A CRITICAL ANALYSIS OF THE DIVIDED COURT OF ARBITRATION FOR SPORT JURISPRUDENCE ON THE WORLD ANTI-DOPING CODE ARTICLE 10.4

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The purpose of this article is to examine the current interpretative divide within the Court of Arbitration for Sport as to the meaning of the term 'intent to enhance sport performance' within article 10.4 of the World Anti-Doping Code. In particular, it assesses the case law with an aim of providing a well reasoned opinion on how it should be approached in future cases to protect both sport and athletes equally. It accepts that balancing the need to protect sport with the need to ensure flexibility and proportionality for athletes who may unintentionally break the rules is a difficult task, which must be approached in a reasonable manner.

Introduction

The legal framework of anti-doping rules created by the World Anti-Doping Agency ('WADA') in the *World Anti-Doping Code 2009* ('Code'), is now well established at the global level. In spite of the many successes of the anti-doping program a current ambiguity within the rules has led to a divide of opinion within the Court of Arbitration for Sport ('CAS'), the top level judicial body for doping cases. Article 10.4 impacts upon and affects dozens of athletes in practice across the world by allowing for varied levels of punishment in very similar circumstances. Thus, it has been the source of much litigation and controversy. The cases of note mainly relate to athletes who have consumed a 'Prohibited Substance', often unknowingly, through their use of supplements. That substance will often be one prohibited in competition only, used out of competition that was positively detected in competition.

The crux of the issue with article 10.4 has been the meaning of the term 'intent to enhance sport performance' within the context of the Code. The existence of different meanings is unsatisfactory for legal certainty, the credibility of the Code, and mostly for the athletes involved. Therefore, this article will critically assess the relevant provisions and divided opinions and offer an argument on how article 10.4 should best be approached in future cases. The need for change within the existing Code has been recognised and, as a result, some significant

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changes are forthcoming in 2015. The implications of these changes are beyond the scope of this article.

An Overview of Relevant Anti-Doping Concepts, Provisions and the Court of Arbitration for Sport

Before undertaking a substantive analysis of the conflicting CAS rulings on the interpretation of the Code, an introductory discussion of some relevant issues relating to the CAS itself and the relevant provisions of the Code, are discussed.

The Principle of Strict Liability

One of the key principles under which the Code operates is strict liability. This doctrine imposes a responsibility, deemed a 'personal duty', on an athlete to be responsible for what he or she ingests, and not to ingest any prohibited substances.[1] As a result, the presence of a banned substance in a doping test is enough to establish a violation[2] and lead to the athlete's disqualification. For athletes, strict liability can be very challenging and in some ways it may be criticised. For example, it means that athletes 'have to ensure that they understand all the rules against doping and that their family, friends, coaches and support personnel understand them too.'[3] Most athletes are not legally trained, may be very young, and in many areas of the world may not be given sufficient education to fully appreciate their responsibilities under the Code.[4] Furthermore, many athletes trust their managers or trainers in good faith and in some cases this can arguably make athletes victims.[5]

While strict liability may seem harsh, it is 'seen as necessary and proportionate' and ultimately considered essential to combat doping in sport, as 'without it, it would be quite impossible to catch athletes.'[6] Strict liability is therefore inherently utilitarian, because WADA has determined that the need to protect sport justifies the burden placed on athletes, and the doctrine is required to tackle doping,[7] a perspective difficult to rebut.

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[1] Code article 2.1.1.

[2] It is not necessary to show intent, fault or negligence on the part of an athlete.

[3] Graham Arthur, 'Methylhexaneamine and Supplement Risks' (2012) 10(9) *World Sports Law Report* 6, 6.

[4] See, eg, *Qerimaj v International Weightlifting Federation* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2822, 12 September 2012) ('*Qerimaj*'). The athlete's home nation, Albania, was deemed non-compliant in WADA's 2011 Compliance Report, meaning that anti-doping had a low priority in that country and there was no anti-doping program in place: at 21 [8.20(2)].

[5] Eg, the East German swim team competing in good faith but forced to take drugs, see: J Savulescu, B Foddy and M Clayton, 'Why We Should Allow Performance Enhancing Drugs in Sport' (2004) 38 *British Journal of Sports Medicine* 666.

[6] Kaisa Kirikal, 'Critical Analysis of the World Anti-Doping Code: Timely Issues Related to Andrus Veerpalu v FIS and Other Relevant Case Law' (2013) 21(1) *Sport and the Law Journal* 30, 35.

[7] The potential for doping rules to be disproportionate and subject to competition law rules was considered in *Meca-Medina and Majcen v Commission of the European Communities* (C-519/04) [2006] ECR I-6691.

The Responsibilities of Athletes and Prohibited Substances

The current 2009 WADA Code also imposes express duties on athletes regarding what constitutes a violation and knowing what substances are included on the 'Prohibited List'.[8] All Prohibited Substances on the Prohibited List are regarded as 'Specified Substances' unless they relate to anabolic or hormone stimulants, such as steroids.[9] Many difficulties exist for athletes surrounding Specified Substances.

A common issue, particularly with nutritional supplements, is highlighted by the case of Mark Marshall.[10] These difficulties are recognised in two parts of the Code. Firstly the commentary to Article 4.2.2 on Specified Substances explains why they should be distinguished in relation to sanctions:

> In drafting the Code there was considerable debate among stakeholders over the appropriate balance between inflexible sanctions which promote harmonization … and more flexible sanctions which better take into consideration the circumstances of each individual case ... the Code sanctions should be made more flexible where the Athlete ... can clearly demonstrate that he or she did not intend to enhance sport performance.

Secondly, the commentary to article 10.4 recognises that Specified Substances are more 'susceptible to a credible, non-doping explanation.' This may be particularly true with Specified Substances which are banned in competition only.[11] This can be problematic when the metabolites of a substance used out of competition remain in an athlete's body when they are tested in competition. Moreover, there are varying reasons, particularly with supplement style products as to why an athlete may use them without knowing that they contain a Specified Substance. Some of these reasons will reflect instances where the athlete has been minimally negligent, if at all. These provisions therefore recognise that a balance must be struck to ensure that unintentional dopers

[8] Code article 2. The Prohibited List is an international standard, created by WADA listing banned substances and methods. WADA will update the List at least annually, but also as often as necessary: at article 4.1.

[9] Code article 4.2.2.

[10] *The Football Association v Marshall* (Award, Football Association Regulatory Commission, 2 May 2012). The athlete checked the ingredients of the product on the List and none matched because the Specified Substance, methylhexaneamine ('MHA'), has several names and the labelled name was not present on the List.

[11] See the current Prohibited List: *Welcome to the List* (1 January 2014) WADA, <http://list.wada-ama.org>.

are not disproportionally punished.[12] CAS cases about reducing a period of ineligibility for Specified Substances can broadly be categorised as follows:

1. an athlete consumes a contaminated product containing a Prohibited Substance which is not declared on the product label;
2. an athlete consumes a product which does declare a Prohibited Substance on its label, but that substance is referred to by a different name on the WADA Prohibited List; and
3. an athlete consumes a product which does declare a Prohibited Substance on its label, which is the same as its name on the Prohibited List, but the athlete does not read or cross-check the ingredients, such as where they are following the advice of a third party that the product is free of Prohibited Substances.[13]

The CAS Panel in Kutrovsky also outlined three similar, but not identical, categories of cases regarding Specified Substances contained within supplements in relation to an athlete's 'state of knowledge'.[14] It can be useful to bear these categories in mind when assessing the CAS decisions. It will be shown how one interpretative approach of the CAS allows for the facts of each case to be taken into account, whereas the other will seemingly always result in no reduction of the ineligibility period regardless of which factual category a case falls under.

The Reduction Provisions

Although an adverse analytical finding will lead to disqualification by virtue of strict liability, an athlete is able to challenge that period of ineligibility[15] using the various reduction provisions contained within the Code. The relevant provisions are articles 10.4, 10.5.1, and 10.5.2,[16] which are designed to offer flexibility in deserving circumstances. Article 10.4 has two clauses and has been at the centre of the current interpretive divide because it is recognised that 'there are two ways in which these clauses can be interpreted'.[17]

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[12] This has been recognised in many CAS cases, see, eg, *World Anti-Doping Agency v Fédération Internationale de Volleyball and Berrios* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2229, 28 April 2011) 13 [79] ('*Berrios*'). The panel stated that: 'Article 4.2.2 of the WADA Code thus sought to introduce some flexibility when determining a sanction for an athlete that has ingested a Specified Substance.'

[13] This may be the advice of a trainer or a doctor, as can be seen from the facts of some cases which have come before the CAS.

[14] See *Kutrovsky v International Tennis Federation* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 17 [9.11] ('*Kutrovsky*').

[15] The mandatory ban for a first time violation is two years: Code article 10.2. Multiple violations are dealt with under article 10.7.

[16] Reductions are also available under Code articles 10.5.3–10.5.5. The period may be increased: article 10.6.

[17] Bradley Wynn, 'UKAD v Whyte: CAS Interpretation of Article 10.4' (2013) 11(7) *World Sports Law Report* 14, 14.

The first paragraph of article 10.4 clearly requires an athlete, to be eligible for a reduction, to establish how the Specified Substance entered his or her body and that 'such Specified Substance was not intended to enhance the Athlete's sport performance'. Unfortunately the wording of the second paragraph is less explicit: '[t]o justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance'.[18]

A subtle question, but one that has caused much litigation in supplement cases, is whether this intention relates to the Specified Substance or a product containing it? By not expressly continuing the language of the first paragraph into the second, the 'language of this clause is ambiguous and susceptible to more than one interpretation.'[19] For legal certainty this is not satisfactory. 'Comfortable satisfaction' is deemed as being a standard higher than the balance of probabilities.[20] Finally, if these conditions are satisfied, the criterion for assessing any reduction is the athlete's degree of fault. Upon a literal reading of the provision, it may be argued that the express wording and meaning of the first paragraph should continue in the second.

The other relevant sanction reduction provision is article 10.5. In contrast to article 10.4, it does not relate to 'intent' but is concerned with the athlete having 'No Fault or Negligence', or 'No Significant Fault or Negligence'.[21] As Ioannidis argues originally "the application of strict liability has been characterized as arbitrary and capricious, as its application failed to take into consideration the degree of fault'.[22] Both articles 10.4 and 10.5 commendably allow this to be done – ensuring flexibility and proportionality in sanctions equal to an athlete's degree of fault. However, a significant difference under article 10.5 is that the maximum reduction is only up to one year, far less than the potential for a full reduction, or reprimand, available in article 10.4.

The Court of Arbitration for Sport

The main aims of CAS are to harmonise case law and uphold legal certainty, which also furthers the aims of WADA. Its establishment was 'motivated by the desire to submit sports disputes to an institution offering specialised knowledge, rapid action and a low cost', and a desire to standardise the sports

[18] Code article 10.4 para 2.
[19] *Oliveira v United States Anti-Doping Agency* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) [9.13].
[20] Code article 3.1.
[21] For the exact conditions, respectively see Code articles 10.5.1, 10.5.2.
[22] Gregory Ioannidis, 'Dillian Whyte Appeal, Article 10.5 & Supplement Use' [2013] 11(9) *World Sports Law Report* 8, 9.

case law.[23] Although the CAS has widely achieved those objectives, the current jurisprudential divide represents a notable failure and may give rise to arguments for future changes in the structure of the CAS.

Within the CAS there is no hierarchy between panels and therefore no decision sets a binding precedent. However, as Blackshaw argues, typically the panels will follow previous decisions 'in the interests of legal certainty' and as 'a result, a useful body of sports law (*lex sportiva*) is steadily being built up'.[24] Whilst the growth of sports arbitration has sometimes been 'viewed with scepticism' the associated issues will not be a focus of this article.[25] With the CAS wishing to ensure legal certainty and the demands of any adjudication on doping rules, the current uncertainty is far from satisfactory.[26] Moreover, it is equally, if not more, unsatisfactory for an athlete wishing for the application of article 10.4. This is because both parties before the CAS may nominate an arbitrator,[27] but, a chairman is then chosen and the interpretation taken can therefore depend ultimately on the view of the chairman. In the end the existing uncertainties may harm the credibility of the anti-doping regime and the Court as a whole.

A Critical Examination of the CAS Jurisprudence on Article 10.4

The focus of this discussion will now turn to critically examining the CAS level jurisprudential divide on the interpretation of intent to enhance sports performance within article 10.4. Currently two, seemingly irreconcilable, schools of thought exist as a result of the issues previously highlighted – the 'substance' and 'product' approaches. Although such a divide within the CAS is not prohibited, it poses several problems for legal certainty, athletes, and the objectives of WADA on harmonisation. Therefore, the aim of this section will be to examine the merits of the leading cases and offer an opinion on what is arguably the 'best' interpretation for future cases.

[23] Alexandra Veuthey, 'Re-Questioning the Independence of the Court of Arbitration for Sport in Light of the Scope of Its Review' (2013) 13(4) *International Sports Law Review* 105, 105.

[24] Ian Blackshaw, 'Arbitration Court Comes of Age' [2004] *European Lawyer* 39, 39. See also Annie Bersagel, 'Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field' (2012) 12 *Pepperdine Dispute Resolution Law Journal* 189. The general use of previous arbitral awards as precedent by the CAS is '[i]n contrast to the practice in the overwhelming majority of arbitral tribunals': at 189.

[25] See, eg, in relation to upholding human rights in CAS jurisprudence: Ulrich Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures' (2012) 12(3) *International Sports Law Review* 43, 43.

[26] See *Kutrovsky* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 18 [9.14] where the panel expressly recognised the less than satisfactory nature of the divide.

[27] In this manner, it is possible for the athlete's representatives to nominate an arbitrator who takes a more favourable approach and for the representatives of the party against the athlete to do the opposite.

Oliveira v USADA: Laying the Interpretative Foundation

The first Panel faced with interpreting article 10.4 was in *Oliveira v United States Anti-Doping Agency*.[28] It established what might be regarded as the most favourable and flexible interpretation for supplement using athletes, the substance approach. The athlete, Oliveira, was able to have her period of ineligibility reduced by six months in the appeal under Article 10.4.

When approaching article 10.4, the Panel recognised the ambiguous wording between the first and second paragraphs. Consequently they viewed that intent within the second condition should concern the Specified Substance. As a result, because Oliveira was unaware that the product contained a specified substance at the time of ingestion,[29] she could not have had the requisite intent.[30] With this narrow view of intention, the case was able to progress past the first two stages of article 10.4 and to the third stage of considering the athlete's degree of fault, which is the decisive criterion and allows for reductions when appropriate. As will be discussed, the *Oliveira* approach appears to best reflect the intention behind article10.4, its wording, and allows for some flexibility in cases where an athlete inadvertently, after exercising due care, ingests a Specified Substance.

Considering that supplements in general are not prohibited by the Code and the need for flexibility in sanctions, the *Oliveira* approach has significant merit. When considering the provision, the Panel argued against a general intention concerning the product as a whole ('product approach'):

> If the Panel adopted that construction, an athlete's usage of nutritional supplements, which are generally taken for performance-enhancing purposes … would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance.[31]

Specified Substances are distinguished from others due to their nature and the *Oliveira* Panel sought to ensure that article 10.4 offers proper flexibility to athletes who may have inadvertently, whilst exercising due care, ingested a Specified Substance by allowing the case to get to the stage where fault is assessed. The merits of a 'product approach' were considered but it was feared that it would limit athletes in supplement style cases to relying on article 10.5. Such a 'consequence would be contrary to the WADC's objective of distinguishing between a specified substance and prohibited substance in determining whether

[28] *Oliveira v United States Anti-Doping Agency* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) ('*Oliveira*').
[29] Or that methylsynephrine is the chemical equivalent of oxilofrine, the Specified Substance in question.
[30] *Oliveira* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) 17 [9.18].
[31] Ibid 16 [9.14].

elimination or reduction of an athlete's period of ineligibility is appropriate under the circumstances.'[32]

In *Oliveira*, the panel considered the key issue with respect to intent was knowledge of the Specified Substance, or lack of such knowledge. This approach is not incorrect or dangerous to the interests of sport. By approaching intent in this manner the Panel enabled the flexibility that article 10.4 is designed to offer, particularly in light of the nature of Specified Substances.[33] Therefore, the *Oliveira* approach would seemingly allow for cases to be judged on their facts and the athlete's level of fault in light of those facts. Whilst high levels of responsibility are imposed on athletes, the purpose of article 10.4 is to protect their fundamental rights and to ensure proportionality by not excessively punishing unintentional dopers who have tested positive for Specified Substances, which are expressly recognised as being susceptible to unintentional ingestion. As a result some would argue that 'the *Oliveira* approach seems to best reflect the intentions of the drafters of Article 10.4'.[34]

Proponents of a broader and more utilitarian approach to ensuring the protection of sport may argue that the *Oliveira* approach unnecessarily endangers sport, even if taking a different approach would adversely affect some inadvertent dopers. From that perspective, it may enable intentional or reckless athletes to use supplements, knowing that it contains a banned substance, before subsequently claiming a lack of knowledge.[35] A recent Panel also questioned that, if knowledge was to be conclusive as to intention, then it seems odd that the Code commentary does not refer to it.[36] While these concerns may appear superficially justified it seems inevitable that intent and knowledge should be linked in some manner. Recent cases, as will be discussed, have elaborated on the concept by exploring issues of direct and indirect intent. Furthermore, the wording of the provision itself protects it from abuse. For example, the issue of intent is only one part to the application of the provision. Even if a non-diligent athlete is able to show a lack of intent by corroborated evidence, the decisive part of the provision is the third stage, assessing the degree of fault. This final stage is where the negligence of an athlete becomes relevant and due to the high standards of diligence expected of athletes, any reduction in the period of ineligibility imposed is often limited. Therefore, the *Oliveira* approach appears to ensure the proper operation of the provision to benefit athletes who

[32] Ibid 16 [9.15].
[33] As previously mentioned, Specified Substances are generally more susceptible to a 'credible non-doping explanation: Code comment to article 10.4.
[34] Antonio Rigozzi and Brianna Quinn, *Inadvertent Doping and the CAS: Part II* (27 November 2013) LawinSport <http://www.lawinsport.com/articles/anti-doping/item/inadvertent-doping-and-the-cas-part-ii-the-relevance-of-a-credible-non-doping-explanation-in-the-application-of-article-10-4-wada-code>.
[35] See *Kutrovsky* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 20 [9.15.9] where the panel felt that such an interpretation could allow 'ignorance' to work in an athlete's favour.
[36] Ibid19 [9.15.3].

inadvertently consume banned substances while not benefiting athletes who intentionally consume.

A CAS Level Acceptance of *Oliveira*

At the CAS level, a majority of cases have followed *Oliveira* either expressly or impliedly, including *Berrios*,[37] *Union Cycliste Internationale v Kolobnev and Russian Cycling Federation*,[38] *World Anti-Doping Agency v International Waterski and Wakeboard Federation and Rathy*,[39] and *Armstrong v World Curling Federation*.[40] These cases will not be examined in depth. Instead, how they contribute towards showing why a substance approach should be favoured will be considered.

In *Berrios*, the athlete was not entitled to a reduction. The athlete had no intent according to the Panel but was not entitled to a reduction because his degree of fault in doing his due diligence was very high.[41] In regards to intention within the second part of article 10.4, the Panel agreed with *Oliveira*.[42] In interpreting the provision they emphasised that the two issues, intent and fault, are not related and should be assessed separately. This is similar to *Oliveira* in so far as the athlete satisfied intent through a lack of knowledge but was only entitled to a partial reduction. Such an approach shows due respect to the wording of the provision and allows for a balance to be struck between the need to protect sport and to protect otherwise clean athletes who inadvertently commit a violation.

Even if a careless athlete were to show and corroborate[43] a lack of knowledge so as to satisfy the onus on the athlete to establish a lack of intent, it is highly unlikely that he or she would be found not to have had some significant degree of fault in not knowing that the supplement contained a Specified Substance, or taking reasonable measures to be satisfied that the supplement did not. Therefore, this approach of considering the three stages of article 10.4, allows

[37] *Berrios* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2229, 28 April 2011).
[38] *Union Cycliste Internationale v Kolobnev and Russian Cycling Federation* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2645, 29 February 2012) ('*Kolobnev*').
[39] *World Anti-Doping Agency v International Waterski and Wakeboard Federation and Rathy* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2701, 21 November 2012) ('*Rathy*').
[40] *Armstrong v World Curling Federation* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2756, 21 September 2012) ('*Armstrong*').
[41] *Berrios* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2229, 28 April 2011) 18–19 [102]. In rejecting a reduction to the ineligibility period, the Panel wanted 'to underline that it believes that Berrios did not intend to cheat or enhance his sport performance.'
[42] Ibid 14–15 [83]. See also *Armstrong* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2756, 21 September 2012) 19 [8.28] where the panel made a statement to the effect that whether an athlete was negligent in not knowing the supplement contained a Specified Substance is a matter separate from intent.
[43] See *Berrios* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2229, 28 April 2011) 18–15 [84] for the Panels recognition that an athlete only satisfies the second paragraph when they can corroborate a claim that they ingested a Specified Substance 'unknowingly'.

for instances of genuine mistake to be differentiated from those of careless ignorance or recklessness.

The *Kolobnev* panel felt that the *Oliveira* approach was correct as it promoted legal certainty and the overall purpose of the rule. The athlete in question received a reprimand by proving a lack of intention and a degree of fault on the lowest end of the 'spectrum of fault'.[44] It was emphasised by that Panel that due to the ambiguity of the second condition, only a construction in line with the first, referring explicitly to the Specified Substance, would harmonize the provision and 'be consistent with the very concept of "Specified Substances"'.[45] A similar decision was reached in *Armstrong*.[46] *Rathy* did not discuss *Oliveira* directly but favoured a Specified Substance approach'.[47]

The logic prompted by the *Kolobnev* argument is particularly interesting. If a continued reading of the meaning from the first condition was not to be implied then it would seem prudent that the Code should explicitly make that known, which it does not. In addition, with WADA's aim of ensuring harmonisation, it seems more reasonable that the two paragraphs should have the same meaning as opposed to the second paragraph being concerned with a wholly new concept. Therefore, this line of authority for the *Oliveira* approach has not only gathered support but also holds several merits relating to the harmonisation of rules and ensuring flexibility. The reasoning behind the approach is also backed up by the context of the rule; intent is simply a condition to satisfy and not the decisive criterion.

Foggo v NRL: Creating the Divide

The interpretation of article 10.4 changed when the panel in *Foggo v National Rugby League*[48] explicitly disagreed with *Oliveira*.[49] In doing so, a separate approach focusing on intention relating to the product as a whole was established.

[44] The factors taken into account in determining his degree of fault are listed: *Kolobnev* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2645, 29 February 2012) 27–8 [87]–[89].

[45] Ibid 26 [81]. The panel had a similar opinion to the idea of 'harmonising' the provision in *Oliveira v United States Anti-Doping Agency* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) 17 [9.17].

[46] The panel quite plainly explains that where the athlete was completely unaware of the Specified Substance 'the absence of intent to enhance performance is obvious since logically the athlete cannot have had intent if he did not know he was ingesting the substance': *Armstrong* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2756, 21 September 2012) 22 [8.49].

[47] When approaching the issue of intent the panel simply stated that, '[w]ith regard to the requirement that such Specified Substance was not intended to enhance the Athlete's sport performance': Rathy (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2701, 21 November 2012) 20 [9.2.7].

[48] *Foggo v National Rugby League* (Award, Court of Arbitration for Sport, Case No CAS A2/2011, 3 May 2011) ('*Foggo*').

[49] Ibid [44]. The relevant substance was MHA, which was labelled using one of its other names. At the time MHA was listed as a 'Non-Specified Stimulant' under s 6a of the 2010 Prohibited List. As a result, there was no power to reduce the ineligibility period because it was a prohibited substance. However, following the violation, it was moved to s 6b, making it a Specified Substance and the mandatory ban eligible for potential reduction.

Such an approach would not allow cases to reach the stage of assessing an athlete's fault or knowledge in light of the facts, as the athlete's use of the supplement would per se be to enhance performance. Despite causing much litigation and discussion at the CAS and national levels,[50] the *Foggo* approach has not been consistently favoured in CAS decisions. It was, however, favoured in the first draft of the 2015 Code[51] but has not been adopted in the finalised version. As will be discussed, this approach is inherently less favourable to, and perhaps disproportionately unfair on, athletes who inadvertently consume prohibited substances, and does not best reflect the purpose of the provision. Further, the *Foggo* decision itself has some clear deficiencies and arguably raises more questions than it answers.

When tackling the second paragraph of article 10.4 and the ambiguous wording of intent, the *Foggo* panel felt that their task was to 'give effect to the natural and ordinary meaning' of the provision 'having regard to the context of the rules as a whole'. They further stressed that the 'rule focuses on the nexus' between taking a substance and actual performance.[52] This relates to the fact that Specified Substances are only banned in competition. If one is used immediately before a competition then arguably it is going to be far more difficult for that athlete to show prima facie a lack of intent to enhance performance. The *Foggo* Panel ultimately concluded that a lack of knowledge is not sufficient and intent should relate to the product containing the substance.[53] Given that a natural reading of article 10.4 would imply that intent should relate to the Specified Substance such a conclusion is questionable. Unfortunately the Panel did not elaborate on why this conclusion was reached but, arguably, it reflects a desire to adhere to strict liability, and leads to the initial disqualification of an athlete who uses a supplement by generally limiting his or her opportunity to show a lack of intent.

Perhaps the most surprising aspect of *Foggo* is that the athlete successfully achieved a reduction under article 10.4. In granting a reduction, the Panel did little to explain how athletes could successfully satisfy the second paragraph in cases concerning supplements, in this case a pre-workout supplement called Jack3d.[54] Inherently such products are used for performance enhancing purposes. The athlete, Foggo, was able to establish that he thought the product was legal. This was corroborated by evidence from his mother and other circumstances which were considered sufficient to satisfy the requisite absence

[50] A few national perspectives, which favour a more hard-edged approach to supplement use and doping will be discussed later.

[51] The first draft of the 2015 Code inserted a comment to article 10.4.1 which explicitly disagreed with *Oliveira* and explicitly stated that if an athlete used 'a product to enhance sport performance' then regardless of his or her knowledge about the substance, the reduction provision did not apply. Had this change come to pass it would arguably have been highly disproportionate to supplement users.

[52] *Foggo* (Award, Court of Arbitration for Sport, Case No CAS A2/2011, 3 May 2011) [46].

[53] Ibid [47].

[54] Jack3d was the pre-workout supplement which contained MHA in *Foggo*.

of intent.[55] A recent Sole Arbitrator, after examining the case law, saw 'minimal differences in the reasoning between Foggo and Oliveira.'[56] For example, the need for corroboration of a lack of intent is required by article 10.4 itself, and the *Oliveira* panel required a lack of knowledge to be corroborated.[57] The corroborating evidence and the arguments for a lack of intent in both cases are also not dissimilar.[58] By saying that one believes a product to be legal, does that not imply that the athlete had a lack of knowledge about the presence of a Specified Substance? Therefore, it may be argued that the *Foggo* panel was right to suggest that something other than a lack of knowledge may show a lack of intent. However, they confused matters by stating that intent should relate to the product as a whole. If intent did relate to the product as a whole, it would suggest that regardless of which factual category a supplement case falls in, even a contaminated product case, an athlete would be using the supplement to enhance his or her performance and a subsequent assessment of his or her fault, or lack of, would not be available.

Finally, the main issue with *Foggo* is that the panel did not explain why the *Oliveira* approach should not be followed and, consequently, why a product approach was required when applying article 10.4. As a later panel has recognised, the panel in *Foggo*, 'did not give any reasons for [their] decision, nor did the decision deal with the legal issues and systematic questions raised by Oliveira.'[59] Whilst *Foggo* was awarded a reduction, a product-based approach seems far more likely to result in disproportionately severe outcomes for many athletes, simply due to the inevitable performance enhancing intent underlying their use of supplements. This could result in many athletes failing at the preliminary stage of 'intent', before any examination of their fault has been conducted; a result disproportionately severe for athletes who inadvertently consume Specified Substances. Under the *Foggo* approach, a first time offender who is an inadvertent user of a Specified Substance, contained in a supplement, receives precisely the same period of ineligibility (ie, two years) as the deliberate cheater who uses anabolic steroids or human growth hormone.

By not explaining why a product-centred approach should be considered correct, and not convincingly distinguishing itself from *Oliveira*, the main effect of

[55] *Foggo* (Award, Court of Arbitration for Sport, Case No CAS A2/2011, 3 May 2011) [52]. His belief that the product was legal was also corroborated by his club's environment of encouraging pre-workout supplements.

[56] *World Anti-Doping Agency v Judo Bond Nederland, de Goede & Dopingautoriteit* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2747, 15 April 2013) 18 [7.7] ('*de Goede*').

[57] The relevant corroborating evidence was the testimony of Oliveira's husband, his efforts to determine the source of the Specified Substance, and also two other in-competition test samples which were negative for the substance: *Oliveira* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) 16–17 [9.18].

[58] In *Oliviera* the evidence corroborated a lack of knowledge and therefore intent and in *Foggo* the evidence corroborated a belief that the product was legal.

[59] *Qerimaj* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2822, 12 September 2012) 16 [8.8].

Foggo was to unhinge legal certainty around the application of article 10.4 for subsequent Panels at the CAS and national levels.[60]

Kutrovsky and *West*: Favouring a *Foggo* Interpretation

Further depth has been added to the CAS level divide with the extensive judgments in *Kutrovsky*, and in *World Anti-Doping Authority v West*,[61] which both found in favour of a product approach. The *Kutrovsky* Panel recognised the uncertainty in many post-Foggo cases and aimed to deliver a convincing line of authority for future cases which best reflected the interests of sport: 'although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.'[62]

Considering that the Panel sided with a product interpretation, this statement conveys that they felt it was the 'correct' approach. However, arguably, with the high benchmark that such an approach could set for supplement users, the results could actually be inimical to the interests of sport. A product approach would essentially exclude the application of article 10.4 to that group of athletes at the stage of intent, even to a highly diligent athlete, preventing any assessment of the degree of fault.[63] Whilst the *Kutrovsky* ruling is very comprehensive, it fundamentally disadvantages athletes. Furthermore the statement also implies that other approaches, like *Oliveira*, result in 'unduly lenient' sanctions. This has already been shown not to be, particularly in supplement cases, as an assessment of fault will often limit any reduction granted.[64] For example, a single CAS arbitrator in *International Wheel Chair Basketball Federation v UK Anti-Doping and Gibbs*[65] implied that a suggested reduction to 12 months for the user of a stimulant which was a Specified Substance would have been much too low to properly reflect the degree of fault.[66]

The Panel in *Kutrovsky* made several assertions against the ruling of *Oliveira*. First, they argued that a purely substance approach 'does not respect the structure of Article 10.4' and, if a lack of knowledge was sufficient, then the requirement

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[60] See, eg, the discussion given by Mountford around the two cases representing conflicting branches of CAS authority and the impact of *Foggo* at a national level: Tom Mountford, 'Tough Love for Accidental Dopers' on Blackstone Chambers, *Sports Law Bulletin* (17 June 2013) <http://sportslawbulletin.org/2013/06/17/tough-love-for-accidental-dopers/>.

[61] (Award, Court of Arbitration for Sports, Case No CAS 2012/A/3029, 22 November 2013) ('*West*').

[62] *Kutrovsky* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 27 [9.54].

[63] Due to the general performance enhancing intent when taking supplements as discussed previously.

[64] See Code comment to article 10.4: '[i]t is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.'

[65] *International Wheel Chair Basketball Federation v UK Anti-Doping and Gibbs* (Award, Court of Arbitration for Sports, Case No CAS 2010/A/2230, 22 February 2011).

[66] Ibid 24–25 [12.15]–[12.20].

for corroborating evidence 'would be made effectively redundant.'[67] This has not been shown to be the case. In the substance cases discussed, corroboration for a lack of knowledge has been required.[68] Acceptable evidence depends on the facts of each case and other arguments, such as a belief that the product was legal (in *Foggo*, for example, where it was used to show a lack of knowledge)."

The Panel also asserted that '[i]t is counter-intuitive that in a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage.'[69] The idea of ignorance was also expressed in *West* where the Panel felt a substance approach would 'have the absurd result of rewarding competitors for being – and remaining – ignorant of the properties of the products they ingest'.[70]

Doping presents a fundamental threat to the integrity of sport and performance enhancers clearly violate the principle of 'fair play' between athletes.[71] That being said, it may be more counterintuitive in a Code which allows supplement use per se, and offers proportionality in sanctions, that those provisions should be interpreted to exclude their application to the objectively inadvertent consumption of banned substances. As a more recent Panel has argued, '[t]he reasoning that no reduction of a sanction can be granted in case of "ignorance" is difficult to follow' and such a ruling may be 'contradictory in itself'.[72] By all accounts, ignorance is seemingly a matter of fault, not of intent, and should be assessed accordingly under the third stage, degree of fault.

A key criticism of *Kutrovsky* is the practical effect which it may have on the operation of articles 10.4 and 10.5. First and foremost it would greatly increase the challenge facing an athlete.[73] As Wynn argues, it 'would rarely allow for a

[67] *Kutrovsky* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 18 [9.15], 16 [9.15.4].

[68] Eg, in *Oliveira*, corroborating evidence included the fact that the supplement was taken for allergies and that there were two other races in which the supplement was not taken before: *Oliveira* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) 16 [9.18]. Also in *Kolobnev*, evidence of the athlete's medical history and a doctor's recommendation to fight a vascular disease corroborated the athlete's words: *Kolobnev* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2645, 29 February 2012) 26 [82].

[69] *Kutrovsky* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2804, 3 October 2012) 20 [9.15.9].

[70] *West* (Award, Court of Arbitration for Sports, Case No CAS 2012/A/3029, 22 November 2013) 19 [53].

[71] This is 'because "clean" athletes relying on their natural potential are disadvantaged over "pharmacologically-enhanced rivals"': Paul A Czarnota, 'The World Anti-Doping Code, the Athlete's Duty of "Utmost Caution," and the Elimination of Cheating' (2012) 23 *Marquette Sports Law Review* 45, 62.

[72] *de Goede* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2747, 15 April 2013) 19 [7.13].

[73] See *Oliveira* (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2011) 15 [9.15]. The earlier panel here had considered the possibilities and possible negative outcomes of a strict approach towards article 10.4 which would go against the Code's aim of distinguishing Specified Substances from other Prohibited Substances in relation to sanctions.

non-doping explanation and supplement use can therefore be penalised.'[74] This would leave athletes with only article 10.5,[75] whose requirements are generally more demanding and offer a more limited scope for reduction.[76] Additionally, the commentary states that they 'are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.' Therefore, the wording of the Code suggests against this outcome. It seems improper that article 10.4 should be interpreted in such a way as to hold unknowing athletes to have intent and prevent any flexibility in supplement cases. If an athlete was negligent then it is not directly a matter for intent, because provided he or she can corroborate his or her claims, an assessment of fault ensures that reductions are given only to an athlete if he or she deserves it in light of the circumstances.

Qerimaj and *de Goede*: Attempting to Settle the Dispute

Although *Kutrovsky* arguably intensified the debate around the interpretative approach to article 10.4, two recent cases, *de Geode* and *Qerimaj*,[77] have subsequently favoured *Oliveira* in principle, having considered the arguments on both sides. Both cases also offered a broader analysis of 'intention' and arguably entrench why *Oliveira* should be followed in future cases.

As discussed, a key problem is the general performance enhancing intent that athletes will have in taking supplements. Both of these cases recognised that this general intent guides professional athletes in their behaviour. As a result the *Qerimaj* Panel argued that, within article 10.4, 'the primary focus can obviously not be on the question whether or not the athlete intended to enhance his sport performance by a certain behaviour (i.e. consuming a certain *product*), but moreover if the intent of the athlete in this respect was of doping-relevance.'[78]

Doping relevance would imply that the athlete must have knowledge of the Specified Substance. Presumably that is why article 10.4 exists, to account for the fact that athletes can use products with no doping intent but which may unknowingly contain Specified Substances. This could be anything from a

[74] Wynn, above n 17, 14–15.
[75] The panel in *Kutrovsky* ultimately allowed a reduction under article 10.5.2.
[76] See Annelize du Pisani, 'A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping Code' [2013] *De Jure* 917, 922. 'Article 10.5.1 of the Code is an extremely difficult defence to prove … Article 10.5.2 is also a difficult defence to prove and has been very rarely satisfied': at 921. See, eg, *World Anti-Doping Agency v Football Association of Wales and James* (Award, Court of Arbitration for Sport, Case No CAS 2007/A/1364, 21 December 2007) 12 [7.10]–[7.11].
[77] The case concerned an athlete testing positive for MHA in his in-competition sample which was traced back to a food supplement named Body Surge, the label of which did not mention MHA explicitly: *Qerimaj* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2822, 12 September 2012) 2 [2.1]–[2.7].
[78] Ibid 17 [8.11(2)] (emphasis in original).

pre-workout supplement to allergy medication[79] as can be seen from the case law. Therefore, from the perspective of protecting athletes this statement seems fair and logical.

One of the more intriguing aspects of these judgments is their analysis of intent. While an athlete may be said to have knowledge of the product and thus have direct intent, the panels also considered that athletes could act in such a manner as to have indirect intent. Arguably this could lessen the fears of some regarding ignorant athletes under the *Oliveira* approach, while also protecting accidental athletes: 'Art. 10.4 … remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. Of course this Panel is well aware that the distinction between indirect intent … and the various forms of negligence … is difficult to establish in practice.'[80]

Furthermore, 'athletes without scientific support can feel like they are in a loaded minefield, where even the best due diligence can come up short.'[81] Importantly, such an approach to article 10.4 would be capable of protecting diligent athletes who inadvertently commit a violation. It seems only fair that the provision should be construed in such a way, considering the purpose of the rule, as a relief from strict liability for Specified Substance violations. If additional evidence shows the athlete to have recklessly waded through a 'minefield', he or she may be said to have indirect intent.[82] Therefore, despite the practical difficulties around these concepts, an assessment of indirect and direct intent may satisfy those on both sides of the divide. However, assessing intent in such a way could blur the line between intent and degree of fault, which are separate conditions of article 10.4. Nonetheless this approach has merit insofar as it recognised that some reckless athletes take the chance that they will be caught while others can be fully diligent but still commit a violation.

Like previous cases, such as *Kolobnev*, the sole arbitrator in *de Goede* focused on the intentions of the Code's drafters to justify a substance-based approach. By distinguishing Specified Substances and the likelihood that their consumption will have a credible non-doping explanation, the drafters can be said to have

[79] *Foggo* (Award, Court of Arbitration for Sport, Case No CAS A2/2011, 3 May 2011). See also *Kolobnev* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2645, 29 February 2012), where the athlete used a supplement recommended to him by a doctor to treat vascular disease.

[80] *Qerimaj* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2822, 12 September 2012) 18 [8.14].

[81] Peter L Ruddock, 'Methylhexaneamine: Why WADA Needs to Clarify Its Prohibited List' on *World Sports Law Report* (25 July 2013) <http://www.e-comlaw.com/sportslawblog/template_archives.asp?chosenYear=2013&chosenMonth=7>. MHA has an abundance of names, most of which are not on the Prohibited List, and some of which are difficult to find. Furthermore, scientific data on the performance enhancing effects of MHA is limited.

[82] In *de Goede*, the sole arbitrator considered additional evidence to conclude a lack of knowledge. One piece of evidence in the athlete's favour was that he stopped taking the supplement before competition: *de Goede* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2747, 15 April 2013) 21 [7.17].

wished for their use to be fully punished when it was done 'intentionally'. Thus, the arbitrator criticised the effect of *Kutrovksy* on the application of the reduction provisions:

> in cases where the prerequisites for a reduction under art.10.4 WADC are not fulfilled, logically there is no room for a reduction based on the more restrictive provision in art.10.5.2 WADC. The interpretation (of the two provisions) followed by the Panel in *Kutrovsky* turns this logic enshrined in the WADC upside down by claiming that it is easier to qualify for a reduction under art.10.5.2 WADC.[83]

This argument is one of the more persuasive against a *Foggo* or *Kutrovsky* style of interpretation. Even with the most liberal readings of the reduction provisions, achieving a reduction to the ineligibility period is a difficult task. It has been argued to be because the 'specific principles and articles of the WADA Code, like strict liability, presumption of competence and proving no fault or negligence, make the challenge nearly impossible.'[84] Moreover, in most of the substance cases, even after passing the criteria of intent, an assessment of fault when using a supplement product will rarely allow for a significant reduction. For example, in *Qerimaj*, the Panel found the athlete's fault to be high in light of the 'very high standard of care' owed by athletes 'to do intensive research' on supplements.[85] With such inherent difficulties already facing athletes, a substance approach towards intent seems the only way of ensuring at least some flexibility for inadvertent dopers.

Some National Perspectives

While this article is concerned with the CAS level divide, a brief recognition of some national interpretations is useful to highlight the effects that the CAS divide has had. The two examples which will be given, Australia and the United Kingdom ('UK'), arguably show the unfair results which have ensued for athletes whose national authorities have taken views which differ from the majority of the CAS decisions following *Oliveira*.

Both Australia and the UK have favoured a resolutely strict approach towards supplement use by professional athletes and in those jurisdictions it is rare for an athlete to succeed under article 10.4. For example, the Australian Sports Anti-Doping Authority ('ASADA') website reveals a raft of MHA cases where athletes have had their two year ineligibility period upheld with only a few cases

[83] Ibid 19 [7.12].
[84] Kirikal, above n 6, 39.
[85] *Qerimaj* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2822, 12 September 2012) 22 [8.22].

of reductions.[86] It has been argued that in Australia, 'the methylhexaneamine supplement cases commonly receive sanctions of a two year ban due, in part, to the athlete being unable to show "no intent to enhance performance."'[87] While the facts of these cases have not been examined, it is arguable that had these cases reached the stage of assessing degree of fault, some athletes would have been found to be less than wholly negligent. It is concerning that the CAS divide has enabled such a sporting nation to act against what is arguably the majority of CAS decisions, and put athletes who may genuinely have had no 'doping' intent when using a supplement at risk of having their careers derailed.

A similar approach has been taken in the UK, where adherence to notions of strict liability, have caused adjudicators to be highly reluctant to allow reductions in cases where a violation has been the result of supplement use. A stream of cases can be found reflecting this, such as *UK Anti-Doping v Whyte*[88] and *UK Anti-Doping v Llewellyn*.[89] The latter Panel was highly critical of the CAS substance cases, going so far as to state 'that the Appeal Tribunal is of the view that *Qerimaj* and *Oliveira* should not in future be followed.'[90]

'Despite having no power to overrule a decision of CAS, the NADP [in this decision], has therefore sent a clear message of its tough new intent.'[91] The *Llewellyn* Panel also stated that since knowledge of the substance is not needed to commit a violation under strict liability, it is 'difficult to understand' why some CAS panels state that knowledge of the substance is needed to show intent.[92] However, this logic is not favoured – it does not respect, as discussed, that every athlete will have some form of performance related intent when using a supplement. What matters is whether that intent was of doping relevance which is inherently linked to having knowledge of the Specified Substance, whether direct or indirect in nature, depending on the evidence of each case and whether the athlete fulfilled his or her duties in researching the ingredients of any given product.

Furthermore, strict liability is inherent to anti-doping regulation and the purpose of article10.4 is to ensure proportionately in sanctions for athletes who inadvertently consume banned substances. It is also relevant that the criterion of degree of fault is typically assessed against the standard of strict liability, representing a difficult challenge for any professional athlete. A very rare

[86] *Rules and Violations* (7 October 2014) ASADA <http://www.asada.gov.au/rules_and_violations/sanctions.html>. When accessed, the list showed 24 athletes who had a full two-year ban because of MHA, and only 2 with a lesser ban of 6 months.
[87] Richard Redman and Garth Towan, *Final Draft of New WADA Code* (3 July 2013) Landers & Rogers Lawyers <http://www.landers.com.au/index.php/publications/sport-and-events/final-draft-of-new-wada-code/>.
[88] (Decision, National Anti-Doping Panel – Appeal Tribunal, 27 March 2013).
[89] (Decision, National Anti-Doping Panel – Appeal Tribunal, 14 February 2013) ('*Llewellyn*').
[90] Ibid [5.42].
[91] Mountford, above n 60.
[92] *Llewellyn* (Decision, National Anti-Doping Panel – Appeal Tribunal, 14 February 2013) [5.11].

example resulting in a reduction is *UK Anti-Doping v Wallader*.[93]It was found in that case that the circumstantial evidence established that she was unaware of the Specified Substance.[94] Irrespective of this the Panel found that she could not have intended to enhance her performance in competition as the supplement, which was taken two days prior, was 'used to give a short term energy boost' only.[95] An approach such as this has the ability to allow a case to be taken forward to the third stage, where it can be properly assessed whether the athlete acted in such a way as to be eligible for any sort of reduction. Therefore, it is a concern that the current divide has allowed for such national approaches to go against the CAS majority in such a way that article 10.4 becomes effectively inapplicable to many athletes who use supplements, regardless of whether they were acceptably diligent or reckless.[96]

Conclusion: Proceeding in the Interim

After reviewing the CAS jurisprudence on intent within the second paragraph of article 10.4, this article has argued in favour of the *Oliveira* approach. This discussion has aimed to highlight the key merits that this approach offers, mainly in terms of being consistent with the overall purpose and context of the provision. By bluntly disregarding *Oliveira*, *Foggo* and *Kutrovksy* have unnecessarily introduced uncertainty into the application of article 10.4. For considerations of legal certainty and fairness, this should not continue.

It has been found that the issue of intent may have been overemphasised. It is not the decisive criterion within article 10.4 and is simply the second stage before reaching the final, and main, part of the provision, assessing the degree of fault. Reading the second paragraph in line with the first, which expressly links the Specified Substance to intention, ensures that athletes who inadvertently consume such a substance are able to reach the final stage. At that stage it then becomes relevant as to what extent the athlete was negligent, or diligent, and thus flexibility is ensured. As such it may be argued that, even 'if a Panel comes to the conclusion that an athlete has not acted intentionally … nothing has "worked in the athlete's favour" yet, since the most important step, i.e. the determination of the length of the sanction on the basis of the athlete's degree of fault is still outstanding.'[97]

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[93] *UK Anti-Doping v Wallader* (Decision, National Anti-Doping Panel – Appeal Tribunal, 29 October 2010) ('*Wallader*').
[94] This included evidence of her research on the internet and her declaring the supplement product on her sample collection form: ibid [36].
[95] Ibid.
[96] Note, only international level athletes may appeal to the CAS and therefore many athletes at the national level may be unlucky in receiving a ban and will not be able to appeal their case to the CAS.
[97] *de Goede* (Award, Court of Arbitration for Sport, Case No CAS 2012/A/2747, 15 April 2013) 20 [7.13].

Whilst it may be true that intent should not only be related to knowledge of the substance, the two seem inherently linked. Athletes may however use other arguments to show a lack of intent, such as a belief that the product was legal or that it was being used for a purpose not related to sport. It is also possible that, as a way of appeasing both sides of the CAS divide, an assessment of indirect and direct intent could be conducted at the stage of intent, which would essentially bring into play matters of fault and would allow athletes who have been diligent to make that known. Although this may blur the lines between assessing intent and the degree of fault, it may offer an improvement on the current situation. Therefore, in the interim it is argued that a substance approach akin to *Oliveira*, or incorporating the approach of *Qerimaj*, would be appropriate to best provide the flexibility desired from article 10.4 for inadvertent violations of the Code.