information that has undergone pseudonymisation,[5] and online identifiers such as mobile device identifiers and IP addresses.[6]

(2) The 'purpose' of handling that data is one that will lead to a relationship of that data with a data subject, ie the data will be used 'with the purpose to evaluate, treat in a certain way or influence the status or behaviour of an individual', such as the review of sporting footage to analyse an athlete's performance.

(3) The 'result' of data processing is one that will lead to 'an *impact* on a certain individual's rights and interests' (emphasis in the original). WP136 underlines that it is not necessary for this to be a substantial impact: 'it is sufficient if the individual may be treated differently' as a result of the processing. For example, the particular deterioration of sporting equipment such as racing car parts or cycling equipment is not of itself personal data, except to the extent to which this deterioration may be attributed to and used to assess or reprimand an athlete or support worker.

1 A body that was established under the DP Directive as a cooperative body representing the data protection authorities of all EU Member States, and that issued non-binding guidance. It has been replaced under the GDPR by the European Data Protection Board.
2 WP136, adopted 20 June 2007.
3 Ibid, p 6.
4 Ibid, pp 10-11.
5 GDPR, Recital 26.
6 GDPR, Recital 30.

A4.9 An essential element of the definition of personal data is that it must relate to an identifiable data subject. Data can identify a data subject either directly or indirectly. Indirectly identifying information may be linked to a data subject through a connection with other information held by the controller, or that could be readily accessed by the controller (for example, data in the public domain). Nor does the individual necessarily need to be known to the controller. In the world of esports, for example, a player may be predominantly or uniquely known by a pseudonym. The fact that the 'real life' player is unknown to a particular controller does not stop information processed about them being considered personal data. Similarly, the choice to deliver marketing to a particular cookie holder based on their browsing history involves the processing of personal data, even if the only known identifier to the organisation is that user's cookie ID.

A4.10 The GDPR states, in Recital 26, that 'to determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used'. The Recital elaborates that:

> 'account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments'.

The equivalent Recital under the DP Directive was considered by the CJEU in C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* (*Breyer*), with the court stating that identification would be unlikely in a case where:

> '[…] the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant'.[1]

This leaves, in practice, a relatively narrow scope for anonymity, which is perhaps not unsurprising given that anonymous data falls outside of data protection law and the reach of regulators.[2] For more information on anonymisation, a vast and controversial topic of itself, organisations can consider lengthy guidance issued

by the UK's supervisory authority, the Information Commissioner's Office (ICO),[3] and information produced by the Article 29 Working Party.[4] The GDPR has since introduced a new concept of 'pseudonymous' data, which has in practice narrowed the bounds of anonymity even further.[5]

1 C-582/14 *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779, para 46.
2 GDPR, Recital 26: 'The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable'.
3 Information Commissioner, 'Anonymisation Code of Practice' (November 2012). Note that this code was drafted to address the previous UK law and is no longer official guidance. It remains accessible and provides some assistance in the absence of more recent UK guidance. The ICO was understood to be working on a new draft code during 2020.
4 Article 29 Working Party, 'Opinion 05/2014 on Anonymisation Techniques' (WP 216) adopted 10 April 2014.
5 Article 4(5) of the GDPR defines pseudonymisation as '[…]the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'. Although pseudonymisation involves taking steps to reduce the identifiability of the affected data, the GDPR clearly applies to such information. For more details, see ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-is-personal-data/#pd4 [accessed 29 September 2020].

A4.11 It is important to remember that personal data about one data subject can be simultaneously the personal data of a third person. This is particularly true of opinions, which are simultaneously the personal data of the holder and the subject. They can also concurrently form part of the intellectual property of others (such as photographs, or information forming part of a database).[1] There is no inherent concept of ownership within data protection law. Rather, controllers and processors have responsibilities and individuals have rights over data.

1 See paras H1.81 (copyright in photographs) and H1.77 et seq (database rights).

A4.12 Within the definition of personal data, there are certain types of data that require additional protection under the GDPR. These types of data are identified in Article 9(1) of the GDPR as 'special categories' of personal data, namely:

> 'personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership […], genetic data, biometric data [processed] for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation'.

This special category data, previously known as 'sensitive' personal data under the DP Directive, is treated differently under the GDPR, requiring an additional legal basis to overcome a general prohibition of processing (see para A4.55) and imposing additional accountability obligations (see Section 3E, 'Accountability' below). Separately, data relating to criminal convictions and offences ('criminal offence data') are also subject to specific restrictions under Article 10 of the GDPR, which are discussed in brief later in this chapter (see Section 3A, 'Lawful, fair and transparent' below). In the UK, s 11(2) of the DPA 2018 expands the definition of criminal offence data to specifically include 'the alleged commission of offences' and 'proceedings' in relation to offences, including their disposal and sentencing. The ICO, in its guidance on criminal offence data, explains that in the UK, at least, the definition should be considered to be even broader:

> 'It includes not just data which is obviously about a specific criminal conviction or trial, but also any other personal data relating to criminal convictions and offences, including:

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both 'common decisions' and 'converging decisions'.[2] On converging decisions, the type of joint control established through the CJEU judgments, the EDPB explains:

> 'an important criteria [*sic*] to identify converging decisions in this context is whether the processing would not be possible without both parties' participation in the sense that the processing by each party is inseparable, ie inextricably linked'.[3]

Joint determination of purpose, the EDPB adds, need not mean that the *same* purpose is pursued, provided that the entities involved 'pursue purposes which are closely linked or complementary […] for example, where there is a mutual benefit arising from the same processing operation' and this isn't simply a case of 'being paid for services rendered'.[4] Joint determination of means, meanwhile, requires merely that the entities have 'exerted influence' over the means of processing, and different controllers can be solely responsible for determining certain means. In particular, the EDPB says that if one entity provides the predominant means of processing – such as a tool or platform – and makes it available to others, a controller who chooses to make use of that tool should still be considered to be jointly determining the means of processing.[5] The use of such common tools or infrastructure will not always lead to joint control, but organisations will need to show that 'the processing they carry out is separable and could be performed by one party without intervention from the other' or that the other party acts as a processor without a purpose of its own.[6]

1 Draft EDPB Control Guidelines, p 17.
2 Ibid, p 18.
3 Ibid.
4 Ibid, p 19.
5 Ibid, p 20.
6 Ibid.

A4.25 Sports organisations may often find themselves in joint control relationships, given this low threshold and their frequent collaboration with others. For example, a sports governing body may find itself a joint controller with a competition organiser, or a professional club may find itself a joint controller with sponsors when carrying out hosted marketing.[1] A prudent approach, in light of the case law and the Draft EDPB Control Guidelines discussed above, would be to assume that a joint control relationship exists when interacting with other controllers over the same data unless each party has clearly distinct purposes and processing activities. Sports bodies in this position should take care to allocate data responsibilities and liabilities between themselves and the other controller(s) in writing.

1 See Section 6A, 'Direct marketing – the GDPR and PECR', below, on hosted marketing and joint control.

C What is the scope of data protection law?

A4.26 Data protection law began life not as a general privacy law, but rather as a reaction to the risks perceived in automated data handling when computers began to land on office desks. This can be seen in the fact that the GDPR excludes from its scope the use of personal data by an individual 'in the course of purely personal or household activity',[1] and is limited in Article 2(1) to processing 'by automated means' and 'other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system'. Non-automated data will usually be in the form of paper records, or handwritten notes. The definition of a filing system in the GDPR is 'any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis'.[2] UK public authorities (caught by the Freedom of Information Act 2000 or Freedom of Information (Scotland) Act 2002) should be aware that even unstructured non-automated data that they process will be considered personal data, thanks to an extension of scope under s 21 of the DPA 2018.

1 GDPR, Art 2(2)(c).
2 The CJEU, in considering the identical language contained in the DP Directive, held in C-25/17 *Tietosuojavaltuutettu intervening parties – Jehovan todistajat – uskonnollinen yhdyskunta*, at para 57 that 'it appears that the requirement that the set of personal data must be "structured according to specific criteria" is simply intended to enable personal data to be easily retrieved'. This appears to lead to a broader interpretation of what is caught by data protection law than was understood by the previous UK law concept of a 'relevant filing system' under the Data Protection Act 1998.

A4.27 The other limit on the scope of both the GDPR and the UK GDPR that will be created by the Data Protection Exit Regulations is territorial. This is not to say that either piece of legislation is unambitious in this respect. On the contrary, many sports organisations outside of the EU and the UK respectively will find themselves caught by these laws. Article 3 of the GDPR states that data protection law will extend to any organisation established in the EU,[1] or to organisations established outside the EU where they either offer goods or services to data subjects in the EU (irrespective of whether payment is required)[2] or monitor the behaviour of data subjects, so far as their behaviour takes place in the EU.[3] Guidance on the extent of this territorial application has been produced by the European Data Protection Board (EDPB),[4] in its Guidelines 3/2018 on the territorial scope of the GDPR under Article 3 ('Territorial Scope Guidelines').[5]

1 GDPR, Art 3(1).
2 GDPR, Art 3(2)(a).
3 GDPR, Art 3(2)(b).
4 This is a legal body set up under Art 68 of the GDPR, composed of a representative from a supervisory authority for each EU Member State, with tasks (including the drafting of guidelines) set out in Art 70 of the GDPR.
5 Version 2.0, published 19 November 2019.

A4.28 The concept of establishment, which Recital 22 of the GDPR tells us 'implies the effective and real exercise of activity through stable arrangements', has been broadly interpreted both by the courts and regulators. The CJEU has ruled both that establishment 'extends to any real and effective activity — even a minimal one',[1] and that the processing 'in the context of activities' of an establishment 'cannot be interpreted restrictively'[2] and includes the carrying out of activities in a Member State that lead to a non-EU operator's activities being profitable, where these two activities are 'inextricably linked'.[3] This could potentially extend the scope of the GDPR to the wider processing of global sports organisations with representative offices or subsidiaries located in the EU or UK carrying out promotion or sales activities.

1 C-230/14 *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság*, ECLI:EU:C:2015:639, para 31.
2 C-131/12 *Google Spain SL, Google Inc v AEPD, Mario Costeja González* ECLI:EU:C:2014:317, para 53.
3 In *Google Spain*, ibid at para 56, the provision of a search engine by Google's US company and its associated data processing was considered to be established through Google's Spanish entity, 'since the activities relating to the advertising space [performed by the Spanish entity] constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed'.

A4.29 It is worth stressing that once considered established in the EU or UK, all processing carried out in the context of that establishment will be covered by the GDPR or UK GDPR respectively. This can include the processing of data collected outside of the EU by an EU established entity. For example, a Premier League club collecting data about its fans in Asia, or a European tennis tournament processing data about entrants from all over the globe, must apply the principles of the GDPR to the entirety of their processing.

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well summarised in the Article 29 Working Party's Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217):

> 'Legitimate interests of the controller, when minor and not very compelling may, in general, only override the interests and rights of data subjects in cases where the impact on these rights and interests are even more trivial. On the other hand, important and compelling legitimate interests may in some cases and subject to safeguards and measures justify even significant intrusion into privacy or other significant impact on the interests or rights of the data subjects'.[2]

1 ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/legitimate-interests/ [accessed 29 September 2020].
2 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC', WP217, adopted 9 April 2014, p 30.

A4.52 Both Recital 75 of the GDPR and WP217 note that, when carrying out an assessment, not all data or data subjects are equal. Recital 75 tells us that particular risk arises when processing data of 'vulnerable natural persons, in particular of children'. WP217 confirms that 'it is important to assess the effect of actual processing on particular individuals'.[1] The Working Party also flagged that the nature of the personal data to be processed was a relevant consideration, noting that 'in general, the more sensitive the information involved, the more consequences there may be for the data subject'.[2] The previous processing of data may also be a factor in a balancing test – for example, 'whether the data has already been made publicly available by the data subject or by third parties may be relevant'.[3]

1 WP217, p 41.
2 Ibid, p 39.
3 Ibid.

A4.53 The ICO has made clear that it expects controllers to carry out formal 'Legitimate Interests Assessments' to determine whether they have met these three tests.[1] A template can be found on its website.[2] This assessment should be carried out prior to the commencement of processing, and is an important part of the accountability documentation that should be maintained by controllers (see Section 3(E) below).

1 ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/legitimate-interests/ [accessed 29 September 2020].
2 ico.org.uk/media/for-organisations/forms/2258435/gdpr-guidance-legitimate-interests-sample-lia-template.docx – [accessed 29 September 2020].

A4.54 Where controllers choose to rely on legitimate interests, this impacts on other obligations, such as what must be included in a privacy notice, and on the rights of individuals. In particular, the right to object to processing is a powerful tool for individuals. This is further discussed in Section 4(B), 'The rights of access and portability' below.

(d) Special category data

A4.55 Processing of special category data is unavoidable in certain areas of sport. Health data, in particular, is captured through anti-doping tests, through management of athletes' injuries and performance, and in the assessment of eligibility for disabled sport. Other types of special category data may also be processed. Information on religion or ethnicity may be vital to help diversity initiatives, whilst an investigation into a safeguarding allegation may involve the collection of information about a child or alleged perpetrator's sex life. Use of this data is however prohibited by the GDPR

unless the relevant controller can demonstrate that it has met one of the conditions under Article 9(2).

A4.56 The available Article 9(2) legal grounds are:

(a) the explicit consent of the data subject (Art 9(2)(a));
(b) processing is necessary to meet employment law or social security law requirements (eg collecting health data to provide maternity or disability rights), as set out in EU or Member State law (Art 9(2)(b));
(c) processing is necessary to protect the vital interests of an individual where the data subject is unable to give consent (Art 9(2)(c));
(d) certain processing by political, philosophical or religious non-profits or trade union where processing relates solely to members and is not disclosed without consent (Art 9(2)(d));
(e) processing involves personal data 'manifestly made public' by the data subject (Art 9(2)(e));
(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity (Art 9(2)(f);
(g) processing is necessary for 'reasons of substantial public interest, on the basis of EU or Member State law' (Art 9(2)(g));
(h) processing is necessary for preventative or occupational medicine, including 'assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of EU or Member State law or pursuant to contract with a health professional' (Art 9(2)(h));
(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats on the basis of EU or Member State law (Art 9(2)(i)); or
(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes based on EU or Member State law (Art 9(2)(j)).

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A4.57 For processing of special category data to be legitimate, it must have an Article 6 legal basis *and* it must meet one of these Article 9 conditions. A key difference between the two Articles is that whilst Article 6 is self-executing, a number of the provisions in Article 9 require reference to national or EU legislation. Controllers cannot assume that they can (for example) identify for themselves whether there is a substantial public interest in processing. Where a provision requires that there be a basis in EU or Member State law, controllers must look to that law for such basis. Although the GDPR recognises that references to laws can be broadly interpreted, and do 'not necessarily require a legislative act adopted by a parliament',[1] there is no specific EU or UK sports legislation.[2] Controllers therefore need to consider laws on a country by country basis. For controllers located outside the EU, this may require reference to multiple countries' laws. In this chapter, we focus on the UK's approach to special category data, but now that the UK has left the EU, British controllers should be aware that where they collect special category data from EU countries they may also need to consider the laws of those countries.

1 GDPR Recital 41.
2 See para A1.8 and generally Chapter A3 (Government Intervention in the Sports Sector).

A4.58 In most countries, these additional special category data conditions are set out in subject-matter specific legislation. For example, in Ireland, a legal basis for the Irish National Anti-Doping Organization (NADO) to handle special category data is set out in s 43 of the Sport Ireland Act 2015. In the UK, special category data conditions are included within the DPA 2018 in Sch 1. Under the GDPR, criminal

(f) details of any international transfer outside of the EU/UK, and details of the safeguards in place (see Section 5, 'International transfers', for more details on international transfers);
(g) how long data will be retained or, if a precise period cannot be stated, the criteria that will be used to determine this period;
(h) information on applicable data subject rights, including the right to withdraw consent if relevant, and the right to complain to a supervisory authority;
(i) where relevant, because of processing required by law or by contract, details of what information the data subject is obliged to provide and the possible consequences of failure; and
(j) the existence of any automated decision-making that might significantly affect the data subject (as described in Article 22 of the GDPR) and details of the logic (ie the parameters being used to direct the automation) and potential consequences of such processing.

1 See para A4.33 on the obligation to appoint a representative. This should not be confused with a requirement to name a contact person unless a data protection officer has been appointed. As a result, this obligation does not apply to controllers established in the EU.

A4.85 Where data is collected directly from the individual, Article 13 requires that this information is presented at the time the data is collected. Where it is collected indirectly, Article 14 requires that the information is provided 'within a reasonable period' and no later than the earliest of:

(a) One month after the data are obtained;
(b) The time of the first communication with the data subject; or
(c) The first disclosure of the data to a third party.[1]

1 GDPR, Art 14(3).

A4.86 WP260 expands on these requirements in some detail. Controllers are expected to take particular care in drafting their notices. In discussing what is 'intelligible' and 'clear and plain language', the Article 29 Working Party said that it is necessary that a notice 'be understood by an average member of the intended audience'.[1] To achieve this, WP260 highlights a need to avoid 'language qualifiers' such as 'may', 'often' and 'some' to the extent possible, as well as 'excess nouns'.[2] Similarly, controllers are expected to use an active rather than a passive voice and to reject 'overly legalistic, technical or specialist language or terminology'.[3] Examples of poor practice given in the guidance include the use of broad generic or 'abstract' statements about how data will be used, such as 'We may use your personal data to develop new services'. Instead, specific and 'definitive' statements should be used.[4]

1 WP260, para 9.
2 Ibid, para 13.
3 Ibid.
4 Ibid, para 12.

A4.87 In order to convey this type of information with sufficient precision and clarity, many sports organisations may find that it is necessary to have multiple privacy notices in place. This will be especially necessary where an organisation needs to address different types of data subjects with whom it interacts (such as professional athletes and fans, whose data will be used in completely different ways). In particular, children will need special consideration. WP260 tells us that controllers must 'ensure that the vocabulary, tone and style of the language used is appropriate to and resonates with children so that the child addressee of the information recognises that the message/information is being directed at them'.[1] Processing of children's data online and providing notices has also been considered by the ICO in its Age-Appropriate Design Code.[2] It recommends the use of 'just in time' notices, prompts

to discuss the notice with an adult, and use of 'child friendly' methods such as 'diagrams, cartoons, graphics, video and audio content, and gamified or interactive content that will attract and interest children'.[3] Importantly, this Code applies to any 'information society services likely to be accessed by children'.[4] As children are defined as anyone under the age of 18, the Code will apply to most general audience sites and services. For most sports organisations offering any type of online service, including news or entertainment content, e-commerce, online games or on-demand video, full compliance with this Code poses a substantial regulatory burden.

1 WP260, para 14.
2 Age Appropriate Design Code, 2 September 2020. Organisations are required to comply with the code by 2 September 2021. In addition to transparency, the Code sets out guidance on a number of topics, including data protection impact assessments, default settings, data minimisation, geolocation data, and profiling. A full review of the Code goes beyond the scope of this chapter, but it should be reviewed in full by any UK controller offering information society services to children or to a general audience.
3 Age Appropriate Design Code, pp 37–42.
4 DPA 2018, s 123.

A4.88 In giving the required notice to both children and adults, there is a tension between the obligation to be clear and concise, and the lengthy details that need to be provided to data subjects under Articles 13 and 14. WP260 recommends that 'layered' notices are used, with more complete information displayed at different stages, noting that this can 'help resolve the tension between completeness and understanding, notably by allowing users to navigate directly to the section of the statement/notice that they wish to read'.[1] In any event, certain core information must be included in the first statement to individuals. In particular, the guidance suggests this top layer must include, as a minimum, 'the details of the purposes of processing, the identity of controller and a description of the data subject's rights', and 'information on the processing which has the most impact on the data subject and processing which could surprise them'.[2]

1 WP260, para 35.
2 Ibid, para 36.

A4.89 There will come a time in almost all data processing where information given in a notice will need to be updated. If this is because a controller wishes to use the data for a different purpose, Articles 13(3) and 14(4) require that data subjects be told of the new purpose and also given all the relevant information otherwise set out in para A4.84 above, prior to the commencement of the new processing. WP260 sets out the expectation of the EDPB that any 'substantial or material change' should be communicated to data subjects, which includes any changes in purpose, to the identity of the controller. or to the methods individuals can use to exercise their rights.[1]

1 WP260, para 30.

A4.90 There are limited exemptions to the obligation to provide a notice. Within the GDPR itself, the only exemption to providing a notice where information is collected directly from the data subjects is where the individual already has all of the relevant information required under Article 13.[1] Although WP260 emphasised that these should be interpreted and applied 'narrowly',[2] more exemptions are set out in Article 14(5) for indirectly collected data:

(a) The information has already been provided (this is unlikely, given the indirect collection, unless the source has done this on the controller's instruction);
(b) The information would be impossible to provide or would involve a disproportionate effort, especially for archiving or research purposes, or where it would make the achievement of the objectives of the processing impossible or seriously impair them (discussed in more detail below);

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this 'may remove the likelihood of risk to individuals, thus no longer requiring notification to the supervisory authority [...]'.

(e) The 'special characteristics of the individual' – the EDPB suggests that the involvement of data relating to 'children or other vulnerable individuals' is likely to increase risk.

(f) The 'special characteristics of the controller' – the nature of the controller may have a bearing, with a NADO losing data about an athlete it is investigating being more likely to be high risk than information lost by a company holding the athlete's details on a mailing list.[2]

In summing up the weighing of these factors, the EDPB suggests 'if in doubt, the controller should err on the side of caution and notify'.[3] WP250 includes, at Annex B, a list of ten breach scenarios that the EDPB would expect to be reported.[4]

1 WP250, p 24.
2 Ibid, pp 23–26.
3 Ibid, p 26.
4 Ibid, pp 31–33.

A4.121 The time given to report a breach, 72 hours from 'becoming aware', is not generous. The EDPB tell us in WP250 that a controller is considered to become aware when it has a 'reasonable degree of certainty' that personal data have been compromised as a result of a security incident.[1] There is an expectation that organisations will put in place measures to ensure that breaches are promptly brought to their attention.[2] The first media report or complaint from an individual will not be considered to have made the controller aware; rather, the controller would be considered to have become aware at the point that its own investigation determines to the appropriate level of certainty that a breach has taken place.[3] The GDPR permits partial reports to be made, and so it is not necessary to have completed a full investigation prior to making an initial report.

1 WP250, p 12.
2 Ibid.
3 Ibid.

A4.122 Where a processor is involved in a breach, it is still the controller that must decide whether there is a risk to data subjects and whether reports to supervisory authorities or individuals are necessary. The sole statutory role for processors is the obligation to report personal data breaches to the controller 'without undue delay'.[1] As discussed below, in Section 3(E), 'Accountability', controllers may seek to impose more requirements by contract, particularly on the remediation of breaches that are the fault of the processor.

1 GDPR, Art 33(2).

A4.123 Reports must be made to the appropriate supervisory authority. For a UK sports organisation where the breach only affects data subjects in the UK, the report must be made to the ICO.[1] For multi-jurisdictional breaches, there may be cross-border reporting requirements. This will particularly be the case where the controller is not established in an EU country. Sports bodies should also be mindful that countries outside of Europe have data breach reporting obligations, particularly in the US, Australia, and Asia. Reports must be made using the forms made available by each authority, which vary in content, and require different information to be provided, from details of staff training to the names and contact details of processors. All will require the information set out in GDPR, Article 33(3), including the nature and quantity of data lost, affected data subjects, the likely consequences of the breach, and the steps taken to address and remedy any adverse effects. To identify relevant supervisory authorities, WP250 advises that controllers should look to their lead authority. For those outside of the EU, the EDPB recommends 'that notification should be made to the supervisory authority in the Member State where the controller's representative in the EU is established'.[2] This should avoid a need to report across a large number of Member States. Organisations located outside of the UK should note that as a result of Brexit the ICO will need to be informed whenever UK individuals are affected by a breach.

1 The ICO requires that reports be made through its website or through its phone line. More details can be found at ico.org.uk/for-organisations/report-a-breach/personal-data-breach/ [accessed 30 September 2020].
2 WP250, p 18.

A4.124 If an organisation is comfortable that a breach does not have to be reported, because it is unlikely to pose a risk to data subjects, this does not mean that it can be entirely dismissed. Article 33(5) of the GDPR requires that 'the controller document any personal data breaches, comprising the facts relating to the personal data breach, its effects and the remedial action taken'. This is one of many types of document or log that controllers must maintain under the GDPR, as a result of the final data protection principle, ie accountability.

E Accountability

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A4.125 All the principles discussed earlier in this section existed under the DP Directive, although the precision of their associated obligations may have differed. The only entirely new principle under the GDPR is that of accountability. Set out in Article 5(2), it requires controllers to 'be responsible for, and be able to demonstrate compliance with' the other principles. The ICO explains that this means controllers 'now need to be proactive about data protection, and evidence the steps [they] take to meet [their] obligations and protect people's rights'.[1] Both specific and principle-based accountability requirements are threaded through the GDPR, which we will consider in turn.

1 ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/ [accessed 30 September 2020]..

(a) Data protection by design and by default (Article 25)

A4.126 Data protection by design and default are the codification of a privacy by design approach championed by data regulators prior to the GDPR. It is, in effect, a proactive rather than reactive requirement to protect data. Data protection by design is addressed in Article 25(1) of the GDPR. It requires that controllers, both at the time of setting the purposes of processing and the time of processing itself, taking into account the relevant risks:

> 'implement appropriate technical and organisational measures [...] which are designed to implement data protection principles [...] in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects'.

In practice, this requirement embeds an obligation for controllers to consider and implement privacy protections at the outset of processing. Sports organisations must be able to demonstrate that this has been done, and that privacy protections are still in place once processing is commenced. Any new customer relationship management system or new participant research project or new collection or use of player data should go through an assessment *before it is started* to ensure that data protection measures and safeguards are in place.

overrides the rights of the individual. It is advisable to rely on contractual grounds where possible, but where this is not feasible (for example, where dealing with children or amateur participants) it is often best to offer an explicit right to object at the point data is collected, to avoid complaint at a later stage. Broadcasters and publishers may be able to rely on freedom of expression grounds to justify refusal of such requests.

(b) *Disciplinary and integrity data* – ADOs and sports governing bodies often process details of integrity, doping, and safeguarding matters, and may publish details of enforcement action they take. Where objection requests are received, bodies are likely to defend these on the basis that this processing is necessary for the compelling interest of protecting the sport's integrity and the rights of its participants to fair play. In relation to publication of enforcement action, this is more likely to cause obvious damage or distress to an individual, and organisations should be prepared both to robustly defend their decision making and to take a case-by-case approach in assessing what ought to be published. Where compromises can be made, such as applying more limited retention periods or tailoring publication to restrict release of identifying details that are not central to a charge or ban, this will demonstrate a proportionate approach.

D Significant automated decisions

A4.178 Article 22 of the GDPR provides that 'the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. Unlike the reactive rights discussed earlier in this Section 4, this is a proactive obligation on the controller much like the individual's right to be informed. Unless the controller can meet a derogation, set out in Article 22(2), such significant automated decisions are not permitted. The derogations only allow such decision-making tools to be used if they are necessary for entering into or performing a contract with the data subject, are authorised by law, or are based on the data subject's explicit consent.[1]

1 GDPR, Art 22(2).

A4.179 This provision is relatively narrow in scope. There are few obvious examples of when such decision making may be used in sport. In practice, the vast majority of decisions will be made with human input, whereas only 'solely' automated decisions are caught here. This is especially true where these decisions have legal or 'similarly significant' outcomes. Examples of decision-making that may still be caught include:

(a) use of software to assess CVs and automatically reject certain candidates;[1] and
(b) use of automated profiles to offer different prices to certain kinds of preferentially treated customer ('dynamic pricing').

1 GDPR, Recital 71.

A4.180 The EDPB has examined the scope of Article 22 within its adopted Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679.[1] This particularly looked at whether targeted online advertising, used by many sports organisations, is likely to trigger Article 22. It explained that:

> 'in many typical cases the decision to present targeted advertising based on profiling will not have a similarly significant effect on individuals [...] however, it [...] may do depending upon the particular characteristics of the case, including:
> - the intrusiveness of the profiling process, including the tracking of individuals across different websites, devices and services;
> - the expectations and wishes of the individuals concerned;
> - the way the advert is delivered; or
> - using knowledge of the vulnerabilities of the data subjects targeted'.[2]

1 WP251 rev 01, revised and adopted on 6 February 2018.
2 Ibid, p 22.

A4.181 If a sports body believes it is carrying out this type of processing, the easiest solution is usually to insert a level of human review. The EDPB is clear that this cannot be done by 'fabricating human involvement'; human oversight must be 'meaningful, rather than just a token gesture'.[1] The alternative is to examine whether the decision can be realistically based on consent, law, or contractual necessity. More detailed guidance on this right can be found in the EDPB's guidance and in the ICO's Guide to the GDPR.[2]

1 WP251 rev 01, p 21.
2 ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/rights-related-to-automated-decision-making-including-profiling/ [accessed 30 September 2020].

5 INTERNATIONAL TRANSFERS

A4.182 The vast majority of sports bodies will carry out some sort of international transfer of personal data. International transfers take place when teams go on international tours, when NADOs share data in the World Anti-Doping Authority's Anti-Doping Administration & Management System (ADAMS), and when a supplier outsources processing work to a third party abroad. In an attempt to prevent the undercutting of data protection requirements when European data leaves its borders, the GDPR requires that protections be put in place before data can be transferred to recipients outside of the European Economic Area – namely, the Member States of the European Union, plus Norway, Liechtenstein and Iceland. These restrictions are set out in Articles 45 to 47 of the GDPR.

A4.183 Under the EU-UK Withdrawal Agreement, the UK will be treated as part of the EU for the purposes of data transfers until the end of the transition period.[1] The parties have further agreed within the political declaration that they will work towards the UK achieving an 'adequacy decision', which is a method of permitting otherwise prohibited transfers under the GDPR, before the end of transition.[2] If this does not come to pass, EU organisations passing data to the UK will need to consider alternative safeguards to ensure data is adequately protected.

1 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [2019] OJ C384I/01, Articles 70–73.
2 HM Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, para 8.

A4.184 When it imports the UK GDPR under the Data Protection Exit Regulations, the UK will in effect gain its own data transfer regime with near-parallel provisions. Given the close relationship between these two frameworks, this Section will address first the GDPR's requirements and tools for protection, and then the differences for transfers of UK data that will come into effect under the Data Protection Exit Regulations.

A What is a restricted transfer?

A4.185 Although not a term used by the GDPR, the ICO refers to 'restricted transfers' to describe transfers that are caught by the GDPR.[1] The ICO guidance also sets out

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(1) the nature, gravity and duration of the infringement, including the nature of the data, data subjects and circumstances;
(2) any mitigating action taken by the controller/processor including security measures;
(3) any previous infringements and compliance with any orders given on the same topic;
(4) the degree of cooperation with the supervisory authority;
(5) any relevant previous infringements by the controller or processor;
(6) whether the infringement was notified by the controller/processor or came to light through other means;
(7) adherence to any code of conduct or certification mechanism; and
(8) 'any other aggravating or mitigating factor […] such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement'.[1]

1 GDPR, Art 83(1).

A4.246 The ICO has also released a Regulatory Action Policy, which sets out its objectives in taking action. These are:

(a) 'to respond swiftly and effectively to breaches of legislation which fall within the ICO's remit, focussing on (i) those involving highly sensitive information, (ii) those adversely affecting large groups of individuals, and/or (iii) those impacting vulnerable individuals'.
(b) 'to be effective, proportionate, dissuasive and consistent […] targeting our most significant powers (i) for organisations and individuals suspected of repeated or wilful misconduct or serious failures […] and (ii) where formal regulatory action serves as an important deterrent […]'.
(c) to '[…] promote compliance with the law through the promotion of good practice and provision of targeted advice […]'.
(d) 'to be proactive in identifying and mitigating new or emerging risks arising from technological and societal change'.
(e) 'to work with other regulators and interested parties constructively, at home and abroad'.[1]

1 ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf, p 6, [accessed 1 October 2020].

A4.247 It is too early to assess the ICO's enforcement activity under this Policy, as it has taken relatively limited action under the GDPR (at the time of writing, monetary penalties had only been recently imposed on British Airways and Marriott in relation to personal data breaches, whilst lengthy investigation into the activities of the activities of credit referencing agencies as data brokers has resulted in no fines).[1] Indeed, much of the enforcement activity prior to May 2020 has related to breaches under the 1998 Act, which, notably, still contains the enforcement rules for PECR and limits the maximum fine that can be imposed for such breaches. Despite these being imposed under the old law, it is possible to see that the ICO has become more willing to impose larger fines, with a number of monetary penalties of the maximum £500,000 now levied, where none had been imposed prior to the GDPR coming into force.

1 ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/10/ico-takes-enforcement-action-against-experian-after-data-broking-investigation/ [accessed 30 October 2020].

A4.248 In reviewing the activity of the ICO, it is possible to note certain trends:

(a) *Breaches of security remain, unsurprisingly, at the heart of a large proportion of enforcement action* – this is not likely to change given the widened breach reporting requirement. That said, organisations should not be discouraged to report personal data breaches because of the risk of enforcement, particularly given that the GDPR requires the ICO to consider the route of discovery and the level of controller cooperation when assessing the level of any fine to impose.
(b) *Transparency breaches are also of particular interest to the ICO* – a number of transparency breaches have now been punished with fines, including a £400,000 penalty imposed on the 'pregnancy club' data broker Bounty for failure to properly inform individuals of the breadth of their data sharing,[1] and a £120,000 penalty imposed on a television production company that failed to properly inform pregnant mothers of the CCTV style filming being conducted at a hospital clinic.[2] The vulnerability of the affected data subjects was flagged in both of these cases. A two-year investigation into credit referencing agencies focused on their 'invisible' processing of personal data, with the ICO imposing an enforcement notice on Experian requiring it to improve its notices and stop processing of data collected unlawfully.[3]
(c) *Breaches of marketing rules in PECR remain a high priority for the Commissioner* – again, this is unlikely to change given the high public demand for action and the large number of complaints the ICO receives. Enforcement action can be triggered for breaches of PECR even where there is a very low level of complaint about the specific breach. The majority of this enforcement is against flagrant offenders, such as data brokers and call centre operators, acting with no regard to the rules. There is, however, a growing level of enforcement against large businesses that ignore or misapply the rules. Examples of PECR enforcement action include:
    (i) A fine of £12,000 on Royal Mail Group in April 2018[4] for sending emails to opted-out customers in relation to price reductions on stamps. Even though Royal Mail argued that this was a service message and that they had a legal obligation under the Postal Services Act 2011 to publicise their tariffs, the ICO considered that the phrasing used and the style of the message constituted marketing and not simply a service message. Royal Mail had created two versions of the message, one for opted in and one for opted out customers; however, according to the ICO it was clear that both messages were promotional and Royal Mail had failed to distinguish between service and marketing messages. The ICO stated that 'the use of more appropriate content and phrasing could have avoided what was intended to be a service message becoming marketing'. There was only one customer complaint in relation to over 300,000 sent emails.
    (ii) A fine of £100,000 on EE Limited in July 2019[5] for sending marketing text messages to opted-out customers, informing them about their ability to check their current data usage through the EE app and the ability to get an upgrade. The ICO did not accept EE's argument that this constituted a service message. Again, this was prompted by one complaint to the ICO in relation to 2.5 million messages sent to opted-out customers.

1 ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/04/bounty-uk-fined-400-000-for-sharing-personal-data-unlawfully/ [accessed 1 October 2020]..
2 ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/04/ico-fines-production-company-120-000-for-unlawful-filming-in-maternity-clinic/ [accessed 1 October 2020].
3 ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/10/ico-takes-enforcement-action-against-experian-after-data-broking-investigation/ [accessed 30 October 2020].
4 ico.org.uk/media/action-weve-taken/mpns/2258621/royal-mail-group-ltd-mpn.pdf [accessed 1 October 2020].
5 ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/06/ico-fines-telecoms-company-ee-limited-for-sending-unlawful-text-messages/ [accessed 1 October 2020].

B Individual and group rights of action

A4.249 Although the vast majority of individuals who are dissatisfied with data handling will complain to the ICO (or other supervisory authority), some will instead

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26.2.5 is subject to an order by a relevant authority that they are lacking in competence to manage their own affairs;
26.2.6 is deprived of their civil rights by proper application of the law;
26.2.7 is serving a period of ineligibility imposed for breach of:
 26.2.7.1 the IBU Integrity Code; or
 26.2.7.2 any code of ethics or other rules of conduct of an NF Member or of another sports organisation;
26.2.8 has been found by a relevant authority to have committed an anti-doping rule violation (whether or not they served any period of ineligibility for that violation);
26.2.9 has been removed from office by Congress or the Executive Board in accordance with this Constitution or the Rules (or previous versions thereof);
26.2.10 is otherwise prohibited from holding such position, or any similar position, under any other circumstances provided by law;
26.2.11 otherwise fails an assessment, made by the Vetting Panel in accordance with the Vetting Rules, of whether the person (a) is of good character and reputation; (b) is able to meet the high standards of conduct and integrity required of an IBU Official; and (c) is physically and mentally fit to perform the role in question; or
26.2.12 in the case of a candidate for appointment to the BIU Board, does not have the independence or experience or expertise required for the role, as specified in the Constitution or the Rules.'

1 International Biathlon Union Constitution (19 October 2019), Art 26.

A5.45 SGBs should have a process in place to vet candidates against these criteria.[1]

> 'One option is for a committee with an independent majority or at least independent representation to determine whether or not each nominated candidate is eligible for election according to agreed rules. The committee should report its decisions to the [SGB] administration or the electoral committee, if one exists'.[2]

For example, World Athletics uses a vetting panel made up of three people who are independent of World Athletics and approved by the Congress on the recommendation of the Council. A decision of the vetting panel that a candidate is ineligible may be appealed to CAS.[3] The Independent Governance Committee for the FIFA Governance Reform Project said in 2012 that:

> 'first and foremost it is fundamental that nominees for senior FIFA positions are vetted by an independent Nominations Committee, to be put in place as soon as possible, in order to ensure that candidates for the next elections fulfil the necessary substantive criteria and ethical requirements and that the selection process is fair and transparent'.[4]

Candidates who have failed the assessment by that committee have challenged the subjective nature of certain of the eligibility criteria, but the CAS has not upheld those challenges.[5]

1 If the body tasked with such assessment raises concerns with the candidate and no response is received, this could be grounds to terminate the eligibility process. *Chiyangwa v FIFA*, CAS 2017/A/5098, para 115 ('In the Panel's determination, the FIFA ERC was justified to raise any additional concerns highlighted in the Mintz Report, to enable it to ultimately take a decision on the eligibility of the Appellant. If those concerns go unanswered, what could the Appellant reasonably expect? The process would be, and was, justifiably terminated at that point').
2 ASOIF Governance Workshop, 'Suggested Components Of Electoral Rules and Processes for International Federations' (ASOIF, 19 October 2017), p 5.
3 World Athletics Constitution (1 November 2019), Articles 65–69. The IBU has adopted similar provisions. IBU Constitution (19 October 2019), Art 27.
4 Independent Governance Committee, FIFA Governance Reform Project, 'First Report by the Independent Governance Committee to the Executive Committee of FIFA' (Basel Institute on Governance, 20 March 2012), p 3.

5 In *Bility v FIFA*, CAS 2015/A/4311, para 57, the CAS panel noted that 'an integrity check is rather an abstract test as to whether a person, based on the information available, is perceived to be a person of integrity for the function at stake'. The panel cited with approval the part of the decision in *Adamu v FIFA*, CAS 2011/A/2426, 'where it was stated that "officials as highly ranked as the Appellant [who was a member of the FIFA Executive Committee at the time] must under any circumstance appear as completely honest and beyond any suspicion. In the absence of such clean and transparent appearance by top football officials, there would be serious doubts in the mind of the football stakeholders and of the public at large as to the rectitude and integrity of football organizations as a whole. This public distrust would rapidly extend to the general perception of the authenticity of the sporting results and would destroy the essence of the sport"' (CAS 2015/A/4311 at para 59). The panel concluded that 'on the basis of all the information at its disposal, […] the FIFA Ad-hoc Electoral Committee could reasonably come to the conclusion not to admit the Appellant as a candidate in the election for the office of FIFA President in 2016. The Panel however deems it important to emphasise that the outcome of the present arbitral proceedings shall not be interpreted as a ruling that the Panel perceives the Appellant as being corrupt, dishonest or not a person of integrity, but rather that the Appellant is one of the first persons subjected to the winds of change blowing through the FIFA administration and failed to meet the very high standards of integrity that are currently demanded from the office of FIFA Presidency in order to clean the image of the worldwide governing body of football' (ibid, para 90). The CAS panel in *Derrick v FIFA*, 2016/A/4579, para 87, endorsed the decision in *Bility*, noting that because of the recent events concerning football organisations and FIFA in particular (as to which, see para A5.3) 'it had become necessary to increase and enhance the checks and controls of the potential high officials that operate in these organisation'. It ruled: 'In the light of the discretionary power provided for in the FGR [FIFA Governance Rules], it is not the function of the FIFA Audit and Compliance Committee to decide whether a candidate has violated the FIFA Code of Ethics but to determine whether the person at stake has an impeccable integrity record and to render its opinion on the suitability of the candidate. In this respect, the FIFA Audit and Compliance Committee concluded that due to his disciplinary record and the ongoing investigation against the Appellant before the FIFA Ethics Committee, the Appellant did not meet the requirements necessary to become Vice-President of the FIFA, and the Panel agrees with its decision' (ibid, in CAS Bulletin (2018/1), p 41, para 3.).
See also the discussion of the English Football League's similar 'Owners' and Directors' Test' at para B5.12.

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(l) *Code of ethics*

A5.46 Upon appointment, all officers, directors, employees and committee members of the SGB must agree to be bound by a comprehensive code of ethics. The IOC adopted its first Code of Ethics for members and officials in the wake of the Salt Lake City voting scandal,[1] and its 'Basic Universal Principles of Good Governance of the Olympic and Sports Movement' require international federations and national Olympic committees to develop and enforce ethical rules based on that Code.[2] ASOIF therefore expects its members to 'incorporate in Statutes all appropriate ethical principles which align with and embrace the IOC Code of Ethics and are applicable to all members, officials and participants'.[3] Details of the contents of such ethics codes and of cases dealing with alleged ethical violations are set out elsewhere in this book,[4] but they should generally include commitments to respect for the human rights of all participants,[5] including a prohibition of unlawful discrimination of any kind, specific provisions on avoidance of conflicts of interest, prohibitions on exerting undue influence and disclosing confidential information or exploiting it for improper purposes, a section on gifts and hospitality, setting out what is acceptable and the process that needs to be followed in order to accept such offers (paying heed to any relevant national legislation, such as the UK's Bribery Act 2010), commitments to abide by any stand-alone integrity-related rules (eg anti-doping rules,[6] rules against the prevention of manipulation of competitions,[7] and safeguarding rules[8]), and finally a broadly-worded catch-all provision to sweep up any other unethical conduct.[9]

1 See para A5.3, fn 1.
2 IOC, 'Basic Universal Principles of Good Governance of the Olympic and Sports Movement' (1 February 2008), principle 3.6.
3 ASOIF, '1st report of the Governance Task Force to ASOIF Council', EPAS (2016) INF13, p 7. See also ASOIF Governance Support and Monitoring Unit, 'Suggested Components for Codes of Ethics for International Federations' (20 March 2019).
4 See para B3.147 et seq.

must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders'.[2]

1 See the IOC's Basic Universal Principles of Good Governance of the Olympic and Sports Movement (February 2008) ('All regulations of each organisation and governing body, including but not limited to, statutes/constitutions and other procedural regulations, should be clear, transparent, disclosed, publicised and made readily available. Clear regulations allow understanding, predictability and facilitate good governance. The procedure to modify or amend the regulations should also be clear and transparent').

2 *USA Shooting & Quigley v Union Internationale de Tir*, CAS 94/129, para 55. This passage has been cited with approval many times since, eg by the CAS panel in *Devyatovskiy & Tsikham v IOC*, CAS 2009/A/1752 and CAS 2009/A/1753, para 6.11. In *WTC v Moats*, AAA Panel decision dated 10 October 2012, para 7.27, a AAA hearing panel cited the passage as authority for its warning that 'WTC should take care to provide its athletes with clear, easy to understand rules so athletes need not struggle to determine what conduct constitutes an anti-doping rule violation'.

B1.21 Looking first at the procedural requirement of a transparent and coherent process for issuing regulations:

(a) Shortly before the 1998/99 football season started, UEFA issued a rule that a club could not compete in a UEFA competition that season if it was under common ownership with another club that was entered in the competition. When that rule was challenged, the CAS panel in *AEK Athens* noted that 'an adjustment to the Contested Rule should not be arranged hurriedly, and commonly controlled clubs and their owners should have some time to determine their course of action, also taking into account possible legal questions (eg if shares are to be sold, minority shareholders may be entitled to exercise pre-emptive rights within given deadlines). There is an obvious need for a reasonable period of time before entry into force, or else the implementation of the Contested Rule may turn out to be excessively detrimental to commonly controlled clubs and their owners'.[1] The panel therefore endorsed a provisional order made suspending the application of the rule while the challenge was pending, and extended that suspension for a further season even after it had upheld the legality of the rule, on the basis that 'paramount considerations of fairness and legal certainty, needed in any legal system, militate against allowing UEFA to implement immediately the Contested Rule in the 1999/2000 football season'.[2]

(b) In *Boxing Australia v AIBA*, Boxing Australia challenged a directive issued by AIBA permitting national federations to enter only one boxer each into a continental qualifying competition for the 2008 Olympics, on the basis that that directive contradicted the rule and practice of its continental association permitting two entries per federation. The CAS panel accepted that AIBA was in principle entitled to adopt a rule reflecting its preferred approach, but only if it 'properly and timeously exercised such discretion. Paramount considerations of legal certainty require that an international federation exercises its normative discretion by adopting resolutions or regulations in proper compliance with the formal procedures set out by its own statutes. International federations are undoubtedly subject to the rule of law. It is not permissible for an international federation bluntly to communicate by e-mail that it does not like a given rule in force at continental level and demand the national federations of that continent to simply disregard such rule even though it binds them contractually'.[3] Instead, 'in order to avoid any risk of uncertainty or arbitrariness, the policy choices of an international federation must necessarily be translated into rules and regulations, correctly adopted – as to both form and substance – and properly and timeously publicized'.[4]

(c) Similarly, in *Quigley*, the CAS panel noted:

'It might be possible by a carefully drafted clause to provide for some form of ongoing adaptation of Regulations, eg by referring to a list of banned substances as may be "revised from time to time" by a defined authorised body. But to imagine that each and every Regulation, no matter how fundamental, is subject to being transformed or eradicated "upon receipt of official (sic) changes in information", would be to deny the proper constitutional functioning of an international federation, which must be orderly, predictable and transparent'.[5]

1 *AEK PAE and SK Slavia Praha v UEFA*, CAS 98/2000, para 161.

2 Ibid, para 163. This case is discussed further at para B1.36.

3 *Boxing Australia v AIBA*, CAS 2008/0/1455, paras 6.29-6.30.

4 Ibid, paras 6.34 and 6.35. See also *CONI*, CAS 2000/C/255, para 58 ('If an International Federation proposes to make changes to its rules, those rules should, if possible, be made after discussion, consultation and explanation with the constituent bodies of that International Federation so that everyone at the National Federations understands clearly what is permitted and what is not permitted. A similar process should be undertaken if National Federations wish to change their rules so as to ensure that their constituent members of clubs have that understanding. The Panel accepts that there must in every sport be occasions on which discussion, consultation and explanation cannot take place before rule changes are made, but, hopefully, such occasions will be rare. If they do occur, great care must be taken, after the changes have been made, to explain the consequences and ramifications of the changes'). Cf *AEK Athens & SK Slavia Prague v UEFA*, CAS 98/200, para 58 ('For a regulator or legislator, it appears to be advisable and good practice to acquire as much information as possible and to hear the views of potentially affected people before issuing general regulations – one can think of, eg, parliamentary hearings with experts or interest groups – but it is not a legal requirement. As a United States court has stated, requiring an international sports federation *"to provide for hearings to any party potentially affected adversely by its rule-making authority could quite conceivably subject the [international federation] to a quagmire of administrative red tape which would effectively preclude it from acting at all to promote the game"* (*Gunter Harz Sports v USTA*, 1981, 511 F. Supp. 1103, at 1122)' [other citations omitted]).
In *South Shields FC 1988 Ltd v The Football Association Ltd*, FA Rule K arbitral panel decision dated 5 June 2020, The FA's rules included an express duty to consult with clubs before changing rules that were applicable to them. The arbitral panel (chaired by Lord Dyson) found that the meaning of that obligation was 'informed by well-established public law principles as to what due consultation requires' (para 60), and that those principles (called the '*Sedley* criteria', from the judgment of Lord Wilson in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56) were that an 'overall assessment […] must be made of the facts to see whether addressees of a consultation had, in a real and practical sense, been accorded a fair opportunity to express their views and opinions. […] the ultimate litmus test is simply fairness; so how the application of the criteria play out in a particular case will depend upon all of the surrounding circumstances' (para 62, quoting with approval Green J in *R (Hutchison EG UK Ltd) v Teleconica UK Ltd* [2017] EWHC 3376 (Admin) at 238). The panel considered that the surrounding circumstances 'will include the urgency of the situation and considerations of practicability' (para 63), and noted that in the context of determining how to address promotion and relegation issues after the Covid-19 pandemic led to early curtailment of the 2019/20 football season, the urgency of the situation justified a streamlined consultation (paras 69, 71).

5 *USA Shooting & Quigley v Union Internationale de Tir*, CAS 94/129, para 28.

B1.22 Moving from process to substance, while an SGB has broad autonomy to bring disciplinary proceedings and to punish misconduct by a member,[1] the principles of legal certainty and predictability mean that no finding of breach may be made in respect of, and no punishment may be imposed for, a member's conduct unless the rules in place at the time of the conduct clearly state that such conduct is prohibited *and* that any transgression will attract a specified punishment,[2] or at least a specific type of punishment or range of punishments.[3] If there is no clear legal basis for a punishment in the rules, then it may not be imposed, even if all are agreed that it would otherwise be warranted.[4] For example:

(a) In *Quigley*, the UIT accepted that the athlete had not intended to use the drug found in his system to gain a performance advantage, but said athletes should be held strictly liable for the presence of prohibited substances in their system. The CAS panel accepted that such an approach might be appropriate in principle, but '[…] the fact that the Panel has sympathy for the principle of a strict liability rule obviously does not allow the Panel to create such a rule

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absence. However slight and excusable his negligence may have been in the minutes prior to the start of the final match, Mr Puerta cannot avoid the conclusion that he suffered a momentary lapse of attention and exhibited a momentary lack of care when he used a glass over which he had lost visual control, especially at such a critical and vulnerable time, just hours before he knew that he would have to undergo a doping test. […]

11.4.13 In all the circumstances, and despite the extraordinary manner in which the contamination with etilefrine occurred, the Panel is forced to conclude that the requirements which might justify a finding of 'No Fault or Negligence' (Article M.5.1 of the Programme) have not been met in the present case. Mr Puerta failed to exercise the 'utmost caution' at the critical time'.

1 *Puerta v ITF*, CAS 2006/A/1025, para 11.4.1. In 2020, reports appeared in the media that Mr Puerta had admitted fabricating the explanation that he had presented to the first instance panel and to the CAS panel as to how the etilefrine had got into his system. See eg Associated Press, 'Mariano Puerta admits lying to CAS about doping', 3 August 2020, espn.co.uk/tennis/story/_/id/29590911/retired-tennis-player-mariano-puerta-admits-lying-cas-doping [accessed 6 December 2020].

C18.18 As further confirmation of the exacting nature of the 'utmost caution' standard, the comment to Code Art 10.4 states that a No Fault or Negligence plea:

> '[…] will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a Competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink)'.

This 'illustrates that only in truly exceptional circumstances will the circumstances of an anti-doping rule violation warrant elimination or reduction of a mandatory sanction because of No Fault or Negligence […]. Thus, even in cases of inadvertent use of a Prohibited Substance, the principle of an athlete's personal responsibility will usually result in the conclusion that there has been some fault and negligence'.[1] However, one CAS panel considering this comment has stated:[2]

> 'The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impracticable expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the commentary to Art 10.5.2 of the WADC as cases of "no significant fault or negligence' may reasonably be judged as cases of 'no fault or negligence".'

1 *Adams v CCES*, CAS 2007/A/1312, para 155.
2 *FIFA & WADA*, CAS 2005/C/976 & 986, para 73.

C18.19 Successful no fault or negligence pleas have been very rare. The authors are aware of only the following cases where a no fault plea has been upheld in more than 15 years of global operation of the Code:

Medication cases

(a) In *FISA v Olefirenko*, the prohibited substance found in the athlete's sample came from a medication given to her by her team doctor at the Olympic Games for which she had a genuine therapeutic need. The player had followed the team doctor's advice in good faith, could not have gone elsewhere for advice at that time, and could not have checked the substance against the Prohibited List herself (because the substance was not included on the Prohibited List by name but instead was a related substance to a substance named on the List[1]). She was found to have done all that could reasonably be asked of her, and therefore to have no fault or negligence for the adverse analytical result caused by the medicine the doctor had prescribed.[2]

(b) In *ATP v Perry*, the athlete had been granted a therapeutic use exemption for a beta-2 agonist called terbutaline, to be administered by inhaler to treat his asthma. At an ATP tournament, he showed his inhaler to an ATP tournament doctor and asked him for a refill, but the doctor instead gave him a refill for salbutamol, a different beta-2 agonist also taken by inhaler and also included on the Prohibited List, without explaining to the player that he was giving him a different medication to the one requested. As a result, the player believed he had been given a terbutaline inhaler, and therefore that his use of the inhaler was covered by the TUE he had been granted previously. Given those circumstances, the hearing panel upheld his plea that he bore no fault or negligence for the salbutamol subsequently found in his sample.[3]

(c) In *Mannella*, USADA accepted that an athlete bore no fault or negligence for the presence of torsemide in her sample, on the basis that the athlete had 'provided USADA with records for a permitted oral prescription medication she was taking at the time of her positive test. This permitted medication did not list torsemide on the label, which is available only by prescription, or any other prohibited substances. However, detailed laboratory analysis subsequently conducted on the athlete's medication tablets, as well as the same brand and dose of tablets independently sourced, confirmed torsemide contamination'.[4]

(d) In *Matter of Albert Garcia*, the nandrolone found in the athlete's sample came from a one-time injection of Decadurabolin administered to the athlete in hospital to treat his severe back pain. The FIBA Commission accepted his plea of no fault or negligence, because:

> '[1] When the Player developed severe back problems […], he turned to the best medical help available to him at that point in time by reporting to the nearest hospital specialising in back problems. It has to be borne in mind that at the time the Player was out of contract and had no access to a "team doctor".
>
> [2] The Player expressly advised the doctor that he was a professional athlete and that he would be subject to regular doping controls.
>
> [3] The Commission has no reason to put into question the Player's story, including his (apparently erroneous) impression that the doctor consulted a book with the list of prohibited substances. […] Under these circumstances, the Player did everything he could be expected to do under the circumstances and thus bears no fault or negligence in connection with his positive test.[5]'

(e) In *Vassilev v FIBT & BBTF*, the facts were even more extreme. The athlete was admitted to hospital with severe stomach pains and underwent an emergency operation for a hernia. As part of his post-operative care, he was given a medication that contained a prohibited substance for which he subsequently tested positive. The CAS panel accepted the athlete's plea of no fault or negligence on the following basis: 'The Panel is satisfied that the Appellant was admitted to the hospital's accident and emergency ward with acute pain, was examined by various doctors and was immediately operated on under anaesthetic. The Appellant had no influence on either "whether" or "how" the surgical intervention would be undertaken. The same applies to the postoperative administration of the drug "Primabulone depot". According to

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of strict liability and uniform penalties, subject to consideration of uniform specific defences. We see no legal vice in the provision for a mandatory two year ban in cases where those defences do not apply').

The *Hipperdinger* panel held that neither Swiss law nor any other factor entitled it to depart from the two-year minimum ban mandated by the Code in cases where the athlete's fault was (by definition) significant, because such a penalty could not be said to be 'extremely serious and totally disproportionate to the behaviour penalised'. Thus, it said: 'If a panel denies the existence of exceptional circumstances, it has, under the WADC, no other choice than to apply the sanction provided in Art. 10.2 WADC'. *Hipperdinger v ATP*, CAS 2004/A/690, para 85. The CAS panel in *Squizzato v FINA*, CAS 2005/A/830, para 10.23, said effectively the same thing, but with a subtle difference in emphasis:

'[…] the mere adoption of the WADA Code by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction of a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for *every* thinkable case. […] However, this does *not* mean that nothing has changed, whereby in spite of the provisions of the World Anti-Doping Code (here DC 10.5), a Panel feels itself free to still apply a potentially more-forgiving principle of proportionality. The Panel is bound to respect the freedom of associations to establish their own rules […]. Therefore, one cannot deny that the bare rule provided in DC 10.5 restricts and substantially limits the CAS panels' discretion in reducing a suspension. The Panel recognises that a mere 'uncomfortable feeling' alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on a personal right which was serious and totally disproportionate to the behaviour penalised […]. However, the Panel considers, not without hesitation, that there should be no further reduction of penalty in the present matter, considering the circumstances of Appellant's case. Nevertheless, the possibility to have a future case which would not fit in properly with one of the definitions provided by art. 10.5 of the WADA Code must be seriously envisaged'.

The CAS panel rendering the advisory opinion requested by WADA and FIFA as to the Code's compliance with Swiss law steered the same course, but with its emphasis more on the common ground identified in *Hipperdinger* than the potential for departure highlighted in *Squizzato*: *FIFA & WADA*, CAS 2005/C/976 & 986, paras 83, 139, 143, 151, 157. The Panel noted that the principle of proportionality overrides any rule mandating the imposition of a specific sanction. It explained: 'To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender' (para 143). In addition, it has 'also to take the overall goal and the need for a uniform and harmonised concept in the fight against doping into account' (para 157). Within this framework, 'only if the sanction is *evidently and grossly disproportionate* in comparison to the proved rule violation and if it is considered as *a violation of fundamental justice and fairness*, would the Panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law' (para 143). Given the need for strong deterrence, the Panel ruled that a two-year ban where the athlete is unable to demonstrate that his fault or negligence is 'not significant' does not infringe that standard, and nor does a ban of at least one year where he is able to demonstrate 'no significant fault or negligence'. In other words, it ruled, the Code respects (indeed it 'guarantees') the principle of proportionality. And as a consequence, '[a] fault which does not qualify as non-significant will therefore inevitably lead to the standard two-year ineligibility under the WADC'. Ibid, para 84. See also *Hondo v UCI, Swiss Olympic and WADA*, CAS 2005/A/922, para 142 ('A more flexible interpretation of the said system that would, for example, allow for the mitigation of the sanction even in the absence of the specific circumstances provided for in articles 264 and 265 RAD could jeopardise the uniform application and effectiveness thereof') (free translation).

The CAS panel in *WADA v Hardy & USADA*, CAS 2009/A/1870, cited the *FIFA/WADA* ruling on proportionality with approval in rejecting the athlete's argument that it should impose only a six-month ban, rather than the 12-month minimum ban mandated by its finding of No Significant Fault or Negligence, in order to avoid the application of the IOC's 'Osaka Rule' (which automatically excluded any athlete banned for more than six months for a doping violation from the next Olympic Games), notwithstanding the athlete's claims that such a consequence would be disproportionate to her offence. It said: 'the Panel cannot be asked on the basis of the principle of proportionality to disregard the provisions of the FINA DC and entirely rewrite the applicable rule in order to seek equal treatment, curing the abovementioned unfair result, and to apply in every case (irrespective of the importance of the athlete) a sanction lower that the one contemplated in the rules because of the existence of the (challenged) IOC Rule – *in abstracto* applicable to every athlete; or to consider in an arithmetical way, in setting the measure of the sanction, the circumstances that the athlete, because of the ineligibility served, has already missed the opportunity to compete in the Olympic Games. Such exercise is clearly

beyond the scope of the powers of this Panel – and can be conducted only by WADA, the International Federations and the IOC, in evaluating the impact of the sanctioning system of the IOC Rule, which is raising so much controversy'. Ibid, para 61.

2 *Squizzato v FINA*, CAS 2005/A/830, para 10.23 ('[…] [t]he mere adoption of the WADA Code by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction of a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for *every* thinkable case'). See also *FIFA & WADA*, CAS 2005/C/976 & 986, para 139 ('The Panel is of the view that the principle of proportionality is guaranteed under the World Anti-Doping Code') and paras 155 and 158 (provision that an offence involving No Significant Fault or Negligence must be given a ban of at least one year is proportionate).

3 *Squizzato v FINA*, CAS 2005/A/830, para 10.23.

(b) *Puerta v ITF*

C20.17 Thus the scene was set for the case of *Puerta v ITF*, the facts of which could not have highlighted more perfectly the tension between harmonisation and proportionality within the Code's sanctioning scheme. Mariano Puerta was found to have inadvertently and unknowingly ingested a tiny amount of his wife's medicine in the dregs of his water glass, so that his subsequent urine sample tested positive for a very small (and in no way performance-enhancing) concentration of etilefrine, a banned stimulant. Puerta's plea of no fault or negligence was rejected on the facts, but his alternative plea of no significant fault or negligence was accepted.[1] In the ordinary course, this would have led to a reduction in the otherwise-mandatory two-year ban of up to 50 per cent, and it is unlikely that a ban of between 12 and 24 months would have excited much adverse comment, if any, given the strict stance taken in *Edwards*, *Hipperdinger*, and the like. However, this happened to be Puerta's second anti-doping rule violation, and therefore the 2003 Code mandated a life ban, and permitted mitigation on grounds of no significant fault or negligence down only to an eight-year minimum. In circumstances where both violations could be argued to have compelling mitigating features, the Code's rigid sanctioning scheme was stretched to the absolute limit. The CAS panel was forced to act, substituting a two-year ban in place of the eight-year minimum. However, it strained to emphasise that that substitution was *not* a departure from the Code, but rather a filling of an inadvertent gap in the Code's otherwise comprehensive sanctioning regime (a failure to cater for a situation where the two offences committed both had significant mitigating features), on the basis that 'the issue that arises in the present case is not an issue which the draftsmen of the WADC appear to have had in mind':[2]

> '11.7.17 It is undoubtedly, and commendably, the aim of WADA and of the signatories to the WADC to ensure that the WADC established a coherent and reasonable policy for sanctioning athletes who were found to have broken anti-doping regulations, and thereby cheated both their fellow athletes and the sporting public at large. The Panel has no doubt that the WADC has achieved that aim admirably, and is an invaluable tool in the fight against doping. Indeed, in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.
>
> 11.7.18 But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some

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(a) Doping

D1.46 An anti-doping rule violation is a disciplinary offence that is subject to the specific provisions of the anti-doping rules concerning proof, sanctions, and appeals.[1] Whether an athlete has breached the rules by having a prohibited substance in their body, or by punching a fellow player, the same considerations arise as to how that breach of the rules is to be dealt with from a procedural perspective. However, the importance of the fight against doping in sport is such that it has been the primary area for development of those principles, and certain special aspects have arisen, which are addressed in detail in Part C of this book.

1 See generally Part C (Anti-Doping Regulation and Enforcement).

(b) Misconduct on the pitch and breach of rules or laws of the game

D1.47 Most sports provide for the ability to discipline participants where they breach the rules of the game in such a way as to amount to misconduct on the pitch.[1] Not every breach of the rules of the game, such as being offside, or even a technical offence or minor incident of foul play, will trigger disciplinary action. There is likely to be a scale of disciplinary responses to such breaches, often set at international level. The most minor playing breaches have no consequence, other than for example an on-field sanction in the form of a free kick or loss of ground. More serious offences may be dealt with by a green or yellow card (temporary suspension) or a red card. Often, as in football, but not always, there are automatic disciplinary sanctions that follow a sending off or an accumulated number of yellow cards over time. Those automatic sanctions may escalate if a player is a repeat offender. The rules may allow for internal appeals in defined circumstances against these automatic consequences. For serious on-pitch offences, the rules may provide for disciplinary proceedings in addition to the automatic sanctions. The most obvious situation where this arises, for example in football and rugby union, is where the player has acted violently on the pitch. In rugby union there are recommended sanctions for different offences, depending upon the assessment of the seriousness of the particular offence on field and whether there are any off-field aggravating or mitigating factors.[2] Disciplinary proceedings can also arise from the breach of other rules such as those against cheating, particularly where they are widely drafted.[3] In the context of violence, sports governing bodies are particularly protective of the referee,[4] and indeed the public.[5]

1 See generally para B3.23 et seq.
2 See World Rugby Regulation 17 and Appendix 3.
3 FA Rule E3(1) requires participants to act in the best interests of the game and not to act in a manner that is 'improper or brings the game into disrepute'. It also specifically prohibits violent conduct, serious foul play, or threatening, abusive, indecent or insulting words or behaviour. Rule E3(2) provides that such an offence may be aggravated if it is shown to be motivated by (amongst other things) racial or sexual discrimination, which are prohibited by FA Rule E4. Deliberate cheating on the pitch, for example in order to throw a match or unfairly to win it, might be caught by a number of prohibitions, such as the general prohibition in FA Rule E3(1) and the more specific rules against taking bribes (FA Rules E5 to E6) and betting (FA Rule E8). See also Stoner, 'The Status of on-field decisions in cricket disciplinary proceedings' [2007] 14(1) Sports Law Administration and Practice, which examines the status of the decision of the umpires to award the match to England after the Pakistani team failed to return to the pitch in the context of disciplinary proceedings brought against the Pakistani captain concerning ball tampering and conduct unbecoming to his status.
4 See, for example Stoner, 'Push and shove, the case of Paolo di Canio' [1998] 5(6) Sports Law Administration and Practice 8. Di Canio's shove, sending the referee sprawling, earned him an 11-match ban. Rugby union international Neil Back received a six-month ban for a similar shove. See further para B3.61
5 Eric Cantona's kick at a spectator after being sent off during a game between Manchester United and Crystal Palace in 1995 led to a £20,000 fine and an eight-month ban. Trevor Brennan's assault on a spectator during a European Rugby Cup match between Toulouse and Ulster in 2007 led to a lifetime ban, subsequently reduced to five years on appeal. See further para B3.79.

(c) Misconduct off the pitch and bringing the sport into disrepute

D1.48 Most sports governing bodies purport by their rules to control more than just conduct on the pitch.[1] Almost without exception, SGBs' rules contain a provision that prohibits 'bringing the sport into disrepute'. By its very nature, this is a 'catch all' provision designed to cover misconduct that is not specifically provided for in more focused rules.[2] The rule may be drafted even more widely, to catch any misconduct that 'could' bring the sport into disrepute, rather than just that misconduct that 'does' in fact adversely affect a sport's reputation.[3] It will be for the disciplinary panel hearing the case to decide as a question of fact whether the conduct complained of does fall within the phrase actually used. There may be different standards for different sports, and a different level of behaviour may be expected from players in different positions. The rule should be applied consistently. The rule has been criticised as being too uncertain as to the conduct that it covers,[4] but there has been no successful challenge to its breadth.[5]

1 For examples of cases where the English courts have reviewed disciplinary decisions in relation to off-pitch conduct and bringing the sport into disrepute, see paras E2.8–E2.10.
2 The Football Association regularly uses FA Rule E3(1) to sanction footballers for misconduct away from the football pitch. The rule is wide in that it covers acting contrary to the best interests of the game, acting improperly, or bringing the sport into disrepute. The rule has regularly been used to sanction footballers for comments made by them on social media platforms such as Twitter (See eg *Football Association v Rio Ferdinand*, decision of the Football Association Regulatory Commission, 13 August 2012, *Football Association v Bernardo Silva*, decision of the Football Association Regulatory Commission, 11 November 2019). Rule 5.12 of the RFU Rules has been used to similar effect by the Rugby Football Union (see *Rugby Football Union v Chance Ridler*, 2 October 2012). See further para B3.97.
3 It should be stressed that FA Rule E3(1) does at least require the SGB to establish that the conduct actually is contrary to the best interests of the sport or improper, or that it actually does bring it into disrepute. Likewise, RFU Rule 5.12 requires the SGB to show that the conduct is prejudicial to the interests of the RFU or the game. It is not enough on the face of either rule that the conduct could be or could do one of these things. Compare this with ECB Directive 3.3, which allows the ECB to sanction cricketers if they conduct themselves in a manner that 'may be prejudicial' to the interests of cricket or that may bring the game of cricket into disrepute. Also note Rule 2.1(vi) in UK Athletics' Disciplinary Rules, which states that 'misconduct' in athletics includes behaviour 'that is otherwise considered by UKA to be unacceptable and contrary to the conduct expected of a person participating in athletics'.
4 See para D1.38, n 1.
5 See further para B1.23.

D1.49 The rules will often include prohibitions on more specific types of off-pitch conduct, such as in betting and bribe taking, or the provision of information to bookmakers or others.[1] Both the FA rules and RFU rules include specific prohibitions on participants re-selling tickets at above face value.[2]

1 See generally Chapter B4 (Match-Fixing and Related Corruption).
2 FA Rule E7. In July 2007 rugby player Joe Worsley had his ticket allocation removed for two years for breach of the equivalent RFU rule.

(d) Other disciplinary rules

D1.50 Specific sports may well provide for specific offences that are peculiar to the particular sport. Furthermore the rules may also include specific rules in relation to the failure of participants to comply with suspensions or other orders of the SGB, participation by others in an event in which a player who is acting in breach of a suspension or other order is also participating,[1] attempts or agreements to breach the rules, and failure by a club to ensure that those under its control comply with the rules.[2] There may also be provision that conviction of a serious criminal offence can constitute misconduct.[3] It should also be noted, as in *FA v Terry*, that a participant can still be found guilty of breaching the rules of the SGB notwithstanding that they may have been found innocent of a criminal offence in relation to the same incident.[4]

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decision whether or not to prosecute. This is because if a decision to prosecute is taken and subsequently a conviction is secured, the defendant is likely to be more easily disciplined by the SGB on the back of that conviction, as opposed to the SGB needing to prove its case by reference to the evidence, at least where the rules provide (as many do) that a criminal conviction is evidence of the relevant act.[1] Further, the police are likely to be better placed to obtain the relevant evidence. In some circumstances disciplinary proceedings might prejudice a police investigation and/or subsequent trial. The police might consequently request that the SGB not commence them. If the CPS decide not to prosecute, these considerations no longer apply. If they do decide to prosecute, the SGB will have to decide whether to continue the stay of its own procedure, to stay its own procedure on the basis that the defendant is suspended in the meantime (if that is an option available to it[1]), or rather to proceed with the procedure. However, still from the perspective of the SGB, there may equally be good arguments for proceeding with its own disciplinary procedure, not least because increasingly where there is a criminal prosecution, it is likely to be many months (even longer) before there is a trial. Expeditious resolution of disciplinary cases is in the interest of all, not least a suspended participant. Disciplinary proceedings may often therefore legitimately be pursued, on the bases that the charges are different, the standard of proof is lower in the disciplinary proceedings, the outcome of the disciplinary proceedings would not be admissible in the criminal proceedings, and that the justified needs of the sport require prompt resolution of the matter.

1 See eg Regulation 24 of The FA's Disciplinary Regulations.
2 The rules may provide that a person under criminal prosecution may be suspended, or provide for suspension while disciplinary proceedings are pending. See eg the *Fallon* case, discussed at para C4.27.

(iii) The concerns of the respondent

D1.97 From the perspective of the respondent, the paramount consideration may be that disciplinary proceedings should not prejudice their criminal trial. The concern may be that a conviction on the lower disciplinary standard might make more likely a conviction on the higher standard, that the respondent might incriminate themself, or that a witness might be rehearsed in the disciplinary proceedings and cross-examination disclosed. If the disciplinary proceedings are not stayed prior to any criminal proceedings, the chair will need to warn the defendant against the risks of self-incrimination and seek to mitigate to the extent possible any other adverse effects that the disciplinary proceedings might have on the criminal proceedings. Equally, the paramount concern for the individual may be not to be suspended from the sport. If there is no interim suspension, it may be seen as best to defend the criminal proceedings, on the higher standard, and if acquitted, to seek to rely on that acquittal before the disciplinary tribunal. If there is interim suspension, the perception may be that it would be best to seek to succeed on the disciplinary proceedings as quickly as possible.

(iv) Proceed or stay?

D1.98 Consequently, in deciding whether disciplinary proceedings are to continue, and on what footing, the disciplinary panel will have the difficult task of weighing all the competing considerations to ascertain how justice is best served. It should in particular take into account any risk of prejudice to the criminal proceedings[1] and it must not allow disciplinary proceedings to continue if they would be unfair to the respondent. It should also take into account the extent to which allowing the respondent to continue to participate in the sport while disciplinary proceedings are stayed, might give rise to difficulties within the sport.[2] If the respondent is to be suspended from participation in the sport pending determination of the charges, issues

may arise as to the proportionality and length of an interim suspension, and what level of case needs to be demonstrated before such a suspension can be imposed.[3]

1 For example, the ICC's Anti-Corruption Tribunal decided not to suspend its disciplinary proceedings against three Pakistani cricketers accused of spot fixing despite prospective criminal proceedings. The risk of prejudice to the criminal proceedings was addressed by publishing a redacted version of the award pending the conclusion of the criminal trial (*ICC v Salman Butt, Mohammad Amir, and Mohammad Asif*, ICC Disciplinary Tribunal (Chair Michael Beloff QC, 5 February 2011). The three were subsequently convicted of offences arising from the same incidents (Amir pleaded guilty in September 2011 and Butt and Asif were found guilty on 1 November 2011): see para B4.49.
2 For example, The FA's decision to suspend its investigation into racist abuse by John Terry pending the outcome of his criminal hearing but allowing him to continue to play for almost a year, including for England at the Euro 2012 tournament, was criticised as having adversely affected race relations within the sport. Terry was ultimately acquitted of the criminal charges, but the charge of misconduct was subsequently found proved against him by the FA's Independent Regulatory Commission (decision 4 October 2012). The Regulatory Commission rejected Terry's argument that the FA Rules precluded it from bringing proceedings against him following his acquittal in the criminal proceedings. See further para B3.143, D1.50, and para G2.91.
3 In *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB), the High Court declined to interfere with a ban from horseracing in the United Kingdom pending the outcome of the jockey's criminal trial, then estimated to be 18 months later. Fallon was ultimately found not guilty at his criminal trial because of lack of evidence. Fallon had argued unsuccessfully before the High Court that the interim suspension ought not to be imposed because there was no case against him. See further para C4.27.

(g) Hearing

(i) Oral hearing or written process

D1.99 The SGB is under an obligation to give the respondent a proper opportunity to be heard.[1] Its rules should provide for oral hearings, and the respondent should be allowed such a hearing if they request it. However, it may be that in some circumstances a written procedure will not offend the principles of natural justice.[2] In the context of disciplinary proceedings, as opposed to (for example) safeguarding proceedings (at least at first instance), an oral hearing is normally required.

1 See para E7.63.
2 See para E7.63.

(ii) In public or in private

D1.100 The form of and procedure for the hearing should be defined in the rules. Such hearings are usually (but not always[1]) held in private, because this is what both the SGB and the respondent would prefer. Irrespective of whether the hearing is held in private or in public, the SGB may provide in its rules for the publication of the outcome of the hearing. This may be justified not only by analogy with the relevant provisions of the European Convention of Human Rights/Human Rights Act 1998, but on the grounds of public interests in the conduct and outcome of disciplinary proceedings in sport.[2] Further, the public is informed by written reasons that explain both the decision and reasons for it.

1 For example certain hearings before the BHA Disciplinary Committee may be conducted in the presence of representatives of the media.
2 Where the ECHR applies, the respondent is entitled to a public hearing: see para C4.17 and para E13.41 et seq. Irrespective of whether the Act strictly applies to the actions of a particular SGB (see para E13.7), best practice is to adopt the same approach by analogy.

(iii) Rules of evidence and procedure

D1.101 The disciplinary panel is not bound by legal rules as to evidence or procedure. Within the sport's regulatory framework, it can set its own procedure at the hearing so long as that complies with the standards of fairness set by the courts.

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be outside the scope of s 40) because the seat of CAS arbitration proceedings is Lausanne, Switzerland.[2]

1 *Raguz v Sullivan & Ors*, judgment dated 1 September 2000 of the New South Wales Court of Appeal (Australia), Case 40650, reported in CAS Digest II, 783.
2 See paras D2.9 and D2.44 et seq.

D2.16 In principle, therefore, CAS is considered to be a sufficiently independent arbitral institution for its awards to be recognised and enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 (the 'New York Convention'). However, whether a particularly composed CAS Panel meets the necessary standards in a specific case depends on the actual independence and the lack of any conflicts of interests of each arbitrator appointed to that Panel, and has to be reviewed in the context of the circumstances of that case.[1]

1 *Mutu and Pechstein v Switzerland*, ECtHR decision dated 2 October 2018, Application nos 40575/10 and 67474/10, para 141.

2 ORGANISATION OF CAS

A Statistics

D2.17 Between 1986 and today, more than 6,000 cases have been filed with the CAS Court Office. Up to the end of 2016, CAS had rendered 3,123 arbitral awards. A substantial number of cases have been withdrawn before any final award was issued. From 2007 to 2014, between 250 and 350 cases have been filed annually. The number has further increased in recent years. Since the introduction of the Ad Hoc Division at the 1996 Olympic Games, this division has rendered 119 decisions (including decisions at the Commonwealth Games).[1] In recent years, an increasing number of CAS awards have been challenged before the Swiss Federal Tribunal. Up to today, only 13 appeals have been successful, which corresponds to a success rate of approximately 0.5 per cent of all awards rendered to date. That proportion doubles to 1 per cent if only the time period of the last four years (since the first successful challenge of a CAS award) is taken into consideration.[2]

1 The CAS publishes annual statistics on its website tas-cas.org.
2 Netzle, 'Appeals against Arbitral Awards by the CAS', in CAS Bulletin, 2/2011, 252; Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence – An Empirical Inquiry into Lex Sportiva* (TMC Asser Press, 2019) p 34; Noth and Haas, 'Article R46 CAS Code', para 16, in Arroyo (Ed), *Arbitration in Switzerland – The Practitioner's Guide,* Vol II, 2nd Edn (Kluwer Law International, 2018).

B The structure of CAS

D2.18 As indicated above, a distinction must be drawn between CAS and ICAS. What is generally known as CAS is an independent arbitral institution, an operational body consisting of a court office located at Château du Béthusy, Lausanne, and a legal staff composed of a Secretary General, several counsels assigned to supervise specific cases, and a CAS Secretariat/CAS Court Office.[1] Furthermore, the CAS is constituted of three Divisions, the so-called Ordinary Arbitration Division, the Anti-Doping Division, and the Appeals Arbitration Division (each headed by a President).[2]

1 See CAS Code Art S22. The Secretaries General have been Gil Schwaar (1984–1994), Jean-Philippe Rochat (1994–1999), and Matthieu Reeb (1999–).
2 Art S20 of the CAS Code.

D2.19 The task of the CAS Court Office consists of assigning the arbitration proceedings submitted to the CAS to one of the Divisions,[1] assisting in the formation of the Panel to sit in a particular case, calculating the advance on costs (where applicable), assisting the Panel in the smooth-running of the procedure, acting as an intermediary in the communications between the Panel and the parties, and calculating the final amount of the costs of the arbitration. Furthermore, the CAS Court Office may appoint — mostly upon request of the chairman of the Panel — ad hoc clerks to assist the Panel in fulfilling its tasks.[2] Recently the CAS itself has started to employ ad hoc clerks that will assist the chairman of a Panel upon his or her request.

1 Art S20, para 2 of the CAS Code.
2 Arts R40.3, para 3 and R54, para 4 of the CAS Code.

D2.20 The task of the Division Presidents (and their replacements in the event they are prevented from carrying out their duties) is to decide on certain (mostly procedural) questions that may arise in between the commencement of the arbitration procedure and the formation of the Panel. The Division President may for example proceed with the appointment of a sole arbitrator in the absence of an agreement by the parties to the proceedings,[1] or decide whether awards in Ordinary Arbitration proceedings can be made public without the consent of the parties.[2] In addition, it is, for example, the President of the Division that is competent, prior to the formation of the Panel, to decide on the language of the procedure,[3] to decide on the extension of time limits,[4] or decide to suspend the procedure,[5] to issue provisional or conservatory measures,[6] and to decide whether or not separate arbitration procedures should be consolidated.[7]

1 Art R40.2 of the CAS Code
2 Art R43 of the CAS Code.
3 Art R29 of the CAS Code, Art A4 of the CAS ADD Rules.
4 Art R32, para 2 of the CAS Code.
5 Art R32, para 3 of the CAS Code.
6 Art R37, para 3 of the CAS Code.
7 Arts R39, para 6 and R52, para 4 of the CAS Code.

D2.21 In 2019, three permanent commissions were created: the CAS Membership Commission, the Legal Aid Commission, and the Challenge Commission. All commissions are composed of ICAS members. The Challenge Commission is further composed of the Division Presidents, less the President of the Division concerned by the specific challenge.[1] The CAS Membership Commission has the duty to propose the nomination or removal of CAS arbitrators or mediators to ICAS. The functions of the Legal Aid Commission are provided in the CAS Guidelines on Legal Aid. The most important task of the Legal Aid Commission is to decide on requests for legal aid in order to guarantee the rights of natural sportspersons to defend their rights before CAS.[2] The Challenge Commission is responsible for challenges regarding the independence and/or impartiality of arbitrators, as well as the removal of arbitrators from the Panel pursuant to Arts R34 and R35 of the CAS Code.[3]

1 Art S7, para 2, lit a of the CAS Code.
2 Art S7, para 2, lit b of the CAS Code, Art 3 of the CAS Guidelines on Legal Aid. The Guidelines are published on the CAS website: tas-cas.org/fileadmin/user_upload/Legal_Aid_Guidelines_2019__en_.pdf [accessed 6 October 2020].
3 Art S7, para 2, lit c of the CAS Code; see also Arts A10, A11 of the CAS ADD.

D2.22 ICAS[1] is the sponsoring and supervising body for the CAS Court Office and CAS ADD Office as well as the appointing authority for the Presidents (and their representatives) of the three Divisions, the permanent commissions (CAS Membership Commission, Legal Aid Commission, and Challenge Commission[2]) and the CAS Secretary General. The ICAS is composed of 20 members, all of whom are high-level jurists with particular experience or expertise in sport.[3] The IOC, the international federations (IFs), and the Association of National Olympic Committees (ANOC), appoint four ICAS members each. Those twelve then appoint four more

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(a) all internal remedies had been exhausted; and
(b) a Statement of Appeal or Request for Arbitration had been filed with CAS.

Accordingly, before a Request for Arbitration or a Statement of Appeal had been filed, the parties had no other option but to apply to a state court for provisional measures. Until 2013, therefore, no waiver of state court jurisdiction could be accepted, because otherwise the parties would be deprived of any possibilities to obtain provisional relief for a significant period and, thus, be denied access to justice. In light of the problems that this might cause, and the opportunity for the evasion of arbitration, the 2013 CAS Code removed the need for the arbitration to have been formally commenced before CAS before provisional and conservatory measures are available from the CAS. The requirement is now merely that:

> 'No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted'.[1]

Article R37, para 6 of the CAS Code then provides that the request for such measures, and any such measures that have been imposed, will lapse if the arbitration is not commenced within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Art R49 of the CAS Code (appeals procedure). Such time limits cannot be extended. It remains to be seen whether these amendments will achieve the aim of bringing all such applications into CAS, and away from state courts.

1 Article R37, para 1 of the CAS Code.

(c) Prerequisites for obtaining preliminary relief from CAS

D2.107 Article 183 of the PILS and Art R37 of the CAS Code[1] provide that the arbitral tribunal may, upon request of a party, order preliminary or protective measures.[2] According to CAS practice, enshrined since 2013 in Art R37, paras 4 and 5, applications for preliminary or protective measures are subject to the following four-pronged test:

(1) the CAS must prima facie have jurisdiction over the dispute;
(2) the requested measures must be necessary to protect the applicant from irreparable harm;
(3) there must be a likelihood of success on the merits of the claim; and
(4) the interests of the applicant in the requested measure must outweigh those of the opposite party that the request be rejected (ie proportionality).[3]

1 A similar provision also exists in the ADD proceedings, see Art A18 of the CAS ADD Rules.
2 See also Segesser, ‚Vorsorgliche Massnahmen im Internationalen Schiedsprozess', Bull ASA (2007), pp 473, 476 et seq.
3 See eg *AEK PAE & SK Slavia Prague v UEFA*, CAS 98/200, CAS Digest II, p 38; *Mexès v AS Roma*, CAS 2004/A/708, *Gibraltar Badminton Association v International Badminton Federation*, CAS 2001/A/329; *Irish Football Association v Football Association of Ireland, Daniel Kearns and FIFA*, CAS 2010/A/2071. See also Netzle, 'Die Praxis des Tribunal Arbitral du Sport (TAS) bei vorsorglichen Massnahmen', in Rigozzi and Bernasconi (eds) *The Proceedings before the Court of Arbitration for Sport* (Schultess, 2007), p 133 et seq; I Blackshaw, 'Provisional and Conservatory Measures – an Under-Utilised Resource in the Court of Arbitration for Sport', (2006) 4(2) ESLJ 6.

D2.108 It is within the discretion of the Panel whether or not provisional and conservatory measures are made conditional upon provision of security (Art R37, para 7 of the CAS Code). Decisions of CAS on requests related to preliminary relief are not arbitral awards and therefore cannot be appealed according to Art 190 of the PILS.[1] However, an order on interim relief may be appealed:

(a) if the CAS thereby declines jurisdiction; or

(b) in the exceptional case that the order de facto rules on the merits of the present dispute, thereby definitively concluding the arbitration proceedings.[2]

1 *X v Y*, Swiss Federal Tribunal decision dated 13 April 2010, 4A_582/2009.
2 Rigozzi and Hasler, 'Article R37 – Provisional and Conservatory Measures', in Arroyo (Ed), *Arbitration in Switzerland – The Practitioner's Guide*, Vol II, 2nd Edn (Kluwer Law International, 2018), n 48.

(d) Enforcement of preliminary relief

D2.109 An arbitral tribunal such as CAS lacks power to enforce preliminary or protective measures or to sanction non-compliance. However, in most CAS cases the parties have voluntarily complied with the Panel's order of preliminary measures. If the party concerned fails to submit voluntarily to the measure ordered, the arbitral tribunal or the applicant may request the assistance of the relevant court (Art 183, para 2 of the PILS). Furthermore, the CAS arbitrators can use the tools of adverse inferences, cost allocation, and even possibly an adverse ruling on the merits, to reprimand non-compliance with their orders on provisional measures.[1] Whether enforcement of an order providing for provisional relief is possible under the New York Convention is disputed.[2] Under the PILS, orders for provisional measures do not qualify as arbitral awards.[3] Such orders cannot therefore be challenged before the Swiss Federal Tribunal.

1 Rigozzi/Hasler, 'Article R37 – Provisional and Conservatory Measures', in Arroyo (Ed), *Arbitration in Switzerland – The Practitioner's Guide*, Vol II, 2nd Edn (Kluwer Law International, 2018), n 50.
2 Knoepfler, 'Reconnaissance et exécution des sentences arbitrales selon la Convention de New York', Séminaire du TAS/CAS Seminar Montreux 2011, 2012, pp 106, 111 et seq.
3 Haas, 'Die (neue) ZPO und die Sportschiedsgerichtsbarkeit', Bull ASA (2012), pp 312, 342 et seq; Rigozzi and Hasler, 'Article R37 – Provisional and Conservatory Measures', in Arroyo (Ed), *Arbitration in Switzerland – The Practitioner's Guide*, Vol II, 2nd Edn (Kluwer Law International, 2018), n 48.

K Taking of evidence

D2.110 The procedure on the taking of evidence is governed by the CAS Code and the PILS, but there are only sparse provisions on the topic in those instruments. The Panel may also take guidance from the IBA Rules on the Taking of Evidence in International Arbitration (dated 29 May 2010).[1] The IBA issued these rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The rules are designed to be used in conjunction with institutional, ad hoc or other rules or procedures governing international arbitrations.[2] They do not constitute binding legal provisions but rather guidelines of a private organisation.

1 ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/IBA_Rules_Evidence/Overview.aspx [accessed 7 October 2020].
2 See IBA Rules on the Taking of Evidence in International Arbitration, p 10.

D2.111 It is up to the parties to bring forward evidence to support their submissions. The PILS remains silent on the issue of the permitted scope of pre-trial discovery (if any). However, Art R44.3, para 1 of the CAS Code stipulates that upon request, the Panel may order a party to produce documents in its custody or under its control, provided the party seeking such production demonstrates that the documents are likely to exist and to be relevant. A discovery request will be submitted to the other party for comments before the Panel issues an order of disclosure.

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the Swiss Federal Tribunal has dismissed the appeal. A CAS award is not a binding precedent and does not preclude a later panel from reaching a different conclusion on a similar question of law.[2]

1 Arts R46 and R59 of the CAS Code, Art A21 of the CAS ADD Rules. Preliminary awards are not final and thus have no *res judicata* effect, cf Berger and Kellerhals, *International and Domestic Arbitration in Switzerland,* 3rd Edn (Stämpli Publications, 2015), para 1645; Kaufmann-Kohler and Rigozzi, *International Arbitration – Law and Practice in Switzerland* (Oxford University Press, 2015), para 6.129.
2 Although CAS decisions in doping cases under the World Anti-Doping Code are binding on first instance doping tribunals convened under Code-compliant rules, and at least strong persuasive authority for subsequent CAS panels. See Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23(3) Arb Int 357; McLaren, 'The Court of Arbitration for Sport' in Nafziger and Ross (Eds), *Handbook on International Sports Law* (Edward Elgar Publishing, 2011), pp 32, 49. See also para B1.60.

D2.169 The CAS Code provides that the award may not be challenged in the Swiss courts if the parties have no domicile, habitual residence, or business establishment in Switzerland and have expressly excluded all setting aside proceedings in the arbitration agreement (or in an agreement entered into subsequently, in particular at the outset of the arbitration).[1] This provision derives from Art 192 of the PILS, which allows the parties to waive any right to challenge an arbitral award in the Swiss courts, or else to exclude some of the grounds for appeal that would otherwise lie, unless one of the parties has its domicile, ordinary residence or a business establishment in Switzerland (in which case such a waiver is prohibited by the Federal Constitution).

1 Arts 46, para 3 and 59 para 4 of the CAS Code.

D2.170 The domicile in Switzerland of many international sports federations, including the IOC, FIFA and UEFA, means that in cases involving such parties the constitutional bar on waiver of recourse to the courts to challenge arbitral decisions applies. As a result, those international federations cannot require athletes to waive the right to challenge CAS awards in the Swiss courts.

D2.171 However, even where no party is Swiss, so that a waiver of the right to challenge an arbitral award in the courts is permitted under the Swiss constitution, the Swiss courts will not strain to uphold such a waiver. In *Cañas v ATP & CAS*, the Swiss Federal Tribunal confirmed that an indirect waiver, ie a waiver that was contained in a separate, pre-existing document signed before the dispute arose, was not sufficient to give rise to a valid waiver of the right to recourse to the courts, especially where such a waiver is contained in the regulations of a sports organisation to which the athletes submit by rather general declarations of acceptance (as opposed to negotiating the clauses individually). Cañas had filed an appeal against a CAS award with the Swiss Federal Tribunal. The ATP argued that Cañas was barred from such an appeal because of a waiver of the right to challenge the award that was contained in the ATP Rules. The Swiss Federal Tribunal said:

> 'The liberalism which characterises case-law relating to the form of arbitration agreements in international arbitration is also evident in the flexibility with which this case-law deals with the problem of the arbitration clause by reference, including in the sports-field. Conversely, as we have already highlighted, case-law is strict when it comes to accepting waivers of appeal, since it states that such a waiver may not be made indirectly and does not, in principle, allow them to be used as a defence against an athlete'.[1]

1 *X v ATP*, Swiss Federal Tribunal decision dated 22 March 2007, 133 III 235.

D Publication of CAS awards

D2.172 Art R43 of the CAS Code provides that awards in Ordinary Arbitration proceedings shall not be made public unless all parties agree, or the Division President so decides. Awards in Appeals Arbitration proceedings, however, will be made public by the CAS unless the parties agree that they should remain confidential.[1] In CAS ADD proceedings, awards shall be made public if any sanctions are imposed, once the award is final and binding,[2] as required by the World Anti-Doping Code. Awards are communicated on the CAS website, in cases of public interest together with a media release drafted by the CAS Court Office. Significant CAS decisions are published in digests;[3] and there is also an archive of such decisions on the official CAS website.[4]

1 Art R 59, para 7 of the CAS Code.
2 Art A21, para 6 of the CAS ADD Rules.
3 See para D2.1.
4 tas-cas.org.

E Enforcement of CAS awards

D2.173 The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies in principle to CAS awards in international proceedings. However, the New York Convention does not define what it means by an 'arbitral award'.[1] The question, therefore, is whether besides partial and final awards also interim/interlocutory awards or decisions on provisional relief fall in its scope of application.[2] In a jurisdiction that has ratified the New York Convention, a court may refuse to recognise and enforce a foreign arbitral award, including a CAS award, only on one of the very limited grounds set out in Art V of the New York Convention. To date, no case of refusal of recognition and enforcement of a CAS award by a foreign court has been reported.[3] It is questionable and heavily debated whether or not – irrespective of Art V(1)(e) of the New York Convention – a court may recognise and enforce a CAS award that has been annulled by the Swiss Federal Tribunal.[4] In Switzerland the New York Convention is not only applicable to foreign awards, but also to a Swiss (international) award for which the parties have excluded the appeal to the Swiss Federal Tribunal. This follows from Art 192(2) of the PILS. Some sports federations (for example, FIFA) provide for a special regime of enforcement for CAS awards.[5] Article 15 of the FIFA Disciplinary Code provides that 'anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a CAS decision (financial decision), or anyone who fails to comply with another final decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS', may be sanctioned. The Swiss Federal Tribunal has ruled that such 'private enforcement mechanisms' are admissible.[6] Enforcing a CAS award via this private enforcement system is far cheaper and faster than going through the New York Convention. In addition, FIFA covers more jurisdictions than there are member states of the New York Convention. There is conflicting CAS jurisprudence as to whether or not such private enforcement is still available once an insolvency proceeding has been opened over the debtor's estate.[7]

1 Knoepfler, 'Reconnaissance et execution des sentences arbitrales selon la Convention de New York de 1958', in CAS Seminar Montreux 2011, 2012, pp 106, 110 et seq; Haas, in Weigand (Ed), *Practitioner's Handbook on International Arbitration* (Oxford University Press, 2002), Pt III, 'New York Convention, Art 1', para 60 et seq.
2 See Stirnimann Fuentes, Marguerat, Navarro Blakemore and Reardon, 'Switzerland', in *The Guide to Challenging and Enforcing Arbitration Awards* (Law Business Research Ltd, 2019), p 558.
3 For a discussion of the enforcement of a 'foreign' arbitration award in an English court, see para D3.109 et seq.
4 Knoepfler, 'Reconnaissance et execution des sentences arbitrales selon la Convention de New York de 1958', in CAS Seminar Montreux 2011, 2012, pp 106, 113.
5 For a detailed description of this mechanism and the CAS jurisprudence related thereto, see Haas, 'The Enforcement of Football-Related Awards by the Court of Arbitration for Sport (CAS)' (2014) 1 ISLR 12 et seq. See also *SV Wilhelmshaven v Norddeutscher Fußball-Verband*, German Federal Tribunal decision dated 20 September 2016, II ZR 25/15.

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course of dealing under the rules would in most cases be likely to apply.[1] Secondly, the ratio of the Court of Appeal in *Stretford* was that if there is such an agreement, then it will almost inevitably amount to a waiver of Art 6 of the ECHR in the absence of a case of duress, undue influence, fraud, mistake or misrepresentation.[2] Under the English law approach as exemplified by *Stretford*, the questions of agreement and waiver of Article 6 of the ECHR go together. The core issue is whether there is agreement to the arbitration rule and, if there is, then this agreement itself amounts to a waiver of Article 6 of the ECHR. For this reason, in the previous edition of this chapter, it was suggested that challenges to arbitration clauses in the rules of sports governing bodies based on Article 6 of the ECHR would be difficult after *Stretford.*[1]

1 Stretford was followed by Cooke J in *ECB v Kaneria*, paras D317–D3.19. See also the recent cases of *Bony* and *Mercato* considered in para D3.8 fn 4.

2 In *ECB v Kaneria*, para D3.18, Cooke J observed, in the context of an argument that the absence of a public hearing infringed Mr Kaneria's Art 6 rights, that Mr Kaneria was to be taken as having agreed to a hearing in private when he agreed to the ECB procedures because the alternative to those procedures amounting to an arbitration would have been that they were an internal disciplinary process, which would have been expected to be in private in any event. See also Tomlinson J in *El Nasharty v J Sainsbury* [2008] 1 Lloyd's Rep 360; [2007] EWHC 2618 in the context of an English commercial arbitration, and *Sumukan Ltd v Commonwealth Secretariat (No 1)* [2007] 3 All ER 342 (CA), approving *Stretford* on this point. Whilst there was some academic criticism of the approach to the issue of voluntary agreement taken in *Stretford* as 'based on a rather bizarre idea of "voluntariness"' (see Ulrich Haas [2012] ISLR 43), this did not result in any different approach in the English courts. The position is, however, slightly different for arbitrations before the CAS, as the Swiss Federal Tribunal has decided that some of the fundamental provisions of the ECHR are to be regarded as part of the Swiss *ordre public* and are consequently applicable in Swiss arbitral tribunals, such as the CAS. See: BG (21 February 2008, 4A_370/2007); Ulrich Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS procedures' [2012] ISLR 43.

D3.32 Since the last edition of this work, the European Court of Human Rights has given judgment in *Mutu and Pechstein v Switzerland.*[1] That case concerned the Romanian footballer Adrian Mutu, and the German speed skater, Claudia Pechstein, each of whom challenged decisions made against them by the CAS.[2] Mutu challenged a CAS decision to uphold an award of compensation made against him in favour of his former club, Chelsea FC, by the FIFA Disputes Resolution Chamber; he contended that two of the members of the CAS panel lacked independence and impartiality and also complained that the hearing was not in public. In *Pechstein*, the challenge to the jurisdiction of the CAS was more fundamental. Pechstein alleged that she had not freely accepted arbitration before CAS because she had no real choice other than to accept the rules of her sports governing body (the ISU), which provided for such arbitration; she claimed that arbitration before CAS failed to comply with Article 6 of the ECHR, because the CAS panel was not structurally independent and because the hearing was not in public. The Court unanimously held that neither Pechstein nor Mutu had waived their Article 6 rights. It unanimously held that there had been a violation in both cases of Article 6(1), due to a failure to conduct a public hearing. However, the majority of the Court rejected the applicants' complaints as to the lack of independence and impartiality of CAS on the facts. The reasoning of the Court on the first of these points (no waiver of Article 6) is of significance. It may be summarised as follows:

(a) The Court referred to previous case law for the proposition that:

> '[…] in the case of voluntary arbitration to which consent has been freely given, no real issue arises under Article 6. The parties to a dispute are free to take certain disagreements arising under a contract to a body other than a court of law. By signing an arbitration clause the parties voluntarily waive certain rights secured by the Convention. Such a waiver is not incompatible with the Convention provided it is established in a free, lawful and unequivocal manner,' (para 96).

(b) In the case of *Pechstein*, the Court held (paras 113–114) that:

> '[…] the only choice in the second applicant's case was between accepting the arbitration clause and thus earning her living by practicing her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level'

and that

> 'Having regard to the restriction that non-acceptance of the arbitration clause would have entailed for her professional life, it cannot be asserted that she accepted that clause freely and unequivocally'.

It therefore distinguished its previous case-law on waiver. The result of this, the Court said at para 115 was that

> 'the acceptance of CAS jurisdiction by the second applicant must be regarded as "compulsory" arbitration […] The arbitration proceedings therefore had to afford the safeguards secured by Article 6(1) of the Convention […]'.

(c) In the case of *Mutu*, the Court rejected any contention that he was faced with a binary choice between accepting the arbitration clause and earning his living by practising his sport at a professional level; his was not a case of 'compulsory arbitration' (para 120). However, it concluded that, because Mutu had challenged the arbitrator appointed by Chelsea, he had nonetheless not unequivocally waived his right to challenge the independence and impartiality of the CAS required under the curial, Swiss, law and that, as with *Pechstein*, '… *the arbitration proceedings had to afford the safeguards secured by Article 6(1) of the Convention …*' (paragraphs 122 to 123).

1 See para D3.6.

2 See paras E13.41, F1.48, F1.79 and F3.260.

D3.33 The following observations can be made in light of the Court's decision in *Mutu and Pechstein*:

(a) The decision in the *Pechstein* case, that an agreement by a sports participant to the rules of a sports governing body in circumstances where the only other choice was 'to refrain completely from earning a living from her sport at that level' is not an agreement given 'freely and unequivocally' and so is ineffective to waive Article 6(1) rights, is difficult to reconcile with English law. To an English lawyer, that appears tantamount to a finding that the arbitration agreement is void due to economic duress. However such a contention was roundly rejected by the Court of Appeal in *Stretford* in the case of a football agent who similarly earned his living from sport at a particular level.[1] Moreover, if the Court's analysis is one of economic duress then it might be thought that it proves too much: why are the rest of the rules of the sports governing body not similarly imposed on the participant without any choice and hence void?

(b) A more traditional (English law) analysis of the position of Pechstein would be that there was no economic duress. She did not have to compete in the sport; however, if she chose to do so, then like all other participants she had to comply with the rules of the sport (at least insofar as those rules were objectively justified: see Section 3C below). If the objectively justified rules include a system of sports arbitration, then her choice was to compete in accordance with the rules or not to compete. There was no evidence that she was economically compelled to compete.

(c) There is a marked tension on this issue between the English law approach exemplified by *Stretford* and the approach of the European Court of Human Rights in the *Pechstein* case. One explanation may be that the applicable law of the arbitration agreement (curial law) in *Pechstein* was Swiss law, and that

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between the athlete and the IAAF on the basis of the consent given by the athlete to doping control. The athlete, in contrast to Modahl, argued that no contract arose. Neither ground was in the event determined.

1 *Walker v UKA and IAAF*, 3 July 2000, unreported, Toulson J; 25 July 2000, unreported and no judgment, Hallett J; IAAF Arbitral Award 20 August 2000 reported at [2001] 4 ISLR 264, see also [2000] 2 ISLR 41.
2 Before Toulson J, 3 July 2000.
3 Hallett J, 25 July 2000.

E8.13 The second Court of Appeal decision in *Modahl*[1] represented a move away from the traditional approach in the cases relied upon by Douglas Brown J at the trial. Latham LJ identified three different bases on which Diane Modahl might have been said to have entered into a contract with the BAF.[2] First, the club acts as agent for its members from time to time in contracting with the governing body (the 'club' basis). Secondly, a contract arises out of repeated participation in events organised by the governing body (the 'participation' basis). Thirdly, a contract arises when a player provides a sample and relies on the appeal process (the 'submission basis'). Latham LJ concluded that the court should consider all the surrounding circumstances to see whether a contract could be implied.[3] He held that the basic structure for a contract was readily identifiable in the fact that the athlete had participated in events under the auspices of the BAF or the IAAF and subject to their rules, and that the governing bodies had accepted responsibility to administer those rules. Contractual intention could be found in the athlete entering those events, even if no entry form was actually completed. Mance LJ agreed, albeit tentatively in the light of the paucity of the evidence, that a contract arose on a combination of the three bases identified by Latham LJ.[4] Jonathan Parker LJ on the other hand was not convinced that a contract arose.[5] The Court of Appeal however held that the terms of the implied contract fell short of those contended for by Diane Modahl. Any implied term was held to be confined to the fairness of the procedure as a whole, and where the decision was actually taken by a separate disciplinary body, such term was confined to an obligation on the sports governing body to establish a fair procedure and did not extend to how the separate disciplinary body carried it out.

1 [2002] 1 WLR 1192, CA.
2 [2002] 1 WLR 1192, para 25.
3 At paras 49 to 52.
4 At para 91 and 103 to 111.
5 At paras 72 to 83.

E8.14 In *Bradley,*[1] Richards J held that in the normal course a jockey under licence would be in a contractual relationship with the Jockey Club,[2] but in the case before him Graham Bradley was no longer under licence. Nevertheless, a contract arose because the former jockey had been offered a choice between being dealt with as if he were licensed, or under the warning off provisions, and chose the former.[3] As already discussed,[4] Richards J also held that because the Appeal Board was a separate body from the Jockey Club, there was no implied term making the Appeal Board responsible for its actions.[5] However he went on to hold (arguably equivocally) that what *could* be implied into the contract in the circumstances of the case were (a) an obligation on the Jockey Club to give effect to the decision of the Appeal Board and no more than that decision and (b) an obligation on the Jockey Club that it would only apply a decision of the Appeal Board in so far as it was lawful.[6]

1 *Bradley v Jockey Club* [2004] EWHC 2164 (QB); [2007] L.L.R. 543. See paras E7.15–E7.21.
2 *Bradley*, paras 51–53 per Richards J.
3 *Bradley*, paras 55–56.
4 See para E7.17.
5 *Bradley*, paras 59–62.
6 Bradley, para 62.

2 EXPRESS CONTRACTUAL OBLIGATIONS

E8.15 The enforcement of express obligations contained in the rules or in commercial contracts is relatively straightforward. The express obligation is there and must be construed and enforced.[1] The limits of a sports governing body's jurisdiction can be interpreted and set by the courts. The court will ask whether the rules confer the power on the sports governing body that it is purporting to exercise. In a case where the sports governing body is subject to both specific express contractual obligations under its rules and the more general public law standard of review under *Bradley*, the courts may adopt a two-level analysis, starting with 'the hard-edged, strict contractual approach' and then moving to 'the more "public law" oriented principles' under *Bradley*.[2] It may of course also be possible to challenge the existence or validity of the relevant contractual obligation, for example if it has not been correctly adopted or if it is contrary to other pre-existing rules, or on grounds of restraint of trade, competition law, or the free movement rules.

1 See *Martinez v Ellesse SPA*, 30 March 1999 CA, for an exposition in the sporting context of the principles of construction of a commercial contract. For those principles generally, see *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at paras 14-22 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173 per Lord Hodge at paras 10–15.
2 *The New Saints FC Limited v The Football Association of Wales Limited* [2020] EWHC 1838 (Ch) at paras 37–38 per Marcus Smith J.

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3 IMPLIED CONTRACTUAL OBLIGATIONS

A The implication of the equivalent of the public law standard of review

E8.16 As described in Chapter E7,[1] it is tolerably clear that where a contract does arise between the player, club or other participant and the sports governing body, it will be implicit in such a contract that the decisions of the governing body are subject to the same grounds for review as apply on the non-contractual basis, which mirror the public law standard of review. However, as explained above, whether a cause of action sounding in damages arises against the governing body depends first on the terms of the contract, secondly on the nature of what has been done wrong, and thirdly on whether the decision-maker was the sports governing body or a separate disciplinary body. Where a contract exists on the terms of the rules, a breach of the express terms in the rules by the sports governing body itself can be sued upon as a matter of contract and in such circumstances a cause of action in damages likely arises. Where a sports governing body has been found to have acted in a way that is impermissible under one of the other grounds for review, by reference to the same supervisory standard that would apply irrespective of contract, and proceeds to enforce that action, it would appear that the sports governing body is in breach of an implied requirement in the contract that it should not do so, and a cause of action in damages will arise. Where on the other hand a disciplinary body created by, but separate from, the sports governing body takes a decision that has been found to be impermissible under any of the grounds for review, by reference to the same supervisory standard that would apply irrespective of contract, it is less clear that a cause of action in damages arises against the sports governing body with which the participant has a contract. In these circumstances, it has been said that the extent of the obligation on the sports governing body is to establish a fair process. It would however appear that the sports governing body may also owe implied contractual obligations first to enforce the decision made by the separate disciplinary body (and nothing else), but secondly not to enforce such a decision if it was reached in breach of the supervisory standard of review.

1 See para E7.3 et seq.