletes and other persons and thus also the rights that they derive from the ECHR or EU law. Therefore, ineligibility must respect the European dimension of proportionality, which this chapter analyses from a legislative point of view.

The goal of this chapter is to analyse how the CoE and the EU shaped the proportionality of ineligibility in the review process leading to the current WADC in force as from 2021 (WADC 2021). The author hypothesises that the CoE and the EU would emphasise the proportionality of ineligibility. They share the goal of eradicating doping through robust rules and sanctions with the World Anti-Doping Agency (WADA) and other anti-doping organisations (ADOs). Nevertheless, while the fight against doping is the primary interest of WADA and other ADOs, the CoE and the EU emphasise the rights that stem from the ECHR and EU law. Therefore, they also accentuate the need for their limitations to be proportionate. Consequently, the author hypothesises that the CoE and the EU would advocate for more proportionality, shorter ineligibility, and greater leniency and flexibility in sanctioning athletes and other persons. Therefore, this chapter empirically evaluates the validity of this hypothesis, seeking the answer to the following two research questions: Did the CoE and the EU emphasise proportionality of ineligibility in the review process leading to WADC 2021? Does WADC 2021 reflect the positions of the CoE and the EU?

The empirical study of the transnational law-making process resulting in WADC 2021 is the main research object of this chapter. In 2017, WADA initiated a two-year-long review process with the view of adopting a new edition of the WADC. During three phases of consultations, WADA's stakeholders, including various sporting, governmental and non-governmental organisations, submitted a total of 1,718 comments and proposals regarding the WADC. The representatives of the CoE submitted 103 comments through its Sport Convention Division. The Chairs of the Working Party on Sport contributed with 17 comments on behalf of the EU. This chapter focuses on comments regarding the proportionality of the duration of ineligibility. Therefore, it analyses submissions concerning the absolute length of ineligibility or the margin of appreciation of ADOs or hearing panels to eliminate, reduce or suspend ineligibility based on the criteria defined in Article 10 of WADC 2021. On this narrower issue, the representatives of the CoE submitted 15 sets of suggestions, while those of the EU and its Member States had two sets of comments.⁵

⁴ WADC 2021, Art 10.14.1, 10.14.2. See also WADC 2021, Comment to Art 10.14.1 for examples of prohibited conduct.

⁵ WADA, 2021 Code Review – First Consultation Phase (in total 637 comments, CoE 28 comments – 2 on proportionality of ineligibility, EU 4 comments – 1 on proportionality of ineligibility), Second Consultation Phase (in total 603 comments, CoE 40 comments – 8 on proportionality of ineligibility, EU 8 comments – 1 on proportionality of ineligibility), Third Consultation Phase (in total 478 comments, CoE 35 comments – 5 on proportionality of ineligibility, EU 5 comments – none on

This chapter starts by highlighting the importance of the European dimension of proportionality for the conditional autonomy of the World Anti-Doping Program under the ECHR and EU law (section I). Second, it provides a context on the competences, policies and activities of the CoE and the EU in the area of anti-doping, focusing on their cooperation with WADA (section II). Consequently, the third and main part of this chapter examines the comments of the representatives of the CoE and the EU in the review process leading to WADC 2021, focusing on those concerning the proportionality of ineligibility. It initially provides their descriptive statistics. Consequently, it examines their content to assess whether they emphasised proportionality of ineligibility. Moreover, it analyses whether the interim versions and especially the final text of WADC 2021 reflect these comments (section III).

I. THE CONDITIONAL AUTONOMY OF THE WORLD ANTI-DOPING PROGRAM: EUROPEAN DIMENSION OF PROPORTIONALITY

The legal nature and autonomy of WADA and the WADC might seem to shelter them from the influence of the CoE and the ECHR, and the EU and its law respectively. WADA is a non-profit foundation established according to Swiss law.⁶ Switzerland is a member of the CoE and has a set of bilateral agreements with the EU but is not a Member State (of the latter). Moreover, WADC 2021 provides that anti-doping rules are ‘sport-specific rules and procedures’, which are ‘distinct in nature from criminal and civil proceedings’ and which are ‘not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings’.⁷ Furthermore, WADC 2021 provides that it shall be interpreted as an independent and autonomous text and not by reference to the signatories or governments’ existing laws or statutes.⁸ Moreover, WADC 2021 stipulates that all courts, arbitral hearing panels, and other adjudicating bodies should ‘be aware of and respect the distinct nature of the anti-doping rules in (WADC 2021) and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport’.⁹ Thus, WADA and other ADOs claim broad autonomy in governing the World Anti-Doping Program.

Nevertheless, in reality, the autonomy of WADA is not absolute but conditional upon compliance with national and international laws and general legal principles, including the principle of proportionality. However specific the anti-doping rules are, they are still ‘regulations of an association which cannot

proportionality of ineligibility). These numbers include comments regarding the draft WADC 2021 itself, excluding the International Standards.

⁶WADA, Constitutive Instrument of Foundation, Art 1.

⁷WADC 2021, Part One: Doping Control.

⁸*ibid* Art 26.3.

⁹*ibid* Part One: Doping Control.

(directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case'.¹⁰ The principle of proportionality is an internationally recognised general principle of constitutional law and human rights.¹¹ In particular, it is the main legal mechanism used to assess limitations to constitutionally and internationally guaranteed human rights.¹² It implies that restrictions must follow a legitimate purpose, there must be a rational connection between the purpose and the restriction and the latter must be necessary to achieve the purpose.¹³ Moreover, the principle of proportionality is a general principle of sanctioning,¹⁴ which stipulates that sanctions must be proportionate to the seriousness of the violation.¹⁵ They must also be adjustable depending on the circumstances of cases due to the related principle of the individualisation or personalisation of sanctions.¹⁶

Moreover, the principle of proportionality applies to the WADC. WADA commissioned legal opinions on the conformity of selected provisions of editions of the WADC in force from 2004,¹⁷ 2009,¹⁸ 2015 (WADC 2015),¹⁹ and 2021²⁰ with legal and human rights principles at the international and national level. All the authors recognised the need to respect the principle of proportionality

¹⁰ CAS 2005/A/830 *Squizzato v Fédération Internationale de Natation* para 48. See also A Duval, et al, 'The World Anti-Doping Code 2015': ASSER International Sports Law Blog Symposium' (2016) *International Sports Law Journal* 16, 115.

¹¹ See amongst others A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press, 2012); G Huscroft, BW Miller, G Webber, *Proportionality and the Rule of Law. Rights, Justification, Reasoning* (Cambridge University Press, 2016); VC Jackson, M Tushnet, *Proportionality. New Frontiers, New Challenges* (Cambridge University Press, 2018); M Kremnitzer, T Steiner, A Lang, *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press, 2020); J-R Sieckmann (ed), *Proportionality, Balancing, and Rights. Robert Alexy's Theory of Constitutional Rights* (Springer, 2021).

¹² See especially Barak (n 11).

¹³ *ibid.*

¹⁴ See amongst others A Von Hirsch, A Ashworth, *Proportionate Sentencing. Exploring the Principles*. (Oxford University Press, 2005).

¹⁵ *ibid.*; J-P Costa, 'Legal Opinion Regarding the Draft 3.0 Revision of the World Anti-Doping Code' (2013) *World Anti-Doping Agency* 8–9; J-P Costa, 'Legal Opinion for WADA Dated 27 April 2017 Regarding a Proposal of the International Olympic Committee for a Revision of the World Anti-Doping Code 2015' (2017) *World Anti-Doping Agency*, 3–5; G Kaufmann-Kohler, G Malinverni, A Rigozzi, 'Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law' (2003) *World Anti-Doping Agency*, para 143, 43.

¹⁶ Costa, 'Legal Opinion Regarding the Draft 3.0 Revision' (n 15) 8; Costa, 'Legal Opinion for WADA' (n 15) 3–5; C Rouiller, 'Legal Opinion on whether Article 10.2 of the World Anti-Doping Code is Compatible with the Fundamental Principles of Swiss Domestic Law' (2005) *World Anti-Doping Agency*, 32–33.

¹⁷ Kaufmann-Kohler et al (n 15); Rouiller (n 16).

¹⁸ G Kaufmann-Kohler, A Rigozzi, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes' (2007) *World Anti-Doping Agency*; A Rigozzi, 'Conformity of the Exclusion of 'Team Athletes' from Organized Training during their Period of Ineligibility with Swiss Law' (2008) *World Anti-Doping Agency*.

¹⁹ Costa 'Legal Opinion Regarding the Draft 3.0 Revision' (n 15); Costa 'Legal Opinion for WADA' (n 15).

²⁰ Costa (n 3).

in the WADC.²¹ In particular, Jean-Paul Costa, the former President of the ECtHR, confirmed that the principle of proportionality applies to anti-doping rules stemming from WADC 2021.²² In addition, the WADC 2021 itself provides that ‘it has been drafted giving consideration to the principles of proportionality and human rights’,²³ and that anti-doping rules ‘are intended to be applied in a manner which respects the principles of proportionality and human rights’.²⁴ Moreover, the WADC 2021 abides by the rule of law, which seeks to ensure that all measures taken in the application of anti-doping programmes respect ‘the principles of proportionality and human rights’.²⁵ Finally, the WADC 2021 explicitly refers to the principle of proportionality in the context of a variety of provisions.²⁶

Additionally, the general legal principle of proportionality has a European dimension enshrined in the ECHR and EU law, which is relevant for WADA and other ADOs when they fall under the jurisdiction of members of the CoE, EU Member States, or both. This is the case particularly when they have a seat on the territory of a member or Member State, or when their rules apply to people falling under the laws of such states. The ECtHR and the ECJ confirmed that WADA and other ADOs must comply with the ECHR and EU law respectively, and have applied the proportionality principle to them.²⁷ Moreover, the purpose of WADC 2021 is to ‘ensure harmonized, coordinated and effective anti-doping programmes at the international or national level with regard to the prevention

²¹ Kaufmann-Kohler et al (n 15) para 80–83, 27–28; Rouiller (n 16) 29–31; Kaufmann-Kohler and Rigozzi (n 18) para 122–41, 42–48; Rigozzi (n 18) para 75–90, 21–24; Costa, ‘Legal Opinion Regarding the Draft 3.0 Revision’ (n 15) p 6, 8–9, 16, 19, 22, 24–26; Costa, ‘Legal Opinion for WADA’ (n 15) para 15–22, 3–5, para 24, p 5; Costa (n 3) 7, 12, 15–16, 19–20, 28. They relied especially on the ECHR, EU law and international conventions related to doping, such as the CoE’s Anti-Doping Convention (1989) and the International Convention against Doping in Sport adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) (2005). They also relied on the Universal Declaration of Human Rights (1948), the Council of Europe’s European Social Charter (1961); the International Covenant on Civil and Political Rights of the United Nations (1966), the International Covenant on Economic, Social and Cultural Rights of the United Nations (1966), provisions on human rights in national constitutions and legislation, and general principles of law.

²² Costa (n 3). He relied especially on the ECHR, EU law and international conventions related to doping, the CoE’s Anti-Doping Convention (1989) and the International Convention against Doping in Sport adopted by UNESCO (2005). See also Minutes of the WADA Foundation Board Meeting, 18 May 2017, Mr Sieveking, 9.4, 41; Minutes of the WADA Foundation Board Meeting, 16 May 2019, Mr Muyters, 10.1, 35; Minutes of the WADA Foundation Board Meeting, 16 May 2019, Mr Sieveking, 10.1, 35; Minutes of the WADA Executive Committee Meeting, 23 September 2019, Mr Sieveking, 6.1, 29; Minutes of the WADA Executive Committee Meeting, 23 September 2019, Mr Young, 6.1, 29.

²³ WADC 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

²⁴ *ibid*, Part One: Doping Control, Introduction.

²⁵ *ibid*, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

²⁶ *ibid*, Art 2.11.2 (Acts discouraging or retaliating against reporting to authorities), Art 5.5 (Non-Code consequences for violations of whereabouts requirements), Art 10.12 (Financial consequences), Art 14.3.7 (Optional public disclosure).

²⁷ *Meca-Medina* (n 1); *FNASS and Others v France* (n 3). See also Costa (n 3) 3–5.

of doping'.²⁸ It also seeks 'to advance the anti-doping effort through universal harmonization of core anti-doping elements'.²⁹ Since WADC 2021 must comply with the ECHR and EU law, the European dimension of proportionality gains global importance. Therefore, the role of the CoE and the EU in the fight against doping, particularly in shaping the proportionality of ineligibility in the WADC, deserves further analysis.

II. THE COUNCIL OF EUROPE, THE EUROPEAN UNION AND THE FIGHT AGAINST DOPING

The CoE and the EU play an important role in the governance of the World Anti-Doping Program and the enactment and implementation of the WADC. Before delving into their comments on WADC 2021, this section examines the competences and policies of the CoE and the EU in the fight against doping. It focuses on their role and function regarding WADA, particularly their participation in the review process of the WADC. First, it analyses anti-doping competences and policies of the CoE stemming particularly from the Enlarged Partial Agreement on Sport (EPAS), the European Sports Charter, the Anti-Doping Convention, the European Cultural Convention and the ECHR (section II.A). Second, it focuses on the EU's anti-doping competences and policies based especially on Articles 6(e) and 165 of the Treaty on the Functioning of the European Union (TFEU) (section II.B). Simultaneously, this section explores how the CoE and the EU co-operate in anti-doping efforts and activities with each other and with WADA and other ADOs.

A. The Council of Europe and Anti-Doping

The CoE's role in the field of sport, including anti-doping, stems from three main legal mechanisms: the EPAS, thematic conventions, and the ECHR. First, the EPAS is a platform for intergovernmental sports co-operation and dialogue between public authorities, sports federations and non-governmental organisations. It develops policies and standards to make sport more ethical, inclusive and safe.³⁰ Moreover, the EPAS promotes and monitors the effective implementation of the European Sports Charter. As such, it also guides the CoE's members to improve their existing legislation or other policies and to develop a comprehensive framework for sport.³¹ Second, the CoE's toolkit for sport includes three thematic conventions: the Council of Europe Convention on the

²⁸ WADC 2021, Purpose, Scope and Organization of the World Anti-Doping Program and the Code.

²⁹ *ibid.*

³⁰ CoE, 'Enlarged Partial Agreement on Sport', www.coe.int/en/web/sport/epas.

³¹ CoE, 'The European Sports Charter', www.coe.int/en/web/sport/european-sports-charter.

Manipulation of Sports Competitions from 2014 (Macolin Convention), the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events from 2016 (Saint-Denis Convention), and the Anti-Doping Convention from 1989.

The Anti-Doping Convention is the main legal instrument of the CoE in the fight against doping, the CoE's first intervention in the domain of sport.³² The members of the CoE, the other state parties to the European Cultural Convention, and other states adopted the Anti-Doping Convention in 1989 with an additional protocol in 2002.³³ Nowadays, 52 state parties³⁴ undertake, within the limits of their respective constitutional provisions, to take the steps necessary to apply the provisions of the Convention with a view to the reduction and eventual elimination of doping in sport.³⁵ The Anti-Doping Convention is primarily an instrument of cooperation between the state parties, WADA and other ADOs. It contains rules and principles on domestic coordination, measures to restrict the availability and use of banned doping agents and methods, laboratories, anti-doping education, cooperation with sports organisations, international cooperation, and the provision of information.³⁶ Importantly, the Anti-Doping Convention sets up the Monitoring Group of the Council of Europe Anti-Doping Convention ('T-DO') as its statutory body.³⁷

The T-DO monitors the implementation of the Anti-Doping Convention, interprets its provisions and aids its state parties. It also reviews the provisions of the Convention and examines any necessary modifications. Moreover, the T-DO approves the list of pharmacological classes of doping agents and methods, and the criteria for the accreditation of laboratories. It also holds consultations with relevant sports organisations. Furthermore, the T-DO recommends to the state parties which measures they should take for the purposes of the Anti-Doping Convention and to keep relevant international organisations and the public informed about activities undertaken within its framework. Following the recommendation of the T-DO, the Committee of Ministers adopted the recommendation on general principles of fair procedure applicable to anti-doping proceedings in sport and related explanatory memorandum in 2022.³⁸ In addition, the T-DO makes recommendations to the Committee of Ministers concerning states that are not members of the CoE to be invited to accede to the Convention. Finally, it makes proposals for improving the effectiveness of

³² CoE, 'Anti-Doping', www.coe.int/en/web/sport/anti-doping-convention.

³³ *ibid.*

³⁴ CoE, 'State Parties to the Anti-Doping Convention', www.coe.int/en/web/sport/state-parties-to-anti-doping-convention.

³⁵ CoE, Anti-Doping Convention, Art 1.

³⁶ *ibid* Arts 2–9.

³⁷ *ibid* Arts 10–11; CoE, The Council of Europe and Sport, Strategic Priorities for 2022–2025, SG/Inf(2022)2, 2.

³⁸ CoE, Recommendation CM/Rec(2022)14 of the Committee of Ministers to member States on general principles of fair procedure applicable to anti-doping proceedings in sport; Explanatory memorandum.

the Convention.³⁹ The T-DO organises advisory groups of experts in many areas of anti-doping.⁴⁰ In fulfilling its mission, it cooperates with WADA, the International Olympic Committee (IOC), the United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO), and other sporting organisations and bodies of the CoE, including the ECtHR.⁴¹ Importantly, it also ensures cooperation with the EU in anti-doping matters.⁴²

Moreover, the T-DO cooperates with the Ad hoc European Committee for the World Anti-Doping Agency (CAHAMA). The CAHAMA is an intergovernmental committee established by a decision of the Committee of Ministers to coordinate positions of state parties to the European Cultural Convention. Historically, the work of the CoE on anti-doping stemmed from the European Cultural Convention adopted in 1954.⁴³ The 50 state parties⁴⁴ agreed to take appropriate measures to safeguard and encourage the development of its national contribution to the common cultural heritage of Europe.⁴⁵ The state parties coordinate their positions regarding WADA through CAHAMA, which has essentially three goals. First, it examines issues concerning relations between the CoE, its members and WADA, and decides on a common position. Second, it draws up, if necessary, opinions for the Committee of Ministers, including the budgetary elements.⁴⁶ Moreover, it periodically revises the mandates of two representatives of the CoE on the WADA Foundation Board.⁴⁷ In addition, the CoE participates in OneVoice, an intergovernmental coordination mechanism on issues related to WADA.⁴⁸ Consequently, the CoE submits its comments on the drafts of the WADC through its Sport Convention Division.⁴⁹

The comments of the CoE also result from the case law of the ECtHR applying the ECHR in doping-related matters. The ECtHR considered rules concerning doping from the perspective of freedom of speech,⁵⁰ the right to a fair trial,⁵¹ and the right to respect for a private and family life.⁵² In particular,

³⁹ CoE, Anti-Doping Convention, Art 11.

⁴⁰ CoE, 'The Monitoring Group of the Anti-doping Convention (T-DO)', <https://www.coe.int/en/web/sport/t-do>.

⁴¹ CoE, Anti-Doping (n 32).

⁴² CoE, Strategic Priorities for 2022–2025 (n 37) 4.

⁴³ CoE, European Cultural Convention.

⁴⁴ CoE, 'State Parties to the European Cultural Convention', www.coe.int/en/web/sport/state-parties-european-cultural-convention.

⁴⁵ CoE, European Cultural Convention, Art 1.

⁴⁶ CoE, 'Ad hoc European Committee for the World Anti-Doping Agency (CAHAMA)', <https://www.coe.int/en/web/sport/cahama>.

⁴⁷ *ibid*; WADA, Constitutive Instrument of Foundation, Art 6.2; WADA, 'Foundation Board', www.wada-ama.org/en/who-we-are/governance/foundation-board.

⁴⁸ CoE, Anti-Doping (n 32).

⁴⁹ CoE, 'Sport', www.coe.int/en/web/sport; WADA, 2021 Code Review – First Consultation Phase, Second Consultation Phase, Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization.

⁵⁰ ECtHR, 28 June 2012 *Ressiot and Others v France*, CE:ECHR:2012:0628JUD001505407.

⁵¹ ECtHR, 2 October 2018 *Mutu and Pechstein v Switzerland*, CE:ECHR:2018:1002JUD004057510.

⁵² *FNASS and Others v France* (n 3). See also *Costa* (n 3) 3–5.

the ECtHR assessed the compliance of anti-doping rules with the ECHR in 2018 in *National Federation of Sportspersons' Associations and Unions ('FNASS') and Others v France*. In the latter case, the ECtHR considered whereabouts requirements stemming from WADC 2015 as implemented into French law. The ECtHR ruled that these requirements comply with the right to respect for private and family life protected by Article 8 of the ECHR. It reasoned that the constraints caused by anti-doping rules were necessary in a democratic society as they were proportionate in the interests of protecting the health and the rights and freedoms of others. Even though the ECtHR upheld the anti-doping rules, it clarified that they must respect the ECHR, especially the principle of proportionality.⁵³

B. The European Union and Anti-Doping

The EU's scope of intervention in anti-doping matters includes coordination of the actions of Member States through incentive measures and recommendations, and the mobilisation of the EU's funding programmes. The legal basis of anti-doping policies and activities of the EU is Article 165 of the TFEU. It provides that the EU 'shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'.⁵⁴ The actions of the EU should aim at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'.⁵⁵ Moreover, the EU and its Member States cooperate in sport-related matters with third countries and competent international organisations, explicitly including the CoE.⁵⁶ To achieve these objectives, the EU adopts incentive measures or recommendations. On the other hand, the EU cannot harmonise the laws and regulations of the Member States in the area of sport.⁵⁷

Anti-doping has been a key part of the EU work plan for sport. In the period between 2017 and 2020, which covered the review process leading to WADC 2021, the integrity of sport, including fighting doping, was one of the priority themes for the Member States and the European Commission (Commission).⁵⁸

⁵³ *ibid.* See also *Costa* (n 3) 3–5.

⁵⁴ TFEU, Art 165(1).

⁵⁵ *ibid.* Art 165(2).

⁵⁶ *ibid.* Art 165(3).

⁵⁷ *ibid.* Art 165(4).

⁵⁸ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the European Union Work Plan for Sport (1 July 2017–31 December 2020), Part II: Developing further the European dimension in sport by establishing an EU work plan, para 12.

The Member States invited the Commission to support them and other relevant actors in their activities by ‘providing the necessary expert input on anti-doping issues, in particular the compatibility with EU law of any forthcoming revision of the (WADC)’.⁵⁹ They have also asked the Council and its preparatory bodies to prepare expert input on anti-doping issues to be discussed within the Working Party for Sport as an EU contribution. Second, they have asked them to prepare the EU and its Member States’ joint position for the meetings of CAHAMA and WADA supported when necessary by meetings of experts. The third requested input was for the Presidency to prepare a seminar on ways of preventing the use of doping by young people in professional and in grassroots sports.⁶⁰

Experts on anti-doping matters prepared material for the discussions within the Working Party for Sport, which resulted in the contribution of the EU and its Member States to the review process that resulted in WADC 2021. In the first consultation phase, Viktoria Slavkova, the Chair of the Working Party on Sport and the Deputy Member of the WADA Foundation Board submitted the comments of the EU and its Member States on their behalf.⁶¹ In the second consultation phase, Barbara Spindler-Oswald, the Chair of the Working Party on Sport contributed on behalf of the EU and its Member States.⁶² Following the adoption of the WADC 2021, anti-doping also remains a key topic in the current EU Work Plan for Sport 2021–2024. The tasks of the EU again include the preparation and coordination of the position of the EU and its Member States for the meetings of the CAHAMA and WADA, particularly the WADA Foundation Board,⁶³ where the Member States have three representatives.⁶⁴ Moreover, the work plan for sport again calls upon the EU Expert Group on Anti-Doping to propose revisions to the WADC.⁶⁵

As in the case of the CoE and the ECtHR, the EU’s intervention in anti-doping matters emanates partly from the case law of the Court of Justice of the European Union (CJEU) in sport-related matters. The CJEU has in particular applied the free movement of persons and services,⁶⁶ and competition law

⁵⁹ *ibid*, Part IV: further steps, para 18.

⁶⁰ *ibid*, Annex 1: Key topics (para 12), requested outputs and corresponding working structures: Anti-Doping.

⁶¹ WADA, 2021 Code Review – First Consultation Phase, Ministry of Youth and Sport, Viktoria Slavkova, Chair of Working Party on Sport, Deputy member of FB on behalf of EU (Bulgaria), Public Authorities – Government.

⁶² *ibid* – Second Consultation Phase, EU and its Member States, Barbara Spindler-Oswald on behalf of the EU and its Member States, Chair of the Working Party on Sport (Austria), Public Authorities.

⁶³ Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the European Union Work Plan for Sport (1 January 2021–30 June 2024), Annex 1: priority area: Protect integrity and values in sport, key topic: Anti-Doping, theme.

⁶⁴ WADA, Foundation Board (n 47).

⁶⁵ See also Commission, ‘Anti-Doping’, <https://sport.ec.europa.eu/policies/sport-and-integrity/anti-doping>.

⁶⁶ CJEU, C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others*, EU:C:1974:140; CJEU, C-13/76 *Dona v Mantero*, EU:C:1976:115; CJEU, C-415/93 *Union royale*

to sport.⁶⁷ Regarding anti-doping, *Meca-Medina and Majcen v Commission* from 2006 is the flagship judgment. The ECJ ruled that EU law, particularly rules on competition and the freedom of movement of persons and services, apply to anti-doping rules. It further considered that the restrictive effects of the detection threshold of Nandrolone on professional athletes were inherent in the pursuit of legitimate anti-doping objectives and, importantly, that they were proportionate to them. The ECJ concluded that the restrictions did not go beyond what was necessary to ensure that sporting events take place and function properly.⁶⁸ Nevertheless, the ECJ warned ADOs that the anti-doping rules

could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties.⁶⁹

Therefore, the ECJ ruled that anti-doping rules do not escape the scrutiny of EU law and that they must respect the principle of proportionality.⁷⁰

III. THE COUNCIL OF EUROPE AND THE EUROPEAN UNION IN THE REVIEW PROCESS OF THE WORLD ANTI-DOPING CODE: PROPORTIONALITY OF INELIGIBILITY

Having examined the competences, policies and activities of the CoE and the EU in anti-doping, this section focuses on their involvement in the review process that resulted in WADC 2021. It particularly examines whether they emphasised the proportionality of ineligibility and whether the interim versions and the final text of WADC 2021 reflect their comments. This section

belge des sociétés de football association and Others v Bosman and Others, EU:C:1995:463; CJEU, C-51/96 and C-191/97 *Deliège*, EU:C:2000:199; CJEU, C-176/96 *Lehtonen and Castors Braine*, EU:C:2000:201; CJEU, C-438/00 *Deutscher Handballbund*, EU:C:2003:255; CJEU, C-265/03 *Simutenkov*, EU:C:2005:213; *Meca-Medina and Majcen* (n 1); CJEU, C-152/08 *Real Sociedad de Fútbol and Kahveci*, EU:C:2008:450; CJEU, C-325/08 *Olympique Lyonnais*, EU:C:2010:143; CJEU, C-22/18 *TopFit and Biffi*, EU:C:2019:497.

⁶⁷ CJEU, T-193/02 *Piau v Commission*, EU:T:2005:22 CJEU; *Meca-Medina and Majcen* (n 1); CJEU, C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, EU:C:2008:376; CJEU, T-93/18 *International Skating Union v Commission*, EU: T:2020:610.

⁶⁸ *Meca-Medina* (n 1) paras 35–60.

⁶⁹ *ibid* para 48.

⁷⁰ The General Court relied on the principles established by the ECJ in *Meca-Medina and Majcen* (n 1) while confirming the key role of the general legal principle of proportionality for the compliance of sporting sanctions with EU competition law in the case concerning eligibility rules of the International Skating Union (ISU). See *International Skating Union v Commission* (n 67) para. 90–95. The ISU appealed the General Court's judgment to the ECJ, see CJEU, C-124/21 P *International Skating Union v Commission*.

analyses both the quantity and quality of the sets of comments of the representatives of the CoE and those of the EU and its Member States. Starting with the quantity, the number of comments is relevant since this indicates the relative level of interest in the topic. Providing more comments on proportionality would suggest that the CoE and the EU accentuate the issue in WADC 2021. On the other hand, a lower number of comments would indicate less interest in the topic. Therefore, Table 7.1 presents the descriptive statistics of the sets of comments that the representatives of the CoE and those of the EU and its Member States submitted in all three phases of the consultation process. It demonstrates that the CoE attempted to influence WADC 2021 and the proportionality of ineligibility considerably more than the EU and its Member States.

Table 7.1 Descriptive Statistics of the Comments of the Representatives of the CoE and the EU in the Review Process of the WADC

Consultation phase (period) ⁷¹	Comments in total	CoE Comments in total	CoE Comments on the proportionality of ineligibility	EU Comments in total	EU Comments on the proportionality of ineligibility
1 ⁷² (12 December 2017 – 31 March 2018)	637	28 (4.4 %)	2	4 (0.6 %)	1
2 ⁷³ (14 June 2018 – 14 September 2018)	603	40 (6.6 %)	8	8 (1.3 %)	1
3 ⁷⁴ (10 December 2018 – 4 March 2019)	478	35 (7.3 %)	5	5 (1 %)	–

Focusing on the proportionality of ineligibility, Table 7.2 illustrates how many comments the representatives of the CoE and the EU submitted on which areas of the draft Article 10 of WADC 2021. Their comments concerned areas including both pre-existing principles of WADC 2015 and the novelties introduced with WADC 2021, especially the new concepts of protected persons and recreational athletes and their sanctioning.

⁷¹ WADA, 2021 Code Review Process, Schedule.

⁷² WADA, 2021 Code Review – First Consultation: Questions to Discuss and Consider.

⁷³ *ibid* – Second Consultation Phase.

⁷⁴ *ibid* – Third Consultation Phase.

Table 7.2 Areas of the Comments of the Representatives of the CoE and the EU in the Review Process of the WADC

Area	CoE	EU
Standard period of ineligibility for presence, use or attempted use, or possession of a prohibited substance or method (Art 10.2 of WADC 2021)	2 ⁷⁵	–
New sanctioning regime for the ingestion, use or possession of substances of abuse (Art 10.2.4 of WADC 2021)	4 ⁷⁶	–
Standard period of ineligibility for other anti-doping rule violations (Art 10.3 of WADC 2021)	6 ⁷⁷	–
Elimination or reduction of the standard period of ineligibility on grounds of fault-related reasons (Arts 10.5 and 10.6 of WADC 2021)	6 ⁷⁸	–
The new concept of protected persons (Definitions)	4 ⁷⁹	2 ⁸⁰
The new concept of recreational athletes (Definitions)	3 ⁸¹	–

(continued)

⁷⁵WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 73; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 52.

⁷⁶ibid – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 201; WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 18, 173; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization (online), 52.

⁷⁷ibid – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 3–4, 200–201; WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 18–19, 78–79, 86.

⁷⁸ibid – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 19, 73, 85, 86; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 52, 60.

⁷⁹ibid – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 72–73, 165–66; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 8, 122–23.

⁸⁰ibid – First Consultation Phase, Ministry of Youth and Sport, Viktoria Slavkova, Chair of Working Party on Sport, Deputy member of FB on behalf of EU (Bulgaria), Public Authorities – Government, 198–99; WADA, 2021 Code Review – Second Consultation Phase, EU and its Member States, Barbara Spindler-Oswald on behalf of the EU and its Member States, Chair of the Working Party on Sport (Austria), Public Authorities, 84–85.

⁸¹WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 200–201; WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 173; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 7.

Table 7.2 (*Continued*)

Area	CoE	EU
The new sanctioning regime of protected persons and recreational athletes (Art. 10.6.1.3 of WADC 2021)	5 ⁸²	–
Elimination, reduction or suspension of ineligibility or other consequences for reasons other than fault (Art. 10.7 and 10.8 of WADC 2021)	3 ⁸³	–

Having presented the quantity, this section further focuses on the content of the comments of the representatives of the CoE and those of the EU and its Member States. The comments that the WADA stakeholders submitted in all three phases of the review process are publicly available.⁸⁴ Therefore, they are the basis for analysing how the CoE and the EU approached the topic of proportionality of ineligibility. Consequently, the interim versions of the draft WADC 2021 and especially its final text enable an analysis of whether they reflect the comments, or not. It would also be interesting to know how the drafting team considered specific comments of the representatives of the CoE, and those of the EU and its Member States. However, the transparency of the review process of WADC 2021 is unfortunately rather limited. The representatives of the drafting team presented some of their conclusions at the meetings of the WADA Foundation Board⁸⁵ or the Executive Committee.⁸⁶ Nevertheless, there are no minutes from the internal discussions of the drafting team.

Therefore, the following section examines the comments of the representatives of the CoE and those of the EU and its Member States, particularly whether they emphasised proportionality of ineligibility. Moreover, it uses interim versions of the draft WADC 2021 and its final text to assess whether they reflect the comments. The analysis follows the structure of Article 10 of the WADC. It starts with the standard period of ineligibility for presence, use or attempted use or possession of a prohibited substance or method (section III.A) and for other anti-doping rule violations (section III.B). Thereafter, it analyses the comments regarding the possible elimination or reduction in the period of ineligibility on the grounds of no significant fault or negligence (section III.C). It particularly

⁸² WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 85–86, 165–166, 173; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 7–8, 122.

⁸³ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 201; WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 91, 96.

⁸⁴ WADA, 2021 Code Review – First Consultation Phase; WADA, 2021 Code Review – Second Consultation Phase; WADA, 2021 Code Review – Third Consultation Phase.

⁸⁵ WADA, ‘Foundation Board Meeting Minutes’, www.wada-ama.org/en/resources/foundation-board-meeting-minutes.

⁸⁶ *ibid.*

examines two new categories of protected persons (section III.D) and recreational athletes (section III.E) and their sanctioning (section III.F). Finally, this section analyses recommendations regarding the possible elimination, reduction or suspension of the period of ineligibility based on reasons other than fault (section III.G).

A. Standard Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Method

The representatives of the CoE unsuccessfully proposed a tightening of the burden on athletes to prove that their doping was not intentional. Athletes or other persons have to prove that the presence, use or attempted use or possession of a non-specified prohibited substance was not intentional to avoid the standard four-year period of ineligibility.⁸⁷ Ulrich Haas, one of the drafters of WADC 2021, notes that they do not have to establish the source of a prohibited substance to exclude intent, which is clear from the wording of the WADC and the case law of the Court of Arbitration for Sport (CAS).⁸⁸ Nevertheless, the comment concerning Article 10.2.1.1 of WADC 2021 provides that it is ‘highly unlikely that (...) an athlete will be successful in proving that the athlete acted unintentionally without establishing the source of the prohibited substance’.⁸⁹ Therefore, the hearing panels should interpret the provision that it is ‘highly unlikely’ that athletes or other persons manage to prove a lack of intent without proving the source of the prohibited non-specified substance. Moreover, the representatives of the CoE proposed the inclusion of the comment directly in Article 10.2.1.1 of WADC 2021. They sought to make ‘establishing the circumstances how the prohibited substance entered the system’ a condition to prove the lack of intent in cases involving non-specified substances. They argued that such a step would help the uniform application of WADC 2021 and the related anti-doping rules.⁹⁰ However, the drafters of WADC 2021 did not reflect the proposal in the final text and the provision remained a non-binding interpretative comment.⁹¹

⁸⁷ WADC 2021, Art 10.2.1.1.

⁸⁸ U Haas, ‘The Revision of the World Anti-Doping Code 2021’ (2020) *CAS Bulletin. Budapest seminar October 2019*, 35, referring to CAS 2018/A/5580 *Blagovest Krasimirov Bozhinovski v Anti-Doping Centre of the Republic of Bulgaria & Bulgarian Olympic Committee*, CAS Bulletin 2019/02, 57; CAS 2016/A/4534 *Mauricio Fiol Villanueva v Fédération Internationale de Natation*, CAS Bulletin 2017/02, 42, 43; CAS 2019/A/6313 *Jarrion Lawson v IAAF*. See also CAS 2018/A/5768 *Dylan Scott v ITF*, para 137 et seq; CAS 2017/A/5178 *Tomasz Zieliński v IWF*, para 87 et seq.

⁸⁹ WADC 2021, Comment to Art 10.2.1.1.

⁹⁰ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 73; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 52.

⁹¹ WADC 2021, Comment to Art 10.2.1.1.

Furthermore, the representatives of the CoE expressed their views on the special sanctioning regime for the new category of prohibited substances, substances of abuse. They include those prohibited substances which are ‘frequently abused in society outside of the context of sport’ and which are ‘specifically identified as substances of abuse on the Prohibited List’.⁹² The WADC 2021 consequently provides a universal three-month period of ineligibility if athletes establish that the ingestion or use of substances of abuse occurred out of competition and was unrelated to sport performance.⁹³ Moreover, ADOs may further reduce the ban to one month if the athlete or other person satisfactorily completes a treatment programme approved by the ADO with results management responsibility.⁹⁴ Nevertheless, such a period of ineligibility is not subject to any further fault-related reductions.⁹⁵ Second, if the ingestion, use or possession of substances of abuse occurred in-competition, but athletes can establish that its context was unrelated to sport performance, hearing panels shall not consider such a violation intentional, or as a basis for the finding of aggravating circumstances.⁹⁶

The representatives of the CoE recommended not to include cocaine as a substance of abuse due to its alleged stimulating effect on sports performance and the danger of drug abuse in sport. They noted that some substances of abuse cannot improve athletic performance, for example, cannabinoids.⁹⁷ On the other hand, they argued that ‘other substances that are proposed for inclusion in this definition, for example, cocaine, are inherently powerful stimulants and can significantly improve athletic performance when using in the competition period’.⁹⁸ Moreover, they claimed that

the introduction of such stimulants in the definition of ‘substances of abuse’ and the imposition for their detection in any concentration of minimum term of ineligibility lasting (three) months can cause a significant increase in the use of cocaine and other similar substances to improve athletic performance.⁹⁹

They particularly argued that ‘the temptation will be high among speed-power and team sports athletes to use this type of stimulants before the start (even if

⁹² *ibid* Art 4.2.3. See also WADA, 2021 Code Revision – Third Draft (Following the Third Consultation phase), Summary of Major Changes, para 23, 11; WADA, 2021 World Anti-Doping Code and International Standard Framework: Development and Implementation Guide for Stakeholders (hereinafter ‘World Anti-Doping Code Development and Implementation Guide’), 11; Haas (n 75) 31–32.

⁹³ WADC 2021 Art. 10.2.4.1. See also *ibid* Art 7.4.1: Such a case may also be a reason for the elimination of a mandatory provisional suspension. See also *ibid* Art. 10.9.2: Such an anti-doping rule violation shall not be considered a violation for the purpose of sanctioning multiple violations.

⁹⁴ WADC 2021, Art 10.2.4.1, Comment to Art 10.2.4.1.

⁹⁵ *ibid* Art 10.2.4.1.

⁹⁶ *ibid* Art. 10.2.4.2.

⁹⁷ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization (online), 52.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

the sample is positive, the sanction will be minimal).¹⁰⁰ Therefore, the representatives of the CoE proposed that cocaine not be included as a substance of abuse.

Should cocaine be considered a substance of abuse and have a special sanctioning regime, the representatives of the CoE suggested an alternative approach based on its alleged performance-enhancing effect. They argued that there should be ‘a detection threshold for these types of stimulants, based on their real ability to improve athletic performance at a specific concentration, above which the detection of cocaine in a sample should be punished by the standard sanction for non-specified substances’.¹⁰¹ The drafting team of WADC 2021 had initially tried to come up with a reporting limit for cocaine under which it had no performance-enhancing effect, but it did not succeed, largely due to the difficulties of analysing urine samples.¹⁰² Consequently, the drafting team created the category of substances of abuse and left the decision of whether to include cocaine or not to the WADA Executive Committee. Based on the recommendation of the WADA List Committee, the 2024 Prohibited List identifies cocaine as a substance of abuse, alongside diamorphine (heroin), methylenedioxymethamphetamine (MDMA/ecstasy), and tetrahydrocannabinol (THC).¹⁰³ Therefore, WADA refused to adopt the suggestion of the CoE and applied to cocaine the special sanctioning regime of substances of abuse.

Having examined the substances of abuse, the representatives of the CoE further commented on the sanctioning of their ingestion, use or possession. They initially criticised a ‘disproportionate sanctioning policy’ for substances of abuse.¹⁰⁴ Consequently, in the second consultation phase, they supported reconsidering sanctions for the ingestion or use of substances of abuse out of competition unrelated to sports performance. They argued that ‘from a psychological perspective, the motivation for taking recreational drugs is often completely at odds with the motivation for taking performance-enhancing substances’.¹⁰⁵ At one point, they recommended considering ‘a uniform one-year or eighteen-month suspension’.¹⁰⁶ They argued that it ‘would save a lot of time and money arguing over “fault”, and particularly about mental health issues’.¹⁰⁷ Moreover, they proposed that ‘sports could also be given the power to stipulate that an athlete must also undergo therapy or rehabilitation before they return to sport. But the sanction should still be stipulated according to the

¹⁰⁰ *ibid.*

¹⁰¹ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization (online), 52.

¹⁰² Minutes of the WADA Executive Committee Meeting, 15 May 2019, 10.1, 31.

¹⁰³ WADC 2021, WADA Prohibited List 2024.

¹⁰⁴ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 201.

¹⁰⁵ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 18.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

individual circumstances of the case'.¹⁰⁸ Nevertheless, such proposals seem to be contradictory. The sanction can be either uniform or based on a case-by-case assessment.

Moreover, the representatives of the CoE encouraged WADA to consider the conflicting opinions of some delegations. They could not 'support the suggestion of a uniform one-year or eighteen-month suspension'.¹⁰⁹ They argued that 'the sanction should still be stipulated according to the individual circumstances of the case'.¹¹⁰ Moreover, they could not support sports organisations having the power to stipulate that an athlete must undergo therapy or rehabilitation before they return to sport. 'We could foresee many practical obstacles, and furthermore, athletes should be able to count on sanctions issued according to the Code is the full sanction, without any additional sanctions given by sports organisations.'¹¹¹ In the end, the drafters of WADC 2021 heard the calls for uniformity and set a uniform three- or one-month ineligibility period for the ingestion or use of substances of abuse out of competition unrelated to sport performance.¹¹² In addition, signatories can enact further code of conduct rules punishing the ingestion or use of substances of abuse for other than anti-doping purposes, but they cannot impose additional sanctions for situations already covered in WADC 2021.¹¹³ Therefore, the drafters of WADC 2021 essentially did not reflect the comments of the representatives of the CoE.

B. Standard Ineligibility for Other Anti-Doping Rule Violations

In addition to the presence, use or attempted use, or possession of a prohibited substance or method, the representatives of the CoE addressed the standard ineligibility for other anti-doping rule violations and their proportionality. In particular, they asked for specifications on the degree of fault that is required to commit each anti-doping rule violation. They proposed an explicit reference to whether the violation needs to be 'intentional' or can also be 'negligent', reasoning with legal certainty and athletes' rights.¹¹⁴ They specifically required clarifications in the case of evasion, refusal or failure to submit to sample collection.¹¹⁵ They asked whether 'intention (as defined in article 10.2.3) must be proved to establish an (anti-doping rule violation) of evasion or refusal

¹⁰⁸ *ibid.*

¹⁰⁹ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 173.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² WADC 2021, Art 10.2.4.1.

¹¹³ *ibid* Art 23.2.2, Comment to Art 23.2.2.

¹¹⁴ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 18.

¹¹⁵ *ibid* 19.

contrary to Article 2.3 (...).¹¹⁶ Finally, Article 10.2.3 of WADC 2021 defines the term ‘intentional’, but only for the purpose of sanctioning the presence, use or attempted use, or possession of a prohibited substance or method.¹¹⁷ Regarding the evasion, refusal or failure to submit to sample collection, the comment to Article 2.3 of WADC 2021 suggests how hearing panels should interpret the provision. It provides that ‘a violation of failing to submit to sample collection may be based on either intentional or negligent conduct of the athlete, while “evading” or “refusing” sample collection contemplates intentional conduct by the athlete’.¹¹⁸ Consequently, the period of ineligibility for failing to submit to sample collection shall be two instead of four years if ‘the athlete can establish that the commission of the anti-doping rule violation was not intentional’.¹¹⁹

Moreover, only certain anti-doping rule violations in WADC 2021 explicitly specify whether they must be committed intentionally or whether negligence is sufficient. Tampering in particular includes ‘intentional conduct which subverts the doping control process (...)’.¹²⁰ It covers any ‘intentional interference or attempted interference with any aspect of doping control’.¹²¹ Moreover, Article 2.9 of WADC 2021 prohibits ‘assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity’.¹²² Furthermore, Article 2.11 of WADC 2021 prohibits ‘any act which threatens or seeks to intimidate another person with the intent of discouraging the person’ from good-faith reporting to authorities.¹²³ In addition, the comment to Article 10.6.2 of WADC 2021 suggests that ‘intent is an element of (tampering, complicity, and acts discouraging or retaliating against reporting to authorities) as well as of trafficking and administration’.¹²⁴ Otherwise, there is no explicit reference to intent or negligence regarding other anti-doping rule violations.

Furthermore, the representatives of the CoE commented on the standard period of ineligibility for tampering, seeking a tightening of sanctions for fraudulent conduct. They initially highlighted the ‘disproportionate sanctioning policy’ for tampering.¹²⁵ They particularly noted that ‘violations involving fraud are more serious than other violations because they involve an intention to deceive: but they all receive the same sanction’.¹²⁶ WADC 2021 defines tampering as an ‘intentional conduct which subverts the doping control process, but which

¹¹⁶ *ibid* 86.

¹¹⁷ WADC 2021, Art 10.2.3.

¹¹⁸ *ibid* Comment to Art 2.3.

¹¹⁹ *ibid* Art 10.3.1.

¹²⁰ *ibid* Annex 1 (Definitions): Tampering.

¹²¹ *ibid*.

¹²² *ibid* Art 2.9.

¹²³ *ibid* Art. 2.11.

¹²⁴ *ibid* Comment to Art 10.6.2.

¹²⁵ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 201.

¹²⁶ *ibid* 3–4.

would not otherwise be included in the definition of prohibited methods'.¹²⁷ Moreover, the definition provides examples of tampering, which include 'any fraudulent act upon the (ADO) or hearing body to affect results management or the imposition of consequences, and any other similar intentional interference or attempted interference with any aspect of doping control'.¹²⁸ Therefore, tampering essentially involves fraud.

Consequently, WADC 2021 provides the same standard ineligibility for all kinds of tampering, except for exceptional circumstances, violations committed by protected persons or recreational athletes, or aggravating circumstances. The standard sanction is four-year ineligibility.¹²⁹ If the athlete or other person can establish exceptional circumstances that justify a reduction of the period of ineligibility, the ban shall range from two to four years depending on the degree of fault.¹³⁰ Moreover, in a case involving a protected person or recreational athlete, the period of ineligibility shall range from a maximum of two years to a minimum of a reprimand and no period of ineligibility, again depending on the degree of fault.¹³¹ On the other hand, tampering during the results management process is an aggravating circumstance that may lead to an increase in the basic period of ineligibility by up to two years, depending on the seriousness of the violation and the nature of the aggravating circumstances.¹³² Therefore, fraudulent tampering during the results management process may lead to two extra years of ineligibility.

Moreover, the representatives of the CoE proposed milder standard ineligibility for whereabouts failures. They argued that ineligibility between one and two years is of 'dubious proportionality' and should be based solely on fault because the violation 'does not involve any doping' and athletes committing it 'are not dopers'. Moreover, they claimed that it should not be subject to financial consequences.¹³³ WADC 2021 provides that the period of ineligibility for whereabouts failures 'shall be two (2) years, subject to reduction down to a minimum of one (1) year, depending on the athlete's degree of fault'.¹³⁴ Therefore, athletes' fault plays an important role in determining the standard sanction for whereabouts failures. Nevertheless, the flexibility between two years and one year is not available to athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that they are trying to avoid being available for testing.¹³⁵ Moreover, whereabouts failures are not excluded

¹²⁷ WADC 2021, Art 2.5, Annex 1 (Definitions): Tampering.

¹²⁸ *ibid*, Annex 1 (Definitions): Tampering.

¹²⁹ *ibid* Art 10.3.1.

¹³⁰ *ibid*.

¹³¹ *ibid* Art 10.3.1.

¹³² *ibid* Art 10.4, Annex 1 (Definitions): Aggravating Circumstances.

¹³³ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 200.

¹³⁴ WADC 2021, Art 10.3.2.

¹³⁵ *ibid* Art 10.3.2.

from the possibility of imposing financial consequences. Nevertheless, ADOs may impose financial sanctions only ‘where the maximum period of ineligibility otherwise applicable has already been imposed’, and they must explicitly respect ‘the principle of proportionality’.¹³⁶

Furthermore, the representatives of the CoE unsuccessfully argued in favour of a milder punishment for trafficking or administration. They claimed that the standard ineligibility starting with four years is reasonable if ‘intent’ is required. On the other hand, negligent violations should ‘benefit from a more flexible sanction with the possibility to reduce the period of ineligibility below (four) years’.¹³⁷ Nevertheless, trafficking or administration can only be intentional. Therefore, there is no possibility of a reduction based on no significant fault or negligence.¹³⁸ Consequently, WADC 2021 provides that the standard period of ineligibility for trafficking or administration ‘shall be a minimum of four (4) years up to lifetime ineligibility, depending on the seriousness of the violation’.¹³⁹ Moreover, an athlete’s support staff committing trafficking or administering a non-specified substance involving a protected person shall receive lifetime ineligibility.¹⁴⁰ Therefore, there is no milder penalty for negligent trafficking or administration.

On top of that, the representatives of the CoE successfully argued in favour of converging sanctions for trafficking and administration on the one hand, and complicity on the other. They argued that the violations might overlap. ‘But the sanctions are different: (trafficking) starts at (four) years, but (complicity) is capped at (four) years. This does not work.’¹⁴¹ Consequently, the first draft of WADC 2021 lifted the cap of four years and proposed maximum lifetime ineligibility for complicity. The representatives of the CoE reacted that ‘it seems advisable to at least maintain the current level of responsibility’.¹⁴² Finally, the period of ineligibility for complicity ‘shall be a minimum of two (2) years, up to lifetime ineligibility, depending on the seriousness of the violation’.¹⁴³ Lastly, the representatives of the CoE commented on the standard ineligibility for the new anti-doping rule violation, acts discouraging or retaliating against reporting to authorities. The representatives of the CoE asked for ‘an unconditional exception’ from such proposed ineligibility between two years and a lifetime.¹⁴⁴

¹³⁶ *ibid* Art 10.12.

¹³⁷ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 78–79.

¹³⁸ WADC 2021, Comment to Art 10.6.2.

¹³⁹ *ibid*, Art 10.3.3.

¹⁴⁰ *ibid*.

¹⁴¹ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 200.

¹⁴² WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 79.

¹⁴³ WADC 2021, Art 10.3.4.

¹⁴⁴ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 79.

Nevertheless, in the end, WADC 2021 does not provide any such exception, and the standard ineligibility depends solely on ‘the seriousness of the violation by the athlete or other person’.¹⁴⁵

C. Fault-Related Elimination or Reduction of the Period of Ineligibility

In addition to the standard period of ineligibility, the representatives of the CoE, and this time also those of the EU commented on the possibility of its reduction on grounds of no significant fault or negligence. The representatives of the CoE particularly asked for clarifications ‘as it is difficult to discern consistent principles in the case law’.¹⁴⁶ They concretely proposed to add notes specifying that the reduction of the period of ineligibility on grounds of no significant fault or negligence ‘is possible only after admitting that the violation was committed unintentionally’.¹⁴⁷ In this regard, they referred to a practice of incorrect application of this item by a CAS sole arbitrator, who had recognised that an athlete had committed an intentional violation, but who reduced the sanction based on no significant fault or negligence.¹⁴⁸ Moreover, the representatives of the CoE asked for specifications in the particular case of evading, refusing or failing to submit to sample collection with regard to possible elimination or reduction of the basic period or ineligibility based on fault-related reasons.¹⁴⁹ ‘Should (elimination or reduction) apply to intentional breaches of Article 2.3?’¹⁵⁰

In WADC 2021, the elimination of the period of ineligibility on grounds of no fault or negligence or its reduction based on no significant fault or negligence is only possible when the violation was not intentional. First, no fault or negligence refers to

the athlete or other person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule.¹⁵¹

Second, no significant fault or negligence means that the athlete or other person established ‘that any fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the anti-doping rule violation’.¹⁵² Therefore,

¹⁴⁵ WADC 2021, Art 10.3.6.

¹⁴⁶ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 86.

¹⁴⁷ *ibid* – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 60.

¹⁴⁸ *ibid*.

¹⁴⁹ *ibid* – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 19.

¹⁵⁰ *ibid* 86.

¹⁵¹ WADC 2021, Annex 1 (Definitions): No Significant Fault or Negligence.

¹⁵² *ibid* Annex 1 (Definitions): No Significant Fault or Negligence.

the definitions of no and no significant fault or negligence exclude the intent on the part of the athlete or other person.

Moreover, WADC 2021 keeps distinguishing between two categories of violations for the reduction of the standard period of ineligibility on grounds of no significant fault or negligence. First, Article 10.6.1 of WADC 2021 provides rules for the reduction of the standard ineligibility for the presence, use or attempted use or possession of a specified prohibited substance or contaminated product. Moreover, WADC 2021 extends such a possibility to specified methods or violations committed by protected persons or recreational athletes.¹⁵³ Such a reduction is possible only if the violation was not intentional, and the standard period of ineligibility is two years.¹⁵⁴ Second, Article 10.6.2 of WADC 2021 specifies the reduction in the case of all other violations.¹⁵⁵ Nevertheless, the comment to the provision provides that the reduction does not concern

articles where intent is an element of the anti-doping rule violation (...) or an element of a particular sanction (...) or a range of ineligibility is already provided in an article based on the athlete or other person's degree of fault.¹⁵⁶

Moreover, the intent is an explicit element of evading or refusing sample collection.¹⁵⁷ Therefore, reducing the period of ineligibility based on no significant fault or negligence is only possible for non-intentional violations, including negligent failure to submit to sample collection.¹⁵⁸

In addition, the representatives of the CoE submitted comments related to the obligation of athletes to establish how a prohibited substance entered their body to claim no significant fault or negligence where there is a presence of a prohibited substance. They argued that 'it is possible to specify that which particular circumstances may be indicative of no significant fault or negligence even in case the athlete failed to establish the source of entering the prohibited substance his/her system (...)'.¹⁵⁹ However, WADC 2021 provides only one exception from such an obligation. In particular, protected persons and recreational athletes do not have to show how the prohibited substance entered their system.¹⁶⁰ All other athletes have to establish the source of the prohibited substance if they want to have the standard period of ineligibility reduced. There are no particular circumstances indicative of no significant fault or negligence without fulfilling such an obligation.

¹⁵³ *ibid* Art 10.6.1.

¹⁵⁴ *ibid* Art 10.2.2.

¹⁵⁵ *ibid* Art 10.6.2, Comment to Art 10.6.2.

¹⁵⁶ *ibid* Comment to Art 10.6.2.

¹⁵⁷ *ibid* Comment to Art 2.3.

¹⁵⁸ *ibid* Art 10.3.1, Comment to Art 10.6.2.

¹⁵⁹ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 73; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 52.

¹⁶⁰ WADC 2021, Annex 1 (Definitions): No Significant Fault or Negligence.

Alternatively, the representatives of the CoE proposed ‘to specify which particular circumstances should not be interpreted as the basis for reducing the sanction period within the framework of this article’.¹⁶¹ Regarding fault, WADC 2021 follows in the footsteps of WADC 2015 and provides that ‘the circumstances considered must be specific and relevant to explain the athlete’s or other person’s departure from the expected standard of behavior’.¹⁶² Consequently, WADC 2021 provides that

for example, the fact that an athlete would lose the opportunity to earn large sums of money during a period of ineligibility, or the fact that the athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of ineligibility (...).¹⁶³

As such, WADC 2021 specifies circumstances that should not be interpreted as a basis for reducing the sanction based on no significant fault or negligence.

Moreover, the comment to Article 10.5 of WADC 2021, which essentially follows the same provision in WADC 2015, provides circumstances that could result in a reduction of a sanction based on no significant fault or negligence. It provides that (Article 10.6.2 of WADC 2021) only applies ‘in exceptional circumstances, for example, where an athlete could prove that, despite all due care, he or she was sabotaged by a competitor’.¹⁶⁴ Consequently, it provides circumstances, which cannot be grounds for eliminating the ineligibility based on no fault or negligence, but which could result in a reduced sanction on the grounds of no significant fault or negligence. These circumstances include a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement, the administration of a prohibited substance by the athlete’s personal physician or trainer without disclosure to the athlete, and sabotage of the athlete’s food or drink by a spouse, coach or other people within the athlete’s circle of associates.¹⁶⁵ Therefore, WADC 2021 provides examples of circumstances which should and should not be interpreted as grounds for a reduction of the period of ineligibility on the grounds of no significant fault or negligence.

On top of that, the representatives of the CoE recommended specifying the length of the period of ineligibility be reduced based on no significant fault or negligence. They particularly argued that the provision should include ‘a scale of different periods of ineligibility ranging from a warning to (two) years, depending on the degree of fault’ as established in the *Cilic* case of the CAS.¹⁶⁶

¹⁶¹ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 73; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 52.

¹⁶² WADC 2021, Annex 1 (Definitions): Fault.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.* Comment to Art 10.5.

¹⁶⁵ *ibid.*

¹⁶⁶ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 60, referring to CAS, 2013/A/3335 *International Tennis Federation v Martin Cilic*.

Moreover, they claimed that WADC 2021 should also define ‘the criteria that has to be met to ascertain the degree of fault’.¹⁶⁷ The representatives of the CoE explained that

the introduction of such scale, specifying criteria for its application, will preclude the imposition of fundamentally different periods of ineligibility (eg, 3 months vs. 20 months) for similar anti-doping rule violations by different ADOs, which is aligned with the main objective of (the WADC), namely justice and equality for all athletes.¹⁶⁸

The CAS set the scale of fault or negligence and the corresponding duration of ineligibility also in the case of the Norwegian cross-country skier Therese Johaug: a significant degree of fault may lead to a sanction of 20–24 months; a normal degree of fault equals a sanction of 16–20 months; and a light degree of fault may lead to a sanction of 12–16 months.¹⁶⁹ Nevertheless, WADC 2021 does not contain such a scale or criteria, and leaves the appreciation to hearing panels.

Moreover, the representatives of the CoE suggested a specification of conditions for reducing the period of ineligibility in cases involving contaminated products. They argued that the comments included in the first draft of WADC 2021 softened the provision and could ‘lead to an unwanted gateway for unclear legal situations’.¹⁷⁰ WADC 2015 provided a period of ineligibility between zero to two years depending on the athletes’ or other persons’ degree of fault if they were able to establish both no significant fault or negligence and that the detected prohibited substance came from a contaminated product.¹⁷¹ Consequently, the accompanying comment provided that ‘in assessing that athlete’s degree of fault, it would, for example, be favorable for the athlete if the athlete had declared the product which was subsequently determined to be contaminated on his or her doping control form’.¹⁷² The representatives of the CoE argued that ‘the fact that it is a “contamination” of supplements and/or food, water, etc. is currently a commonly used (and not proven) claim by the athletes involved’.¹⁷³ Therefore, they suggested that the provision should ‘provide a clear case scenario in which both the disciplinary bodies and the athletes, as well as the competent anti-doping organisations, can clearly differentiate between an attributed fault and a missing responsibility concerning the anti-doping rule violation’.¹⁷⁴

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ CAS 2017/A/5015 *Fédération Internationale de Ski v Therese Johaug & NOPC*, CAS 2017/A/5110 *Therese Johaug v NOPC*. See also Czech NOC Arbitration Commission, 2018-1, *Šeřl*, para 9.16.

¹⁷⁰ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 85.

¹⁷¹ WADC 2015, Art 10.5.1.2.

¹⁷² *ibid* Comment to Art 10.5.1.2.

¹⁷³ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 85.

¹⁷⁴ *ibid.*

Finally, WADC 2021 has kept the content of the initial provision but substantially modified the accompanying comment. The comment specifies that ‘athletes are on notice that they take nutritional supplements at their own risk’.¹⁷⁵ Consequently, it explains that ‘the sanction reduction based on no significant fault or negligence has rarely been applied in contaminated product cases unless the athlete has exercised a high level of caution before taking the contaminated product’.¹⁷⁶ The comment is followed by a provision similar to the one in WADC 2015 regarding the declaration of the product which was subsequently determined to be contaminated on the doping control form.¹⁷⁷ Consequently, it states that

this article should not be extended beyond products that have gone through some process of manufacturing. Where an adverse analytical finding results from environment contamination of a ‘non-product’ such as tap water or lake water in circumstances where no reasonable person would expect any risk of an anti-doping rule violation, typically there would be no fault or negligence under Article 10.5.¹⁷⁸

Therefore, WADC 2021 provides athletes, ADOs and disciplinary bodies with extended guidance on when the sanction can be reduced on grounds of no significant fault or negligence in cases involving contaminated products.

D. Protected Persons

Regarding fault-related reductions in the period of ineligibility, comments of the representatives of both the CoE and the EU concerned a new category of protected persons. The representatives of the EU and its Member States considered in particular already in the first consultation phase that ‘the rights of athletes, including minors, must be properly guaranteed in (WADC 2021)’.¹⁷⁹ In the second consultation phase, they emphasised ‘the objective of the protection of minors to the primary consideration of the best interests of the minor for all actions and decisions concerning minors’.¹⁸⁰ Therefore, the representatives of the EU and its Member States encouraged WADA ‘to consider if the sanctions in the Code are appropriate for minors’.¹⁸¹ Consequently, they welcomed ‘the

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ WADC 2021, Comment to Art 10.6.1.2.

¹⁷⁹ WADA, 2021 Code Review – First Consultation Phase, Ministry of Youth and Sport, Viktoria Slavkova, Chair of Working Party on Sport, Deputy member of FB on behalf of EU (Bulgaria), Public Authorities – Government, 198–99.

¹⁸⁰ *ibid.* – Second Consultation Phase, EU and its Member States, Barbara Spindler-Oswald on behalf of the EU and its Member States, Chair of the Working Party on Sport (Austria), Public Authorities, 84–85.

¹⁸¹ *ibid.* – First Consultation Phase, Ministry of Youth and Sport, Viktoria Slavkova, Chair of Working Party on Sport, Deputy member of FB on behalf of EU (Bulgaria), Public Authorities – Government, 198–99.

aim to implement more flexibility in the scale of the sanctions'.¹⁸² Therefore, the representatives of the EU and its Member States supported more flexible sanctions for minors with the aim of protecting their interests.

Consequently, the representatives of the CoE and those of the EU and its Member States expressed their concern regarding the initial proposal to reduce the age limit for minors. WADC 2015 defined a minor as 'a natural person who has not reached the age of eighteen years'.¹⁸³ The representatives of the EU and its Member States suggested 'keeping the definition of minors as all human beings below the age of (eighteen), as defined in the UN Convention on the Rights of the Child'.¹⁸⁴ Moreover, the representatives of the CoE pointed out that 'reducing the age limit for minors to be treated as minors under (the WADC) violates the current UN Convention on the Rights of the Child'.¹⁸⁵ They explained further that

although the proposal to reduce the age limit is based on an explicit proposal of the athletes, the legality of such a proposal is limited by applicable, supranational law. An implementation into national law is internationally extremely difficult or merely impossible to standardize.¹⁸⁶

Therefore, the representatives of the CoE and those of the EU and its Member States recommended keeping the definition of minors as natural persons under the age of 18.

Finally, the drafters of WADC 2021 kept the original notion of a minor, but only for the purpose of the newly retitled public disclosure.¹⁸⁷ Moreover, they created a new category of protected persons that overlaps with the notion of a minor. The new concept includes three categories of athletes or other natural persons who were not of a certain age or did not have legal capacity at the time of the anti-doping rule violation. The first group contains athletes or other persons younger than 16.¹⁸⁸ The second category includes those athletes or other persons who have not reached the age of 18 and who are not included in any registered testing pool and have never competed in any international event in an open category, which excludes competitions that are limited to junior or age group categories.¹⁸⁹ The third category includes those athletes or other persons

¹⁸² *ibid* – Second Consultation Phase, EU and its Member States, Barbara Spindler-Oswald on behalf of the EU and its Member States, Chair of the Working Party on Sport (Austria), Public Authorities, 84–85.

¹⁸³ WADC 2015, Annex 1 (Definitions): Minor.

¹⁸⁴ WADA, 2021 Code Review – Second Consultation Phase, EU and its Member States, Barbara Spindler-Oswald on behalf of the EU and its Member States, Chair of the Working Party on Sport (Austria), Public Authorities, 84–85.

¹⁸⁵ *ibid* – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 165–66.

¹⁸⁶ *ibid*.

¹⁸⁷ WADC 2021, Appendix 1 (Definitions): Minor, Art 14.3.7.

¹⁸⁸ *ibid* Appendix 1 (Definitions): Protected Person.

¹⁸⁹ *ibid* Appendix 1 (Definitions): Protected Person, Comment to Protected Person.

who have been determined to lack legal capacity under applicable national legislation for reasons other than age.¹⁹⁰ Therefore, the final category would include, for example, a Paralympic athlete with a documented lack of legal capacity due to intellectual impairment.¹⁹¹ As such, the drafters of WADC 2021 implemented the proposal of the representatives of the CoE to provide a special regime also to para-athletes.¹⁹²

Similar to the definition of minors, the representatives of the CoE expressed concern about the compliance of the definition of protected persons with the Convention on the Rights of the Child. They particularly invoked Article 2, which prohibits ‘discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’.¹⁹³ The representatives of the CoE feared that the definition of protected persons might violate this provision since ‘age, as an indicator of a “status” of a child could constitute a discrimination’.¹⁹⁴ Consequently, they called for a legal expert’s opinion, suggesting Costa.¹⁹⁵ He concluded that ‘the threshold of 16 years is reasonable and does not seem disproportionate’.¹⁹⁶ Moreover, he argued that ‘considering significant variation can be accepted for the purpose of criminal sanctions, this is even more acceptable for the non-criminal and lighter sanctions in the World Anti-Doping Code’.¹⁹⁷ Therefore, Costa concluded that ‘the exception for certain athletes aged between 16 and 18 is proportionate and nondiscriminatory’.¹⁹⁸ Following the favourable opinion of Costa, later also confirmed by other authors,¹⁹⁹ the drafting team kept the definition of a protected person, which also appears in the final text of WADC 2021.

E. Recreational Athletes

In addition to protected persons, representatives of the CoE supported the introduction of a more flexible sanctioning regime for recreational athletes. They highlighted the fact that under WADC 2015, recreational athletes ‘are held to

¹⁹⁰ *ibid* Appendix 1 (Definitions): Protected Person. See also World Anti-Doping Code Development and Implementation Guide (n 79) 19.

¹⁹¹ *ibid* Appendix 1 (Definitions): Comment to Protected Person.

¹⁹² WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 72–73.

¹⁹³ Convention on the Rights of the Child 1989, Art 2.

¹⁹⁴ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 8, 122–23.

¹⁹⁵ *ibid*.

¹⁹⁶ Costa (n 3) 19.

¹⁹⁷ *ibid* 20.

¹⁹⁸ *ibid*.

¹⁹⁹ Haas (n 75) 36–37; A Kambhampati, S Star, ‘Playing True? A Critique of the 2021 WADA Code’ (2021) *International Sports Law Journal* 21, 231.

exactly the same standards as their elite-level counterparts'.²⁰⁰ They specified that 'athletes who compete at a purely social level are now facing long bans from a sport for failing to check supplement products closely enough, or remember the specifics of bi-annual anti-doping "education" sessions that last barely an hour'.²⁰¹ In this regard, the representatives of the CoE pointed out that elite athletes and recreational athletes 'have little in common aside from the sport they compete in'.²⁰² Therefore, they proposed to consider whether 'graduated sanctions, that take account of relevant experience, competition level and infrastructure, should be introduced'.²⁰³ As such, the representatives of the CoE supported the introduction of a sanctioning regime that takes into account the specificities of recreational athletes.

Consequently, the representatives of the CoE commented on the definition of recreational athletes. They particularly emphasised that 'the definition of recreational athletes should be carefully drafted, so that ADOs do not face difficulties trying to transpose/use it'.²⁰⁴ In the end, WADC 2021 provides National Anti-Doping Organisations (NADOs) with the power to define which natural persons are recreational athletes under their authority.²⁰⁵ Nevertheless, WADC 2021 restricts their appreciation by imposing three limitations. First, the definition may not include any person who was an international or national level athlete within a five-year period prior to committing any anti-doping rule violation. Second, WADC 2021 excludes any person who has represented any country in an international event in an open category in the past five years. Finally, the definition may not cover any person who has been included in any registered testing pool or other whereabouts information pool maintained by an international federation or a NADO within the past five years.²⁰⁶ In this regard, WADA suggests that a recreational athlete may be

any person who engages or participates in sport or fitness activities for recreational purposes but who would not otherwise compete in competitions or events organized, recognized, or hosted by a national federation, or by any affiliated or non-affiliated association, organisation, club, team, or league.²⁰⁷

Therefore, the concept of recreational athletes only applies to persons who participate in sport in lower categories than international and national level athletes.²⁰⁸

²⁰⁰ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 200–201.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 173.

²⁰⁵ WADC 2021, Appendix 1 (Definitions): Recreational Athlete.

²⁰⁶ WADC 2021, Appendix 1 (Definitions): Recreational Athlete; World Anti-Doping Code Development and Implementation Guide (n 79) 19.

²⁰⁷ WADA, 2021 Model Rules for National Anti-Doping Organizations, Introduction, 7, Definitions, 74. For an example of NADO's regulations, see Regulations for Doping Control and Sanctions in Sports in the Czech Republic 2022, Introduction, 7, Definitions: Recreational Athlete, 65.

²⁰⁸ Haas (n 75) 29.

Nevertheless, such a definition does not prevent all the difficulties in its transposition or use. On the one hand, the representatives of the CoE acknowledge that the new category of recreational athletes means that ‘countries can operate an anti-doping system targeting only persons that engage in fitness activities at a non-competitive level, as is the case in Denmark, under which the sanctioning regime slightly differ from that in the WADC’.²⁰⁹ On the other, there may be different definitions of recreational athletes in different countries, ‘for example, because of different criteria for who might be a part of their whereabouts pools’.²¹⁰ Consequently, such different definitions can result in unequal treatment amongst recreational athletes on grounds of nationality, residence, licence membership of sport organisation, or presence in the country.²¹¹ Moreover, the narrow definition creates inequalities between certain sports since it does not include some athletes that are considered to be amateurs by international federations.²¹² Therefore, there remain practical difficulties in the transposition and use of the definition of recreational athletes.

F. Ineligibility for Protected Persons and Recreational Athletes

Having assessed the definition of protected persons and recreational athletes, the representatives of the CoE commented on the new sanctioning regime of such persons. In particular, they successfully opposed the initial idea to shift the burden of proof from minors to ADOs to establish intent in cases involving non-specified substances. According to the first draft of WADC 2021, an ADO had to establish that the violation was intentional so that a minor receives a four-year ban. Otherwise, the standard ineligibility would be two years. Nevertheless, the representatives of the CoE asked: ‘Is it really acceptable to impose a 2-year-ban to a 17-year-old with a sample positive to multiple steroids where the ADO is not able to gather enough evidence to prove the intent and give a 4-year-ban?’²¹³ Conversely, they would welcome ‘more flexibility in the range of applicable sanctions and reductions, but the quantum of sanctions shall remain identical for all athletes’.²¹⁴ Richard Young, the main drafter of WADC 2021, explained to the WADA Foundation Board that ‘the team had received a lot of feedback on it and dropped it’.²¹⁵ He specified that ‘some of the most interesting feedback

²⁰⁹ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 7.

²¹⁰ Synrem, W, ‘A guide to the main changes under the 2021 World Anti-Doping Code’ (2020), *Law In Sport*.

²¹¹ Haas (n 75) 29; Synrem (n 197).

²¹² World Conference on Doping in Sport, Katowice, Poland, 5–7 November 2019, Intervention on behalf of the IIHF delivered by its legal director Ashley Ehlert, 2.

²¹³ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 165–66.

²¹⁴ *ibid.*

²¹⁵ Minutes of the WADA Foundation Board Meeting, 15 November 2018, 6.1.1, 20.

had come from the Council of Europe, which had always been a very strong supporter of minors' rights, and it had told the team that it had gone too far'.²¹⁶ Therefore, the representatives of the CoE contributed to the fact that minors must establish a lack of intent in cases involving non-specified substances to avoid the standard four-year ineligibility.

Moreover, the representatives of the CoE opposed the initial proposal to alleviate sanctions for minors and recreational athletes. Richard Young explained that 'in draft one, there had been a proposal that, when a minor established no significant fault, instead of the sanction being reduced by a half, the sanction could go all the way down to a warning'.²¹⁷ However, the representatives of the CoE refused this proposal. They asked:

How can an athlete who is a minor/recreational athlete who: a) tests positive for a non-specified substance; and b) bears no significant fault (as opposed to no fault at all), receive only a reprimand and return immediately to competition without this posing a serious threat to protecting a level playing field?²¹⁸

They argued that 'if the adverse analytical finding concerns a steroid, such a minor/recreational athlete could still be benefiting from the performance enhancing substance in his system'.²¹⁹ Therefore,

allowing such an athlete (who acted with a certain degree of fault) an immediate return to competition would be detrimental to creating a level playing field and be manifestly unfair to his clean competitors. This cannot be the objective of the very Code which is designed to protect clean athletes.²²⁰

Thus, the representatives of the CoE did not support the idea of providing hearing panels with more flexibility while sanctioning the negligent doping of minors and recreational athletes.

Consequently, all minors do not benefit from milder sanctions as a direct consequence of the comment made by the representatives of the CoE. Richard Young admitted that he 'had been fairly impressed with the position of the Council of Europe'.²²¹ He noted that 'usually, the Council of Europe as a group was very supportive of the rights of minors'.²²² However, 'it thought that it went too far; the code drafting team had agreed and taken it out'.²²³ Moreover, the representatives of the CoE suggested more flexibility in the range of applicable sanctions and reductions for recreational athletes, but the quantum of sanctions should stay identical for all athletes. They argued that 'the maximum applicable

²¹⁶ *ibid.*

²¹⁷ Minutes of the WADA Executive Committee Meeting, 14 November 2018, 6.1.1, 23.

²¹⁸ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 85–86, 166.

²¹⁹ *ibid.*

²²⁰ *ibid.*

²²¹ Minutes of the WADA Executive Committee Meeting, 14 November 2018, 6.1.1, 23.

²²² *ibid.*

²²³ *ibid.*

sanction in case of absence of significant fault or negligence should be 2 years'.²²⁴ Therefore, the representatives of the CoE proposed more flexibility while sanctioning recreational athletes, but that the upper limit of sanctions should remain identical as in the case of other athletes.

In the end, protected persons, including some minors and recreational athletes, benefit from the initially proposed milder sanctions and the greater flexibility of hearing panels. Article 10.6.1.3 of WADC 2021 provides a special regime for cases where protected persons or recreational athletes commit an anti-doping rule violation not involving substances of abuse with no significant fault or negligence. In such cases, 'the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two (2) years ineligibility (...)'.²²⁵ Therefore, even though not all minors benefit from this amendment, those falling within the definition of protected persons do. This was, for example, the case with the Russian figure skater Kamila Valieva at the XXIV Olympic Winter Games in Beijing in 2022. Valieva was 15 years old at the time and therefore a protected person. The CAS panel noted that 'there is a lacuna, or a gap, in (...) (WADC 2021) (...) ' concerning provisional suspensions of protected persons.²²⁶ Consequently, her status as a protected person was one of the reasons why the CAS panel lifted the provisional suspension and let Valieva compete.²²⁷ Therefore, protected persons benefit from milder sanctions and a greater sanctioning flexibility of hearing panels.

In addition, the representatives of the CoE successfully suggested that milder and more flexible sanctions should be imposed not only for presence, use or attempted use, or possession of a prohibited substance or method, but also for evading, refusing or failing to submit to sample collection.²²⁸ They argued that 'indeed, a minor who is submitted to a first doping control might, in good faith, feel uncomfortable and refuse to be supervised during the collection of the sample'.²²⁹ They claimed that

otherwise, the new regime could lead to unfair differences in the sanctioning regime between a 15-year-old athlete sanctioned for 2 years for the use of anabolic steroids and another one sanctioned for 4 years because he felt uncomfortable having to submit to a first doping control.²³⁰

²²⁴ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 173.

²²⁵ WADC 2021, Art 10.6.1.3.

²²⁶ CAS OG 22/08-CAS OG 22/09-CAS OG 22/10, *IOF, WADA, ISU v RUSADA*, Valieva, ROC, para 200.

²²⁷ *ibid* para 202–18.

²²⁸ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, p. 165–166, 173; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 7, 8, 122.

²²⁹ *ibid* – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 165–66; WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 8, 122.

²³⁰ *ibid* – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 8, 122.

In the end, Article 10.3.1 of WADC 2021 provides protected persons and recreational athletes with an exception from the standard four-year period of ineligibility for evading, refusing or failing to submit to sample collection, but also for tampering. ‘The period of ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of ineligibility, depending on the protected person or recreational athletes’ degree of fault.’²³¹ Therefore, the WADC 2021 reflects the comments of the representatives of the CoE and provides milder and more flexible sanctions for protected persons and recreational athletes also regarding an evasion, refusal or failure to submit to sample collection.

Finally, the representatives of the CoE successfully supported an optional public disclosure of violations committed by minors. WADC 2015 exempted minors from the mandatory public disclosure of anti-doping rule violations.²³² In the draft WADC 2021, the exception originally covered protected persons. The representatives of the CoE noted that ‘the exception in the public disclosure disappears for minors who do not fall within the definition of “protected persons”’.²³³ They further commented that such a situation ‘is incompatible with our current national legislation and will certainly be a major issue if the draft does not evolve’.²³⁴ Consequently, they recommended that public disclosure shall not be requested for all minors, irrespective of the fact that they fall or do not fall under the definition of ‘protected persons’.²³⁵ Finally, Article 14.3.7 of WADC 2021 provides that

the mandatory public disclosure (...) shall not be required where the athlete or other person (...) is a minor, protected person or recreational athlete. Any optional public disclosure in a case involving a minor, protected person or recreational athlete shall be proportionate to the facts and circumstances of the case.²³⁶

Therefore, WADC 2021 includes an exemption from mandatory public disclosure for all minors, regardless of whether they fall under the definition of a protected person or not.

G. The Elimination, Reduction, or Suspension of the Period of Ineligibility or Other Consequences for Reasons Other than Fault

Finally, the representatives of the CoE commented on the possibility to eliminate, reduce or suspend the period of ineligibility or other consequences on

²³¹ WADC 2021, Art 10.3.1.

²³² *ibid* Art 14.3.6.

²³³ WADA, 2021 Code Review – Third Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 7–8, 122.

²³⁴ *ibid*.

²³⁵ *ibid*.

²³⁶ WADC 2021, Art 14.3.7.

grounds other than fault. Under WADC 2015, the elimination, reduction or suspension concerned ineligibility.²³⁷ The first draft of WADC 2021 broadened such a possibility to all consequences of anti-doping rule violations. The representatives of the CoE initially highlighted the ‘disproportionate sanctioning policy’ for substantial assistance.²³⁸ Moreover, they suggested that ‘it is not clear what effect widening an ADOs powers to suspend any Consequence, and not just the period of ineligibility, is supposed to have, when the Article is read as a whole – it appears to be inconsistent’.²³⁹ Moreover, ‘if this change is adopted, Article 13.2 will need to be amended to allow appeals relating to all consequences, rather than just periods of ineligibility’.²⁴⁰ In the end, WADC 2021 provides the possibility to eliminate, reduce or suspend any consequence,²⁴¹ but ADOs cannot suspend disqualification or mandatory public disclosure based on substantial assistance in discovering or establishing violations.²⁴² Moreover, appeals are extended to apply to all consequences of anti-doping rule violations.²⁴³ Nevertheless, neither WADC 2021 nor any other document explains such a modification.

Moreover, the representatives of the CoE pleaded for an expansion of the possibility to reduce the period of ineligibility where there is an admission of an anti-doping rule violation in the absence of other evidence. They argued that ‘an athlete that voluntarily admits to a possible rule violation, irrespective of later proof, should be entitled to a reduction without WADAs consent in an Art. 2.1-case’.²⁴⁴ They further explained that ‘the principle of a reduction is commonly applied because admittance will reduce the financial complications of a criminal procedure’.²⁴⁵ Finally, they argued that ‘the length of reduction should depend on at what time the admission was forwarded’.²⁴⁶ Therefore, the representatives of the CoE supported broadening the possibility to reduce a period of ineligibility based on the admission of an anti-doping rule violation.

Nevertheless, WADC 2021 has kept the possibility of an admission of an anti-doping rule violation having the period of ineligibility reduced as provided in WADC 2015. An athlete or other person must voluntarily admit the violation before receiving the notice of a sample collection or the other admitted violation. Moreover, the admission must be the only reliable evidence of the

²³⁷ WADC 2015, Art 10.6.

²³⁸ WADA, 2021 Code Review – First Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 201.

²³⁹ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 91.

²⁴⁰ *ibid.*

²⁴¹ WADC 2021, Art 10.7.

²⁴² *ibid* Art 10.7.1.1.

²⁴³ *ibid* Art 13.2.

²⁴⁴ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 91.

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

violation. Consequently, ‘the period of ineligibility may be reduced, but not below one-half of the period of ineligibility otherwise applicable’.²⁴⁷ Moreover, the provision ‘is intended to apply when an athlete or other person comes forward and admits to an anti-doping rule violation in circumstances where no anti-doping organisation is aware that an anti-doping rule violation might have been committed’.²⁴⁸ Conversely, ‘it is not intended to apply to circumstances where the admission occurs after the athlete or other person believes he or she is about to be caught’.²⁴⁹ Moreover, ‘the amount by which ineligibility is reduced should be based on the likelihood that the athlete or other person would have been caught had he or she not come forward voluntarily’.²⁵⁰ Therefore, WADC 2021 does not reflect the CoE’s proposal regarding a modification of the regime of a reduction of ineligibility based on the admission of guilt.

In addition, the representatives of the CoE addressed the possibility of a reduction of a sanction based on a prompt admission of a violation after being confronted with the violation. They particularly proposed that it should be specified whether, in the case of multiple grounds for reduction, athletes can rely on a prompt admission to receive a suspension below two years, which was the minimum limit in WADC 2015.²⁵¹ However, the drafters of WADC 2021 omitted the possibility of a reduction of the period of ineligibility down to a minimum of two years based on a prompt admission of an anti-doping rule violation from WADC 2021. WADA explains that ‘Articles 10.6.3 (Prompt Admission) and Article 10.11.2 (Timely Admission) have been eliminated and replaced with a new Article 10.8. Both of the prior Articles have been a repeated source of questions and misinterpretations.’²⁵² Therefore, the new results management agreements replaced the possibility of reducing a sanction on the grounds of a prompt or timely admission. They include a one-year reduction for certain anti-doping rule violations based on an early admission and acceptance of a sanction and a case resolution agreement.²⁵³

IV. CONCLUSION

The CoE and the EU shaped the proportionality of ineligibility in WADC 2021 to a limited extent. This chapter hypothesised that representatives of the CoE and the EU would advocate for more proportionality, and thus shorter ineligibility, greater leniency and flexibility in sanctioning athletes and other persons.

²⁴⁷ WADC 2021, Art 10.7.2; WADC 2015, Art 10.6.2.

²⁴⁸ WADC 2021, Comment to Art 10.7.2; WADC 2015, Comment to Art 10.6.2.

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ WADA, 2021 Code Review – Second Consultation Phase, Council of Europe, Sport Convention Division (France), Public Authorities – Intergovernmental Organization, 96.

²⁵² World Anti-Doping Code Development and Implementation Guide (n 79) 13.

²⁵³ WADC 2021, Art 10.8.2.

Nevertheless, this turned out to be only partially true. The representatives of the CoE attempted to influence the proportionality of ineligibility in WADC 2021 significantly more than the representatives of the EU and its Member States. The CoE submitted 15, while the EU only had two sets of suggestions in this regard. Both sets of comments of the EU, which WADC 2021 reflects, recommended milder and more flexible sanctions for protected persons. On the other hand, only one-third of the comments of the CoE advocated milder sanctions. On the contrary, the representatives of the CoE pleaded for a tightening of sanctions in one third of their comments. The rest of the comments submitted by the CoE were neutral in this regard. Therefore, the CoE puts a similar emphasis on punishing dopers as it does on the proportionality of ineligibility, contrary to the original hypothesis. Finally, the text of WADC 2021 fully reflects both the sets of comments submitted by the EU and one third of the comments submitted by the CoE. It reflects the other third of the CoE's comments partially and disregards the final third.

Future research further exploring the role of the CoE and the EU in influencing the proportionality of ineligibility for doping would be desirable. In particular, it should explore the reasons behind the involvement of the CoE and the EU in the review process of the WADC, especially why the CoE intervenes in the process to a significantly greater extent than the EU. Moreover, it could examine why the CoE emphasises a tightening of sanctions in certain areas while pleading for greater proportionality in others. In addition, it should focus on how WADA reflects the comments of the representatives of the CoE and the EU and why. In this regard, the increased transparency of the review process of the WADC, particularly the discussions and conclusions of the drafting team, is desirable. It would help the researchers and the public to better understand how WADA and the review process work. Moreover, increased transparency would also strengthen WADA's good governance and athletes' confidence in the effective fight against doping which also protects their rights. In September 2023, WADA started gathering feedback on WADC 2021 to have the new edition of the WADC effective from 2027.²⁵⁴ As the review process is now back on track, the time is ripe for more transparency.

²⁵⁴WADA, WADA launches first phase of 2027 World Anti-Doping Code and International Standards Update Process (online): <https://www.wada-ama.org/en/news/wada-launches-first-phase-2027-world-anti-doping-code-and-international-standards-update>.