THE SANCTIONING PROCESS FOR SPECIFIED SUBSTANCES IN THE 2015 WORLD ANTI-DOPING CODE – A FRESH START?

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Doping has again come into the public spotlight due to high-profile cases uncovered around the world – such as the Lance Armstrong matter in the United States or the Essendon drug scandal in Australia. In the shadow of these cases, the World Anti-Doping Agency ('WADA') has worked on a revision of its World Anti-Doping Code ('Code'), which will enter into force on 1 January 2015. One area of the Code that has been significantly changed is inadvertent or unintentional doping. Under the old Code, the 2009 version,[1] *there has been some uncertainty in this respect due to conflicting (and controversial) case law. The 2015 version of the Code*[2] *aims to correct this by introducing a new system for unintentional doping. This article will focus on these changes that will be introduced by the Code 2015 and will analyse how effective they are in addressing the concerns raised under the Code 2009 and the relevant case law.*

The Regime for Specified Substances

What Are Specified Substances?

Under the Code, Specified Substances are substances which have a greater possibility of entering an athlete's body inadvertently.[3] These substances can be contained in everyday products that are normally taken for non-doping reasons (eg, drugs used for medical reasons) and are likely to be taken without any intention of doping. In addition, specified substances are generally – but not always – only prohibited in-competition but not out-of-competition.[4] For example, pseudoephedrine, is contained in products such as Aspirin Complex, an ordinary over-the-counter drug that is used to fight the symptoms of colds and flu. Generally, with respect to specified substances 'there is a greater

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1 WADA, *World Anti-Doping Code* (at 1 January 2009) ('Code 2009').

2 WADA, *World Anti-Doping Code* (at 1 January 2015) ('Code 2015').

3 *2014 Prohibited List* (2014) World Anti-Doping Agency <https://www.wada-ama.org/en/questions-answers/2014-prohibited-list#node-351>.

4 Estelle de La Rochefoucauld, 'CAS Jurisprudence Related to the Elimination or Reduction of the Period of Ineligibility for Specified Substances' [2013] (2) *CAS Bulletin* 18, 19.

likelihood that these substances could be susceptible to a credible non-doping explanation'.[5] The view of the Code on specified substances is that they 'should not in any way be considered less important or less dangerous than other doping substances'.[6]

The standard ineligibility period for a violation of article 2.1 is two years under the Code 2009.[7] If the substance in question is a specified substance, the athlete may be able to claim a reduction of the standard ineligibility period under article 10.4. If the athlete fulfils the requirements of article 10.4, the two-year ban can be reduced or even replaced by a reprimand, depending on the degree of fault by the athlete.

Paragraph 1 of article 10.4 of the Code 2009 reads:

> Where an *Athlete* … can establish how a Specified Substance entered his or her body … and that such Specified Substance was not intended to enhance the Athlete's sport performance … the period of *Ineligibility* found in Article 10.2 shall be replaced with the following: First violation: At a minimum, a reprimand and no period of Ineligibility from future *Events*, and at a maximum, two (2) years of *Ineligibility*.

Consequently, the athlete has to establish two things in order to be able to benefit from the application of article 10.4:

(1) how the specified substance entered the body; and

(2) that the substance was not intended to enhance sport performance.

If the athlete is able to prove (1) and (2) to the comfortable satisfaction of the disciplinary panel, the standard period of ineligibility is no longer applicable and the panel can impose either a mere reprimand or a ban of up to two years. The exact sanction, is determined by the degree of fault on the side of the athlete.[8]

How the Substance Entered the Athlete's Body

The first requirement the athlete has to fulfil is to show how the specified substance entered his or her body. He or she has to do this on the balance of probability, meaning that the disciplinary panel should find the athlete's explanation '*more probable than not*'.[9] Case law shows that the athlete's

[5] *2014 Prohibited List*, above n 3.
[6] Code 2015 comment to article 4.2.2.
[7] Code 2009 article 10.2. The standard ineligibility period will be increased to four years provided that the anti-doping rule violation ('ADRV') was intentional: Code 2015 article 10.2.1.
[8] de La Rochefoucauld, above n 4, 19. See also Code CODE 2009 comment to article 10.4.
[9] de La Rochefoucauld, above n 4, 20. See also Code CODE 2009 comment to article 10.4.

explanations – depending on the substance in question – often relate to smoking a joint,[10] taking contaminated supplements,[11] taking over-the-counter drugs for medical reasons[12] or the like. This requirement – due to the lower standard of proof – seems rather straightforward and easy to fulfil but reality shows that this is not so easy. The reason for this is that in inadvertent doping cases the athlete often does not know how the substance entered the body, resulting in difficulties in providing an explanation to the disciplinary panel.[13] Mere ignorance or lack of knowledge is generally not sufficient to fulfil this requirement.[14]

No Intention of Enhancing Sport Performance

The second requirement of the athlete is to establish that he or she did not take the substance to enhance sport performance. Unlike the first requirement, the standard of proof for this second requirement is much higher: the athlete has to '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'.[15] The mere assertion of the athlete that he or she did not have any intention to enhance sport performance when he or she took the prohibited substance is not enough. The commentary to article 10.4 Code 2009 lists some examples of such corroborating evidence including:

> the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance.[16]

Result if Both Requirements Have Been Fulfilled

If the athlete is able to establish how the substance entered his or her body and that he or she did not take the substance for enhancing his or her sport performance, the second part of article 10.4 becomes operative: to determine a sanction based on the degree of fault. Showing how the substance entered the athlete's body and that he or she did not take the substance for enhancing sport

[10] See, eg, *Rebagliati v International Olympic Committee* (1998) 1 Digest of CAS Awards 419.
[11] See, eg, *Vencill v United States Anti-Doping Agency* (Award, Court of Arbitration for Sport, Case No CAS 2003/A/484, 11 March 2014); *World Anti-Doping Agency v Hardy* (Award, Court of Arbitration for Sport, Case No CAS 2009/A/1870, 21 May 2010).
[12] See, eg, *Edwards v Internatiaonal Association of Athletics Federations* (Award, Court of Arbitration for Sport, Case No CAS OG 04/003, 17 August 2004); *World Anti-Doping Agency v Fédération Internationale de Gymnastique* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2403, 25 August 2011).
[13] Antonio Rigozzi, Marjolaine Viret and Emily Wisnosky, 'Does the World Anti-Doping Code Revision Live Up to Its Promises? [2013] (11 November 2013) *Jusletter* 1, 26.
[14] de La Rochefoucauld, above n 4, 21.
[15] Code 2009 article 10.4
[16] Code 2009 comment to article 10.4.

performance are only the door openers; nothing has yet determined whether the standard sanction will be altered. The panel now has the chance to review all the facts, the particular circumstances, the athlete's behaviour and – based on the athlete's degree of fault – set a sanction that it deems appropriate. But just because the athlete benefits from the application of article 10.4 does not automatically mean that the standard sanction *must* be altered. It seems that some scholars[17] and case law[18] confuse the applicability of article 10.4 (the opening of the door, so to speak) with an automatic reduction of the standard ineligibility period ("the walking through the door"). However, as mentioned above, this is definitely not the case: just because article 10.4 is applicable, there has been nothing said about whether the standard sanction shall be reduced or not; this is to be determined in a second, separate step.

The Oliveira/Foggo Debate

As shown above, the applicability of article 10.4 Code 2009 consists of two steps. In the first step, the athlete has to show how the substance entered his body and that he did not have the intention to enhance his sport performance. Provided that the athlete is able to establish these two requirements, the panel – in a second step – can then set a sanction depending on the athlete's fault.

Two conflicting decisions of CAS regarding the interpretation of article 10.4 have started a heated debate – the so-called '*Oliveira/Foggo* debate'[19] – about when the first step is fulfilled. To use the previous metaphor, the debate is about the circumstances in which the door should be opened. At the centre of this debate is the correct interpretation of paragraph 2 of article 10.4, which deals with the intent to enhance sport performance. In order to understand the different interpretations, one has to look at the exact wording of article 10.4 paragraph 2:

'[t]o justify any elimination or reduction, the *Athlete* … must produce corroborating evidence … which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance.'[20]

Unlike paragraph 1, paragraph 2 does not link the production of corroborating evidence that the athlete had no intention of enhancing his or her sport performance with the specified substance.[21] The difference between paragraph 1

[17] Clifford J Hendel, 'Sanctions for Non-Intentional Doping: Article 10.4' (2013) 11(9) *World Sports Law Report* 3, 5.
[18] See, eg, *Foggo v National Rugby League* (Award, Court of Arbitration for Sport, Case No CAS A2/2011, 3 May 2011) ('*Foggo*').
[19] See Mark Smith, 'A critical analysis of the divided Court of Arbitration for Sport Jurisprudence on the World Anti-Doping Code article 10.4' (2013) 8(1) Australian and New Zealand Sports Law Journal.
[20] Code 2009 article 10.4 para 2.
[21] Antonio Rigozzi and Brianna Quinn, *Inadvertent Doping and the CAS: Part I* (27 November 2013) Law in Sport <http://www.lawinsport.com/articles/anti-doping/item/inadvertent-doping-and-the-cas-part-i-review-of-cas-jurisprudence-on-the-interpretation-of-article-10-4-of-the-current-wada-code>.

and paragraph 2 of article 10.4 is, therefore, that paragraph 1 clearly points 'to intent with respect to the specified substance, but not the product containing it', whereas paragraph 2 'doesn't mention the specified substance and appears to focus the inquiry on a general intent/lack of intent to enhance performance by taking the product'.[22]

The CAS panel in *Oliveira v* the *United States Anti-Doping Agency*[23] decided that the athlete only needs to prove that he or she did not take the *specified substance* (but not the product itself) to enhance sport performance.[24] The wording of paragraph 2 of article 10.4 has to be interpreted in this way due to its *ratio legis* (the purpose of the rule).[25] In *Foggo*,[26] on the other hand, the CAS panel decided that the athlete must prove that he or she did not take the *product* (and not only the specified substance) to enhance sport performance.[27] The *Foggo* panel's interpretation is, again, based on the *ratio legis* of paragraph 2 of article 10.4.[28] Two panels have thus interpreted paragraph 2 of article 10.4 of the Code 2009 in a completely different way – albeit both refer to the *ratio legis* of the norm in question.

The consequence of this different interpretation is the following: under the *Oliveira* interpretation, an athlete who took contaminated supplements (and who did not know that they contained a specified substance) may be eligible for a reduction of the sanction under article 10.4 as long as he or she can prove that he or she did not take the *specified substance* contained in the supplements to enhance his or her performance; whether the supplements themselves were taken for enhancing the performance is irrelevant. Under the *Foggo* interpretation, on the other hand, the same athlete is not eligible for a reduction under article 10.4 *because* he or she took the *supplements* to enhance his or her sport performance. It follows from the *Foggo* interpretation of paragraph 2, that article 10.4 is never applicable in cases of contaminated supplements because supplements are generally taken to enhance sport performance.[29] Consequently, paragraph 2 of article 10.4 will never be fulfilled because the athlete will not be able to show that he or she had no intention of enhancing his or her sport performance when he or she took the supplements. The application of article 10.4, therefore,

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[22] Hendel, above n 17, 3.

[23] (Award, Court of Arbitration for Sport, Case No CAS 2010/A/2107, 6 December 2010) ('*Oliveira*').

[24] de La Rochefoucauld, above n 4, 22.

[25] Rigozzi and Quinn, above n 21; *Union Cycliste Internationale v Kolobnev* (Award, Court of Arbitration for Sport, Case No CAS 2011/A/2645, 29 February 2012) 25–6 [78]–[81].

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

[27] Matthew Chantler, *WADA Article 10.4 'Specified Substances' – The End of the Farce?* (10 February 2013) Law in Sport <http://www.lawinsport.com/blog/mills-reeve/item/wada-article-10-4-specified-substances-the-end-of-the-farce>.

[28] Hendel, above n 17, 4.

[29] It is important to recognise that the *Foggo* approach has been developed in a case involving supplements and this approach, therefore, cannot be applied uncritically to other cases involving specified substances, such as medication or contaminated food cases.

is basically limited – albeit falsely I assert – to cases where specified substances were found as a result of taking drugs for medical purposes or of contaminated food.

Article 10.5 of the Code 2009

Under the Code 2009 the first defence in doping cases involving specified substances is generally not article 10.4 but article 10.5.1 because the period of ineligibility can be completely eliminated under that provision. Article 10.5.1 is applicable in exceptional circumstances only and requires 'no fault or negligence' on the side of the athlete. If one looks at case law relating to article 10.5.1, one notices that it is almost impossible to establish 'no fault or negligence'.[30] So basically, even though article 10.5.1 may be the first defence, article 10.4 – due to the high requirements of article 10.5. 1 – is the *main* defence in cases of specified substances. If an athlete does not know how the substance entered his or her body or if he or she is not able to establish the two requirements of article 10.4, he or she may further try to rely on an article 10.5.2 defence. In this case, the athlete has to establish that he or she bears no *significant* fault or negligence. 'No significant fault or negligence' means that the athlete can establish that 'his or her 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'.[31] How this definition has been interpreted in case law is detailed later in this article.

Specified Substances in the Code 2015

The aim of the Code 2015 is clear: to punish 'the so-called real cheats more harshly while at the same time offering more flexibility to inadvertent dopers'.[32] Unlike the Code 2009, the Code 2015 implements a different approach with a longer standard ineligibility period for intentional doping.[33] Therefore, it makes sense to provide a short overview of the Code *2015* regime before going into more detail about the sanctioning system for inadvertent doping involving specified substances.[34]

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[30] It is basically limited to cases where an athlete sabotages another competitor; 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, 56.

[31] Code 2009 app 1 (definition of 'no significant fault or negligence') (emphasis in original).

[32] Rigozzi, Viret and Wisnosky, above n 13, 18.

[33] Under the Code 2009, intentional doping constitutes aggravating circumstances, thus triggering the application of article 10.6, resulting in a period of ineligibility up to four years. The difference between the Code 2009 and the Code 2015 with respect to intentional doping is that the starting point has shifted.

[34] Under the Code 2009 the starting point is always the two-year standard ineligibility period, which can be increased in cases of intentional doping, whereas under the Code 2015 the starting point is the four-year standard ineligibility period which can be lowered in cases of unintentional doping.

The Code 2015 has introduced two standard ineligibility periods: one for intentional dopers (four years) and one for unintentional dopers (two years), where the four-year period is the starting point. Article 10.2.1, which is relevant to intentional dopers, reads as follows:

> The period of Ineligibility shall be four years where:
>
> 10.2.1.1 the anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.
>
> 10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional.

Article 10.2.2, which is relevant to unintentional dopers, reads: 'If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.'

Consequently, besides the still relevant distinction between specified and non-specified substances, there is a second distinction that becomes even more relevant under the Code 2015: one between intentional and unintentional doping. With respect to non-specified substances, article 10.2.1 contains a presumption that their use constitutes intentional doping whereas the use of specified substances, generally, constitutes unintentional doping (article 10.2.1.2). What constitutes intentional doping is defined in article 10.2.3:

> As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

The Code 2015, therefore, has implemented quite a considerable shift away from the principles incorporated in the Code 2009 (where intention, basically, was not relevant for the standard period of ineligibility[35]) and it remains to be seen whether this approach will be crowned with success or will result in new challenges and uncertainties that need to be resolved by jurisprudence.

Specified Substances in Particular

Specified substances under the Code 2015 play a more prominent role than under the Code 2009 because of the introduction of two different standard ineligibility periods for intentional and unintentional doping. If a specified substance is

[35] But see Code 2009 article 10.6.

involved, the standard ineligibility period is – as it was under the Code 2009 – two years (article 10.2.1.2) unless the anti-doping organisation ('ADO') can prove that the taking of the specified substance is an act of intentional doping. The Code 2015, in this respect, contains a presumption that will help the athlete to establish that the doping was unintentional:

> An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance *and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition*.[36]

Therefore, the question of how article 10.2.3 relates to article 10.2.1.2 with respect to establishing intent arises. If the athlete can show that he or she used the substance out-of-competition, the presumption of article 10.2.3 takes effect and the doping is presumed unintentional – with the consequence that the standard ineligibility period is two years. In such a case, the ADO may still rebut this presumption by showing that the doping nevertheless was intentional, which would result in a four-year ban.

But what happens, for example, if an athlete takes an over-the-counter drug for medical reasons that contains a specified substance during a sports event (which is in-competition)? He or she will not be able to establish that the drug has been used out-of-competition. The presumption of article 10.2.3, consequently, will not be applicable. It is to be expected that in such a case the athlete will still have the possibility to show that the doping was unintentional – he or she just cannot rely on the previously-mentioned presumption. The ADO, on the other hand, is – it is asserted – not relieved from providing its own evidence that the doping was intentional. Just because the presumption of article 10.2.3 does not take effect does not at the same time mean that the ADO is relieved from establishing that the doping was intentional. In other words, the absence of the presumption of article 10.2.3 does not automatically mean that the doping was intentional. To interpret article 10.2.1.2 and article 10.2.3 differently would mean that athletes in cases as described above are worse off than under the Code 2009 – which is against the Code 2015's aim to target the real cheats.

Reduction of Sanction

Besides the relevance of the specified substance in determining the standard period of ineligibility (two or four years), the specified substance also plays a role in the reduction of the standard ineligibility period in cases of unintentional doping. The relevant article in this respect is article 10.5.1 of the Code 2015, which replaces article 10.4 of the Code 2009. Article 10.5.1 differentiates

[36] Code 2015 article 10.2.3 (emphasis added).

between the reduction of the sanction in cases of specified substances (10.5.1.1) and in cases of contaminated products (10.5.1.2).

The wording of article 10.5.1.1 reads:

> Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* … can establish *No Significant Fault or Negligence*, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's … degree of Fault.

Article 10.5.1.2 that relates to contaminated products reads as follows:

> In cases where the *Athlete* … can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the Athlete's … degree of Fault.

The Code 2015 contains the following definition of contaminated products:[37] '[a] product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.'

The definition of contaminated products makes clear that the athlete cannot solely rely upon the packaging but has to engage in further investigations. But unlike in the Code 2009, the athlete no longer has to establish that he or she did not intend to enhance his or her sport performance. With respect to both specified substances and contaminated products, he or she only has to establish no significant fault or negligence. The definition of "no significant fault or negligence" is the following:

> The Athlete … establishing that his or her *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. … for any violation of Article 2.1, the Athlete must also establish how the *Prohibited Substance* entered his or her system. [38]

The athlete must, however, still establish how the substance entered his or her body. This is now part of establishing no significant fault or negligence. In order to prove no significant fault or negligence, the athlete has to establish that 'he or

[37] Code 2015 app 1. This definition raises some interesting questions in particular relating to access *to the internet.*

[38] Code 2015 app 1.

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 otherwise violated an anti-doping rule".[39] The key words here are 'utmost caution', a concept that already exists under the Code 2009. This concept is addressed in more detail below.

If the athlete is able to establish no significant fault or negligence, the standard sanction (which is two years) can be replaced with a reprimand with no period of ineligibility or with a period of ineligibility of up to two years.

Comparison of the Code 2009 and Code 2015 regarding Specified Substances

What Are the Consequences of the Changes in the Code 2015?

The controversial paragraph 2 of article 10.4 of the Code 2009 that led to the *Oliveira/Foggo* debate has not been introduced into the Code 2015. The athlete still has to establish how the substance entered his or her body – which will bring the same difficulties with it as under the Code 2009 – but it is no longer necessary for him or her to establish that he or she had no intention of enhancing his or her sport performance. What he or she has to prove, though, is that he or she acted with no significant fault or negligence. The difference between the former 'no intention of enhancing sport performance' and the new 'no significant fault or negligence' is that (a) the latter no longer needs to be proved by corroborating evidence and (b) the no significant fault or negligence does not relate to the product but rather only to the specified substance, due to the wording of the definition.

In addition, article 10.5.1.2 of the Code 2015 clearly addresses the problem resulting from the *Foggo* interpretation of article 10.4 of the Code 2009 in connection with contaminated products. This means that even though the athlete took a certain (contaminated) product to enhance his or her sport performance, he or she will be able to benefit from article 10.5.1.2 as long as he or she can establish that the adverse analytical finding ('AAF') results from a contaminated product according to the Code definition and that he or she bears no significant fault or negligence. The new articles 10.5.1.1 and 10.5.1.2 in the Code 2015 are better suited to inadvertent doping cases than article 10.4 of the Code 2009, and their applicability is not limited only to some cases as article 10.4 is today if one follows the *Foggo* decision. Consequently, the *Oliveira/Foggo* debate appears to have been overcome by the new wording of articles 10.5.1.1 and 10.5.1.2, which seem to adopt the interpretation of article 10.4 of the Code 2009 stipulated by the *Oliveira* decision. From an athlete's perspective, this is more than welcome and will hopefully strengthen their rights.

[39] Code 2015 app 1 (definition of 'no fault or negligence').

On the other hand, the new system under the Code 2015 with two standard ineligibility periods – one for intentional doping, one for unintentional doping – does not just bring relief for athletes that have used a specified substance. Whereas under the Code 2009 the athlete's intention is not relevant for the standard ineligibility period[40] but only in cases of a reduction of the sanction, the Code 2015 introduces this element also when assessing the standard ineligibility period. The consequence is that under the Code 2015 an athlete is faced with three different situations: (a) a four-year ineligibility period if the ADO can establish that the doping was intentional, (b) a two-year ineligibility period if the doping was unintentional and (c) a reprimand or an ineligibility period up to two years if no significant fault or negligence can be established. The Code 2015, therefore, raised the bar because under the Code 2009 the athlete only faced two situations: (a) a standard ineligibility period of two years and (b) an elimination, reprimand or an ineligibility period up to two years in cases of articles 10.4 or 10.5.

Despite this tightening, the key concept as of 1 January 2015 with respect to a reduction of the standard ineligibility period for specified substances is no longer 'no intention to enhance sport performance' but rather 'no significant fault or negligence'. This concept is not new and already exists under the Code 2009. The next paragraph looks at the case law relating to 'no significant fault or negligence' to see how CAS interprets this concept.

The Jurisprudence Relating to No Significant Fault or Negligence under the Code 2009

Under the Code 2009, article 10.5.2 is only applicable in truly exceptional circumstances and 'not in the vast majority of the cases',[41] limiting the applicability of the 'no significant fault or negligence' defence. Furthermore, under the current Code, the period of ineligibility can only be reduced to one year and cannot be removed entirely. In general, jurisprudence relating to '*no significant fault or negligence*' imposes 'an onerous "duty of utmost caution to avoid any prohibited substance entering [the athlete's] body"',[42] therefore, setting the bar very high.

For example, in *World Anti-Doping Agency v Hardy*,[43] the CAS found that Jessica Hardy was negligent despite what she had done to make sure that her supplements were not contaminated.[44] She had contacted various representatives of the manufacturer; she had consulted her coach and team nutritionist, as well

[40] Except in cases of Code 2009 article 10.6.
[41] Code 2009 comments to articles 10.5.1, 10.5.2.
[42] Czarnota, above n 32, 57 (citations omitted).
[43] *World Anti-Doping Agency v Hardy* (Award, Court of Arbitration for Sport, Case No CAS 2009/A/1870, 21 May 2010).
[44] Ibid 33 [127].

as officials from the US Olympic Committee regarding the supplements. Before she tested positive, she had taken the supplements for 18 months and had not once tested positive. The CAS nevertheless held that she was negligent and that she could have done more.[45] The CAS upheld the one-year suspension.[46] In another case, *Knauss v International Ski Federation*,[47] the athlete was found to be negligent even though the packaging did not list the specified substance and he even made inquiries with the manufacturer of the supplement.[48] The CAS upheld the 18 months suspension.[49] In a further case, *Despres v Canadian Centre for Ethics and Sport*,[50] the supplements were recommended by a sports nutritionist officially engaged by the sports federation. Again, the CAS found that the athlete could have done more, such as consulting his personal doctor or doing further research. In addition, because the CAS considered that the athlete took the supplements for performance enhancing purposes (to recover faster from a hip surgery) it upheld the two-year ban.[51]

It must be noted that the case law cited above and the strict interpretation of 'no significant fault or negligence' resulting from these decisions, relate only to contaminated supplements cases. This jurisprudence and the strict interpretation of 'no significant fault or negligence' cannot be transferred uncritically to other cases involving specified substances such as contaminated food or medicine cases. In other cases not relating to contaminated supplements, the jurisprudence is also rather harsh.[52] In any event,

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[45] Ibid 32 [120]:

> The Panel recognizes that Hardy could have taken other conceivable steps. WADA, indeed, indicated in its submissions other actions that Hardy could have taken: for instance, she could have conducted further investigations with a doctor or another reliable specialist; she could have the supplements tested. Those circumstances actually show that Hardy was indeed negligent, also considering that the risks associated with food supplements are well known among athletes, years after the first cases of anti- doping rule violations caused by contamination or mislabelled products were detected and considered in the CAS jurisprudence. The Panel however finds that Hardy has shown good faith efforts "*to leave no reasonable stone unturned*" (Despres Award, § 7.8) before ingesting the AdvoCare products: she made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements.

[46] Due to the limitations in the Code 2009, it was not possible for the CAS to impose a sanction of less than one year. It would be interesting to see what kind of sanction a panel would impose on Hardy under the Code 2015, where the sanction can be less than one year.

[47] *Knauss v International Ski Federation* (Award, Court of Arbitration for Sport, Case No CAS 2005/A/847, 20 July 2005).

[48] *Knauss v International Ski Federation* (Award, Court of Arbitration for Sport, Case No CAS 2005/A/847, 20 July 2005) 9 [17].

[49] Ibid 9–10 [18]: ' Of course, the Appellant could have had the nutritional supplement tested for its content. He could also have avoided the risk associated with nutritional supplements by simply not taking any.'

[50] *Despres v Canadian Centre for Ethics and Sport* (Award, Court of Arbitration for Sport, Case Nos CAS 2008/A/1489 and CAS 2008/A/1510, 30 September 2008).

[51] Czarnota, above n 32, 60.

[52] See, eg, *Squizzato v Fédération Internationale de Amateur* (Award, Court of Arbitration for Sport, Case No CAS 2005/A/830, 15 July 2005) where a 17-year-old swimmer had used a skin cream to fight skin affection.

> The duty of utmost caution requires athletes to know … what substances … are included on the Prohibited List, follow health care and nutrition guidelines set by governing bodies, review a product's packaging, refrain from ingesting any products without consulting a 'competent medical professional', refrain from ingesting products from 'unreliable sources' and avoid places with an 'increased risk of contamination.'[53]

This particularly applies to consuming contaminated supplements but also applies to medication and even to drinks and food. But even if the athlete follows professional advice from an official, such as a team doctor, this does not relieve the obligation to do his or her own investigation.[54]

The jurisprudence of CAS can therefore be summarised as follows (albeit in a somewhat exaggerated way): whatever the athlete has done to prevent inadvertent doping, the CAS will generally find that he or she could have done more. This is particularly troubling considering that the doping education for athletes is not on the level it should be. It is questionable whether it is right to impose such a high standard if the sport federations do not fulfil their obligation of educating young athletes in doping matters. On the other hand, when analysing the case law relating to article 10.5.2 of the Code 2009, it must be kept in mind that the panel's ability to reduce a sanction is limited due to the fact that it is not possible to give a sanction of less than one year; this may result in ineligibility periods that seem rather harsh, given the specific circumstances.

Interpretation of No Significant Fault or Negligence under the Code 2015

The most obvious differences between the Code 2015 and the Code 2009 concerning the 'no significant fault or negligence' concept are that under the Code 2015, this concept is no longer applicable only in exceptional circumstances and the sanction can be reduced to less than one year. The scope of this concept, therefore, has been broadened under the new *WADA CODE*, which will provide some relief for athletes.

The definition of 'no significant fault or negligence', on the other hand, has not been modified; the key element still is 'utmost caution'. As pointed out, CAS set a very high threshold under the Code 2009 for an athlete to establish 'no significant fault or negligence', particularly in cases of contaminated supplements. Besides the broader application of 'no significant fault or negligence', it is difficult to see how the wording of articles 10.5.1.1 and 10.5.1.2 of the Code 2015 will

[53] Czarnota, above n 32, 58 (citations omitted).
[54] See, eg, *Despres v Canadian Centre for Ethics and Sport* (Award, Court of Arbitration for Sport, Case Nos CAS 2008/A/1489 and CAS 2008/A/1510, 30 September 2008).

lead to a shift in the CAS jurisprudence that is more in the athletes' favour. The stringent interpretation of 'no significant fault or negligence' developed under the Code 2009 in cases involving contaminated supplements must not be adopted as the general standard under the Code 2015 that also applies to contaminated food or medication cases. If it was, athletes would definitely be worse off than under the regime of the Code 2009.

In interpreting 'no significant fault or negligence' in the Code 2015, disciplinary tribunals should rather follow the differentiated approach taken by a panel in a recent CAS decision.[55] Even though article 10.4 of the Code 2009 (and not article 10.5.2) was applied, the panel developed guidelines on how to approach an inadvertent doping case that would also be helpful under the new Code 2015.[56] The panel differentiated between three different degrees of fault: (a) significant degree of or considerable fault; (b) normal degree of fault; and (c) light degree of fault.[57] The panel then linked the length of the ineligibility period with these different degrees of fault:[58] (a) significant degree of fault cases will result in an ineligibility period of 16 to 24 months, with a standard significant fault case leading to a 20 months suspension; (b) normal degree of fault cases will result in an ineligibility period of 8 to 16 months, with a standard normal degree of fault case leading to 12 months suspension; and (c) light degree of fault cases will result in an ineligibility period of 0 to 8 months, with a standard light degree of fault case leading to a 4 months suspension. The objective level of fault determines into which of the three categories of fault the athlete falls; the subjective level of fault, on the other hand, shall determine the specific suspension within that category of fault.[59] When determining what can be expected from an athlete, the panel mentioned that it included what an athlete

[55] *Cilic v International Tennis Federation* (Award, Court of Arbitration for Sport, Case Nos CAS 2013/A/3327 and CAS 2013/A/3335, 11 April 2014).

[56] Ibid 14 [66]:

> The ITF made clear in its submission that, whether it was successful or not in this case, it would welcome guidance on how to approach the determination of sanctions within the 0-24 month range specified in Article 10.4. It invited the setting out of principles which could guide a hearing panel's discretion to encourage consistency. The Panel has accepted that invitation, since it agrees that it would be helpful to have guidelines to assist stakeholders when considering the application of Article 10.4.

[57] Ibid 15 [69].

[58] Ibid 15 [70].

[59] Ibid 15–16 [71]–[73]:

> In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in the light of his personal capacities.
>
> The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.
>
> The subjective element can then be used to move a particular athlete up or down within that category.

could do to prevent an ADRV.[60] In this respect, the panel made an interesting statement: '[h]owever, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances'.[61] The panel establishes different duties of care depending on the substances involved. In cases of substances that are prohibited at all times, 'an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.'[62] The same applies to cases where a substance, that is only prohibited in-competition, is taken in-competition. If such a substance, on the other hand, is taken out-of-competition but the athlete returns an AAF in-competition, the panel is of the opinion that the athlete's degree of fault is either normal or light because 'no significant fault can be attributed to the athlete'.[63] The panel made two exceptions from this:[64] (a) where the products involved are sold for 'performance enhancing' purposes,[65] and (b) where the product is a drug designed for therapeutic purposes.

One can ask whether it would have been preferable to develop this concept not based on the substance involved but rather based on the source that led to the AAF. If an athlete takes contaminated glucose tablets, should the duty of care be higher depending on whether the tablets were contaminated with a substance that is only prohibited in-competition compared to one that is prohibited at all times? Be that as it may, this decision rightly acknowledges that there are different situations that require different assessments in order to achieve a fair result. The approach and the guidelines developed in this decision should be adopted by future panels when applying article 10.5 of the Code 2015.

Hopefully, CAS will view the changes to the inadvertent doping system under the Code 2015 as an opportunity to review and adjust its jurisprudence with respect to 'no significant fault or negligence' in order to establish a fair and balanced approach that takes into account that athletes are only human and mistakes can happen. The recent CAS decision mentioned provides some hope in this respect.[66] However, it remains to be seen how the jurisprudence with respect to no significant fault or negligence will develop under the Code 2015.

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[60] 'The athlete could always (i) read the label of the product used … (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters': ibid 16 [74]

[61] Ibid 16 [75].

[62] Ibid 16 [75(a)].

[63] Ibid 17 [75(b)(ii)].

[64] Ibid 17 [75(b)(ii)].

[65] This exception, however, should not be applied to all cases of supplements under the Code 2015 but only to those containing a clear indication that they are, or might be, performance enhancing (eg, if the product name is "Muscle Pro" or "Muscle Growth", to take the example of the CAS panel).

[66] *Cilic v International Tennis Federation* (Award, Court of Arbitration for Sport, Case Nos CAS 2013/A/3327 and CAS 2013/A/3335, 11 April 2014).

Conclusion

The Code 2015 introduces some significant changes to the sanctioning process in general and for specified substances in particular. The most notable change is the explicit differentiation between intentional and unintentional doping and the aim to punish intentional dopers more harshly than under the previous Code regimes. This shall be achieved by a new standard ineligibility period of four years for intentional doping. Whether this aim will be achieved remains to be seen and largely depends upon the interpretation of the new term 'intentional doping' introduced into the Code.

With respect to specified substances, the new Code dismisses the system of 'no intention to enhance sport performance' entirely by introducing the 'no significant fault or negligence' test also for specified substances. In addition, the Code 2015 introduces a specific defence for contaminated products cases, which clearly helps to end the *Oliveira/Foggo* debate and ensures that inadvertent dopers may benefit from a reduced sanction if the specific circumstance so require even if contaminated supplements are involved. On the other hand, it cannot be ruled out that the new wording, in particular the definition of contaminated product, brings along new difficulties in the interpretation of these terms. In addition, one can only hope that the CAS or other disciplinary tribunals do not adopt the interpretation of 'no significant fault or negligence' that was developed under the Code 2009 in contaminated supplements cases. On the contrary, such tribunals should adopt the differentiated and sophisticated approach taken by the panel in *Cilic v International Tennis Federation*.[67] In the end, we will have to wait for the first inadvertent doping cases to reach CAS (which, experience shows, will not take long) to see how article 10.5 is applied and what the changes in the Code 2015 to the sanctioning system really mean for athletes.

[67] Ibid.