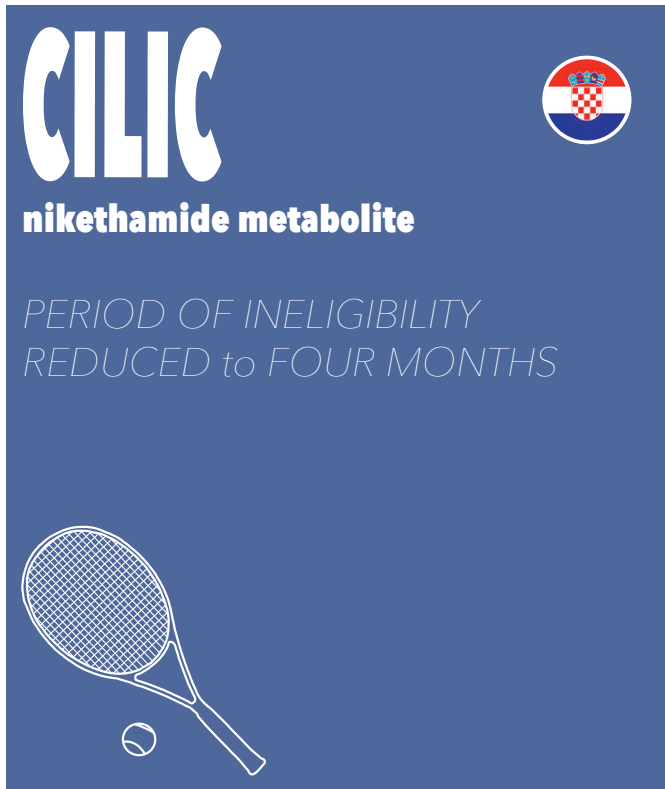


Still need proof sugar is bad for you?

Cilic, glucose, “light” fault, and four months out

Marin Cilic v. International Tennis Federation (ITF)

CAS 2013/A/3335, April 11, 2014.



Key words:

Degree of fault, Specified Substances, Inadvertent ingestion, Period of Ineligibility

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In this blog post, we analyze the recent CAS award in the *Marin Cilic v. ITF* matter, which revolves around the determination of the *Ineligibility* period based on the *Athlete's* degree of fault. The post also assesses the implications of the CAS award for the upcoming 2015 World Anti-Doping Code (the “Code”) regime.

The *Cilic v. ITF* CAS decision is remarkable for two reasons:

- First, for the willingness of the CAS Panel to expound on general principles for evaluating the degree of fault of an *Athlete* in the context of *Specified Substances*, to achieve a harmonized application of the Code.

- Second, for the well-laid out principles themselves, which include an explicit and systematic evaluation of both the objective and subjective components relevant to the fault of the *Athlete*. The Panel’s reasoning is broadly premised on the notion that objective elements of a violation should be considered before the subjective elements, and that violations involving *Substances Used Out-of-Competition*, but prohibited only *In-Competition* generally de facto involve a lower level of fault. The award also shows, however, that objective and subjective components inevitably influence each other in the assessment.

THE FACTUAL CIRCUMSTANCES

Marin Cilic a renowned Croatian tennis player (who would go on to win the 2014 US Open) was subjected to *In-Competition Testing* during the BMW Open in Munich, Germany on May 1, 2013, which yielded an *Adverse Analytical Finding* for N-ethylnicotinamide, a *Metabolite* of nikethamide (a *Specified* stimulant explicitly named in class S.6 of the Prohibited List). The tennis player admitted to the violation, explaining that the substance entered his system through a glucose tablet that his mother purchased on his behalf. During the Rolex Masters in early April 2013, the tennis player had noticed that he was running low on his glucose tablets used regularly as part of his training regime, on the advice of a member of his training staff. His mother purchased coramine glucose tablets from a pharmacy, which the pharmacist assured her were safe for professional athletes. Following what was an extremely stressful tournament for the tennis player, he checked the label of the tablets, noting that they contained “nicethamide,” which he mistakenly assumed was French for “nikotinamid,” a non-prohibited vitamin that his normal brand of glucose tablets contained. He even sent a photo of the box to a member of his training staff to double check that they were safe for him to take.

He took these glucose tablets for three days preceding the BMW Open, before switching back to his usual brand of glucose tablets on April 27, four days before the *Test* in question.

THE CAS PROCEEDINGS

The CAS proceedings resulted from an appeal made against the initial disciplinary decision issued by the International Tennis Federation (ITF) Tribunal. The ITF Tribunal found that while the tennis player did not intend to enhance his performance, his degree of fault was “quite high” given in particular his ready access to professional advice and considerable anti-doping education, noting in particular that he could have easily discovered that the tablets contained a *Prohibited Substance* had he looked closer at the product packaging or conducted an Internet search. Concluding that the violation was neither “at the most serious end of the scale” nor “venial” the ITF Tribunal imposed a period of *Ineligibility* of nine months.

Before the CAS, since there was no challenge as to the origin of the substance and it was equally undisputed that the tennis player did not intend to enhance his performance, it was accepted that Article 10.4 [of the ITF ADR, corresponding to Article 10.4 of the Code] regarding *Specified Substances* applied. The only issue under appeal was the period of *Ineligibility* based on Marin Cilic’s degree of fault. In an interesting twist, the ITF asked the CAS panel, regardless of the success of its appeal, to provide guidance on how to determine a sanction within the 0-24 month range provided in Article 10.4. Judging from the depth and thoughtfulness of its response, the Panel seemed to welcome this invitation.

General principles in setting the period of *Ineligibility* for *Specified Substances*

According to the 2009 Code (corresponding to the ITF rules applicable in Cilic), if Article 10.4 applies (i.e. absence of intent to enhance performance and origin of the substance are established), the period of *Ineligibility* for first time anti-doping rule violations is “at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, a

period of *Ineligibility* of two (2) years, with the “degree of fault [...] the criterion considered” in determining where the sanction should appropriately fall within this range.

As shown in Figure 1 below, the *Cilic* CAS Panel recognized three categories of fault within this 0 to 24-month range: light, normal, and significant. In order to determine within which category of fault a given violation falls, the CAS Panel recommended that both the objective and subjective levels of fault be considered. It described the objective level of fault as referring to “what standard of care could have been expected from a reasonable person in the athlete’s situation” and the subjective element as “what could have been expected from that particular athlete, in light of his personal capacities.” Between the objective and subjective elements, the CAS Panel suggested that the objective element should be “foremost in determining into which of the three relevant categories a particular case falls” and the subjective element can then be evaluated to “move a particular athlete up or down within that category.” The Panel advised that there could be exceptional cases, however, where the subjective elements are so “significant” that they could move the *Athlete* into a lower or higher “category” of fault.

Objective elements

According to the *Cilic* CAS Panel, “in theory, almost all” anti-doping violations related to a product containing a *Prohibited Substance* “could be prevented” if the *Athlete* takes the following measures:

1. read the label of the product used (or otherwise ascertain the ingredients)
2. cross-check all the ingredients on the label with the list of *Prohibited Substances*
3. make an internet search of the product,
4. ensure the product is reliably sourced and
5. consult appropriate experts in these matters and instruct them diligently before consuming the product.

Stating that *Athletes* cannot always be reasonably expected to take all of these steps in all circumstances, the Panel proposed two different standards of care depending upon whether the substance in question is prohibited at all times, or *In-Competition* only. For substances that are prohibited at all times, due to their being “particularly likely to distort” competition, the *Athlete* “must be particularly diligent” and thus the “full scale of duty of care [presumably all five of the factors mentioned] must apply.” For substances that are only prohibited *In-Competition*, the level of care required varies based on whether the substance in question was actually *Used In-Competition*. If the substance was *Used In-Competition*, then the “full standard of care” again applies. If, however, the substance was *Used Out-of-Competition*, the CAS Panel proposed that the “level of fault is different from the outset.” According to the Panel, the reason for this special assessment for this particular combination (substances prohibited *In-Competition* yet ingested *Out-of-Competition*) is that the illicit behavior is not tied to the ingestion of the substance itself. Rather, it is linked to the “fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition.”

The CAS Panel reasoned that to require *Athletes* not to consume these substances at all would be tantamount to expanding the prohibition at all times to the list of substances prohibited *In-Competition* only. Pointing to an earlier CAS award (*FINA v. Ciehlo*, CAS 2011/A/2495) to support this view, the Panel concluded that the lesser degree of fault inherently associated with these types of violations justifies a general rule that the applicable range of sanctions is 0 to 16 months, rather than 0 to 24 months. The CAS Panel did, however, highlight two exceptions to this general rule:

- **Exception 1:** If the product is sold as “performance enhancing,” a greater standard of care is required. The CAS Panel noted that the appropriate criterion in determining whether a product is performance enhancing is not whether it is a “supplement”, since this word

- **Exception 1, cont’d.:** is “devoid of any helpful meaning in this context”. Instead the purpose of the product should be considered, which is ascertained by looking at the product’s advertising on the box, or how it is “discussed on the internet or used by the community in practice.”
- **Exception 2:** If the product is a “medicine designed for therapeutic purposes,” a higher standard of care is also required, as it is known that medications can contain *Prohibited Substances*. However, not everything that is purchased at a pharmacy should be considered a medicine. Rather the Panel provided an example from prior CAS jurisprudence that a caffeine pill used to stay awake *Out-of-competition* or to overcome tiredness is not a medicine. (See *FINA v. Ciehlo*, CAS 2011/A/2495, at para. 8.19)

Subjective elements

In terms of relevant subjective elements, the Panel considered that a close look at the circumstances of the case at hand is always required, but provided a list from earlier CAS cases of criteria considered relevant in the past, including the following:

- Youth or inexperience (CAS 2011/A/2493, para. 42)
- Language or environmental problems (CAS 2012/A/2924, para. 62)
- Anti-doping education received or accessible (CAS 2012/A/2822)

Any other personal impairments, including:

- An athlete who has taken a certain product over a long period of time without incident (CAS 2011/A/2515, para. 73)
- An athlete who has previously checked the product’s ingredients
- An athlete suffering a high degree of stress (CAS 2012/A/2756, para. 8.45 et. seq.)
- An athlete who made a careless but reasonable mistake (CAS 2012/A/2756, para. 8.37)

Other factors

As a final note on the general principles for an appropriate reduction on a period of *Ineligibility for Specified Substances*, the CAS Panel found that taking into account any other factor outside of fault would be contrary to the rules and that a panel should depart from the clear wording of a provision only “in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy.”

Application of the general principles to the facts of the Cilic case

According to the CAS Panel, since the substance was prohibited *In-Competition* but ingested *Out-of-Competition* and was not a medicine, the level of fault attributed to the tennis player could in principle not be “significant.” Accordingly, the third category of fault (“significant degree of fault”) was eliminated from the outset, and the *Athlete* was subject to a period of *Ineligibility* ranging from 0 to 16 months. In order to further narrow the range and establish whether the *Athlete’s* degree of fault was “light” or “normal” the Panel turned to the objective elements. While the Panel noted that the precautions taken by the *Athlete* were not sufficient to actually avoid an anti-doping rule violation, they were sufficient to place the violation within the “light degree of fault” category, thus drawing a 0 to 8 month period of *Ineligibility*.

To determine the exact period of *Ineligibility* within this “light degree of fault” range, the Panel analyzed the subjective elements of the case. The Panel labeled the fact that the tennis player actually read the ingredients as the most important of the subjective elements, noting that his mistaken belief that “nicethamide” was “nikotinamide” was “careless but not highly careless.” This mistake was also “plausible” and “responsible for reducing his subjective capacity to act according to the required standards.” The Panel also dismissed the notion that the tennis player’s mistake as to the name of the substance should have invoked a level of doubt that would drive a reasonable person to conduct further research. In support of its views, the Panel cited the fact that the player’s past conduct demonstrated (in effect) that he took his anti-doping responsibilities very seriously and that

he was an “honest and truthful” man. Other mitigating factors included the fact that he spoke some French (apparently enough to create a risk of confusion, but not enough to actually help him avoid an anti-doping rule violation); that he was under “considerable stress;” and the fact that he had already taken glucose for a long time without incident, so was less attuned to the associated risks. Interestingly, while the Panel listed the fact that an *Athlete* is experiencing a high degree of stress as an example of a subjective element that could mitigate the level of fault associated with an anti-doping rule violation, and found that Cilic was under “considerable” stress at the time of the violation, it also noted, without further explanation, that it would not attribute any “significant” weight to this factor.

In closing, the Panel decided that the “exacerbating and mitigating factors in this case are of roughly equal weight” and thus placed the appropriate level of fault directly in the middle of the 0 to 8 month category of a “light degree of fault”, assigning a four month period of *Ineligibility* to the tennis player.

Of note, the ITF had also invited the Panel to explain how its reasoning differed from that set forth in the initial decision rendered by the ITF Tribunal. The arbitrators were of the view that this analysis, in addition to being neither helpful nor necessary, was not really appropriate in light of R57 of the CAS Code, which guarantees the parties the right to a *de novo* consideration of the case. Despite this stated hesitation, the Panel did point out that its decision departed from the ITF’s in terms of its assessment of the reasonableness of the tennis player’s actions. It noted in particular, that it accepted the line of reasoning presented by the tennis player’s attorneys. Namely, once it was accepted that the mistake in the identity of the substance was reasonable, the Panel concluded it would then be unreasonable to expect that he fulfill more of the “objective” elements described in the award, such as performing an Internet search or consulting the ITF’s wallet card.

CILIC AWARD CONSIDERED THROUGH THE LENS OF THE 2015 CODE

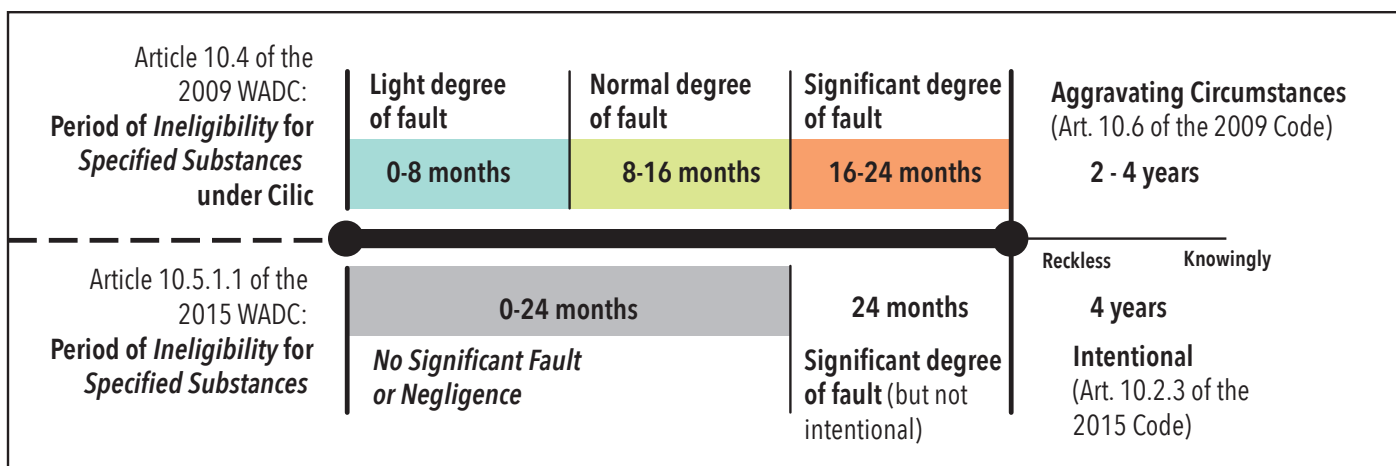
The CAS Panel’s dedication to a systematic – almost textbook-like – analysis of the principles underlying an *Athlete’s* degree of fault under the 2009 Code cannot but evoke the perspective of the 2015 Code, to become “effective” in a few months, on 1st January 2015. This correlation is perhaps not surprising given that the president of the CAS Panel in this case was a member of the drafting team of the new 2015 Code.

We focus here on the extent to which the “general principles” outlined in this award are reflected in the 2015 Code, knowing that *a priori* the two versions of the Code differ when it comes to the process for determining an appropriate period of *Ineligibility* in (see Figure 1). By contrast, we do not address in detail the merits of the various principles described and the relevance assigned to them for assessing the degree of fault in connection with different categories of products.

The following points highlight some of the general principles set forth in the *Cilic* award under the 2009 Code and discuss how they might be applied or carried through under the 2015 Code.

Categories of fault defined in the *Cilic* Award. As illustrated in Figure 1, above, under the 2015 Code only those violations falling into Categories 1 and 2 (a light and normal degree of fault, respectively) would qualify for a reduction under the new wording of the *Specified Substances* provision (Article 10.5.1.1). In order to reduce the “default” two-year period of *Ineligibility* under the 2015 Code, *Athletes* newly have to establish *No Significant Fault or Negligence*, which eliminates the “third” category defined in the *Cilic* award of “significant degree of fault”: if the degree of fault is found significant, under the 2015 Code, the period of *Ineligibility* can no longer be reduced below two years. This results from the decision in the new regime to abandon the special criterion of “absence of intent to enhance performance” applicable so far under Article 10.4 of the 2009 Code, in favor of the uniform application of the *No Significant Fault or Negligence* criterion to *Specified Substances* also. Note, by contrast, that non-*Specified Substances* should benefit from a more favorable regime under the 2015 Code, provided it can be established that they were ingested through a *Contaminated Product* and with *No Significant Fault or Negligence*.

FIGURE 1: A COMPARISON OF THE PERIODS OF *INELIGIBILITY* FOR *SPECIFIED SUBSTANCES* UNDER THE 2009 CODE AS INTERPRETED BY THE *CILIC* PANEL AND AS ANTICIPATED UNDER THE 2015 CODE



This in effect could reduce the significance of the distinction *Specified* versus non-*Specified*, favoring instead a gradation based rather on the degree of *Fault* of the *Athlete*, which appears consistent with the rationales underlying the *Cilic* award.

Accordingly, should CAS Panels wish to adopt the general principles set forth in this award in future, both the categories of fault and their associated period of *Ineligibilities* would need to be revisited. In this respect, it will be interesting to see how future Panels will interpret the objective and subjective components of fault, concepts which are well-implanted in the legal culture of some civil law countries, but may not be as familiar in other jurisdictions.

Lower level of fault where the violation involves a substance prohibited only *In-Competition* but *Used Out-of-Competition*. The 2015 Code newly includes a special assessment provided for this particular “substance-violation” combination that reflects a fundamental notion underlying the *Cilic* award, which is that substances prohibited *In-Competition* only but *Used Out-of-Competition* typically involve a lower level of fault.

For *Specified Substances*, according to the new Article 10.2.3 of the 2015 Code, the *Athlete* need only establish that the substance was *Used Out-of-Competition* to receive the benefit of a rebuttable presumption that the violation was “not intentional.” Even though the presumption is – in theory – rebuttable, this should give an *Athlete* a reasonable certainty that the period of *Ineligibility* will not exceed two years. As shown in Figure 1, intentional violations under the 2015 Code otherwise entrain an inflexible four-year period of *Ineligibility*, whereas under the 2009 Code, the only hypothesis in which a period of *Ineligibility* can exceed two years for first-time violations is the presence of aggravating circumstances (Article 10.6).

However, to reduce the *Ineligibility* further, i.e. below the two-year mark, *Athletes* will then need to establish *No Significant Fault or Negligence*, which puts them into a more difficult position than the *Cilic* award, where establishing *Use Out-of-Competition* is described already - in principle - as a sufficient indication that the associated level of fault was “not significant.” It is questionable whether this same interpretation (*Use Out-of-Competition* = non-significant fault) will still be possible under the new regime.

For non-*Specified Substances*, to establish that the violation was “not intentional” under the 2015 regime, the *Athlete* must show in addition that the *Use* was in a “context unrelated to sport performance.” This requirement is conceptually reminiscent of the two exceptions set forth in the *Cilic* award that requires a panel to look to aspects of the context surrounding the consumption of the product (i.e. whether it is advertised to serve a performance enhancing purpose, or whether it involves a medication) in determining whether a higher standard of care is expected from the *Athlete*. One wonders if panels applying this special assessment under the 2015 Code will likewise emphasize similar objective aspects when interpreting whether a substance was *Used* in a context unrelated to sport performance.

Interestingly, the new Code appears to effectively take a different slant in its approach regarding the standard of care for medications. In the *Cilic* award, the CAS Panel advised that *Use* of medications requires a higher standard of care on part of the *Athlete*, since medications can typically contain *Prohibited Substances*. Under the 2015 Code, however, violations involving medications should generally not be considered *Used* “in a sport-related context”, and thus more easily fall under the category of “not intentional,” accounting for a lower level of fault and opening the door to further reduction of the *Ineligibility*.

Strong emphasis on objective elements when determining a sanction under the 2015 Code. The *Cilic* award is interesting as an illustration of the challenges involved in developing an adequate framework to balance considerations of fairness with the need for a harmonious application of the Code, a challenge that should continue to prevail under the 2015 Code.

While the Panel outlined a very clean framework that readily favored the objective side of the evaluation, yet the subjective elements still exerted a considerable - if not decisive- influence. As the Panel stated, once it was accepted that the *Athlete* was reasonable in his mistake regarding the ingredients of the glucose tablet, his “subjective capacity to comply with his objective duty was reduced.” This statement is remarkable in that it essentially describes a pathway for the subjective elements of the case to preempt and affect the objective analysis of the circumstances. Therefore, the Panel was at the very least influenced in the objective portion of its reasoning by the subjective realities of the case, which ultimately appears an inevitable component of setting the period of *Ineligibility* in accordance with the proportionality principle.

One wonders if CAS Panels will adopt a similar pragmatic approach in applying the new 2015 Code, since the objective elements of a violation are more strongly drafted into the provisions themselves. For example, the freshly minted definition of *Contaminated Products* includes such fact-based elements as “not disclosed on the product label or in information available in a reasonable internet search.”

CONCLUSION

In sum, the few aspects discussed above reveal that the criteria and approaches developed under the 2009 Code with respect to the *Athlete’s* fault cannot be transposed without further thoughts to the 2015 regime.

The 2015 Code operates on a different structure altogether, especially due to the need to accommodate the new four-year period of *Ineligibility* and the novel concept of “intentional doping”. Nevertheless, the *Cilic* award is an excellent demonstration of the manner in which CAS panels can contribute to shaping clear assessment charts for implementing the new sanctioning regime. The CAS panel explicitly mentioned its duties to defer to the factors declared relevant in applicable provisions, subject to imperatives of proportionality that might command a departure from the applicable rules to avoid a breach of public policy (probably an implicit reference to Swiss Supreme Court case law). This statement is an important signal for the mission of CAS panels that will adjudicate the first cases under the 2015 Code. The sanctioning regime may change in 2015, but the need for interpreting the provisions will remain, including giving sufficient consideration to proportionality. No doubt the thorough criteria laid out in the *Cilic* award will continue to form a guidance for fault-related issues. As such, this award can be predicted to remain a valuable source of inspiration for future CAS panels in and beyond 2015.

Available at:

<http://wadc-commentary.com/cilic>

This comment appeared as a blog entry as part of the World Anti-Doping Code Commentary Project, funded by the Swiss National Science Foundation and in collaboration with the University of Neuchâtel. For more information please visit our website at:
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