



**Arbitration CAS 2009/A/2019 Jakub Wawrzyniak v. Hellenic Football Federation (HFF), award of 21 May 2010**

Panel: Prof Luigi Fumagalli (Italy), President; Mr Piotr Nowaczyk (Poland); Prof Petros C. Mavroidis (Switzerland)

*Football*

*Doping (Methylhexaneamine)*

*Applicable law: principle of non-retroactivity and of lex mitior*

*Presence of a substance similar to a prohibited substance*

*Identification of a second violation*

*Additional sanction*

1. Under a well established CAS jurisprudence, in order to determine whether an act constitutes an anti-doping rule infringement, the Panel applies the law in force at the time the act was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future. The principle of non-retroactivity is however mitigated by the application of the “*lex mitior*” principle.
2. A substance which is not explicitly included in the applicable list of prohibited substance like Methylhexaneamine, but which is however a substance similar to a prohibited substance – must be prohibited under the principle that not only are the listed substances prohibited, but also any other substances with a similar chemical structure or similar biological effect(s). Methylhexaneamine must therefore be considered as a prohibited substance similar to the Tuaminoheptane, a specified prohibited stimulant specifically mentioned in the 2008 Prohibited List. As a result, the presence of Methylhexaneamine in the Player’s bodily samples constitutes an anti-doping rule violation.
3. According to Article 52.5 of the 2009 FIFA ADR for the purpose of imposing sanctions, an anti-doping rule violation will only be considered a second violation if FIFA can establish that the player committed the second anti-doping rule violation after he had received notice of the first anti-doping rule violation. In this respect, if a later-in-time but earlier discovered violation has been established and that after its notification an earlier-in-time but later discovered violation is established, those violations have to be treated as one single first violation.
4. According to Article 52.6 of the 2009 FIFA ADR, an additional sanction should be imposed based on the sanction that could have been imposed if the earlier-in-time but later discovered violation had been adjudicated at the same time as the later-in-time but earlier discovered violations discovered, unless the Player has voluntarily admitted

**the earlier anti-doping rule violation in a timely manner after notice of the violation for which he was first charged.**

Jakub Wawrzyniak (the “Player” or the “Appellant”) is a professional football player of Polish nationality, born on 7 July 1983.

The Hellenic Football Federation (HFF or the “Respondent”) is the national football association for Greece. It is affiliated to the Fédération Internationale de Football Association (FIFA), the governing body of international football.

In the early months of 2009 the Player, who was at the time playing for the Greek football team FC Panathinaikos, underwent numerous doping controls performed by the Hellenic National Council for Combating Doping (“Eskan”).

On 5 April 2009 the Player took part in a football match between FC Panathinaikos and FC Skoda Xanthi of the Greek 1<sup>st</sup> National Division Championship. After that football match, the Player underwent a doping control (the “April Control”).

After the laboratory analysis, Eskan informed the HFF that the “A” sample collected from the Player at the April Control had tested positive for Methylhexaneamine. The adverse analytical finding of the “A” sample was notified to the Player on 6 May 2009 and thereafter confirmed by the “B” sample analysis.

As a result of the above, disciplinary proceedings (the “First Disciplinary Proceedings”) were started against the Player before the competent Greek authorities for an anti-doping rule violation.

On 4 June 2009, the Disciplinary Committee of the First Instance Greek Super League (the “Disciplinary Committee”) issued a decision (the “First DC Decision”), imposing a three-month disqualification to the Player. In support of the First DC Decision, the Disciplinary Committee made reference to some Greek provisions (and chiefly to Article 24 of the Disciplinary Code of the HFF then in force: the “2008 HFF Disciplinary Code”) and applied Article 47.1 and Article 47.4 (c) of the 2009 FIFA Anti-Doping Regulations (the “2009 FIFA ADR”), finding that:

*“the forbidden substance 4-methyl-2-hexanamine ... which is characterized as a special reference substance ... entered the appellee’s body as a diet booster, for weight loss (during the time he was in Poland with the National Team of this country) and not to enhance his athletic performance. ...*

*From the aforementioned it derives that the above appellee footballer did not take the above substance in order to improve his athletic performance.*

*Therefore, according to the above provisions, a reduced penalty should be imposed on him in relation to the one provided for, relative to the grade of his liability ...”.*

Both the Player and the HFF appealed the First DC Decision before the Appeals Committee of the HFF. The Appeals Committee of the HFF (the “Appeals Committee”) issued, on 1 July 2009, a decision (the “First AC Decision”), imposing on the Player a one year disqualification as from 5 April 2009. The Appeals Committee, in fact, applied “*the provision of paragraph 2, chapter C, article 24 of the Disciplinary Code*” to conclude that “*the penalty*” of two years of suspension, otherwise applicable, “*should be reduced by half*”. In other words, the Appeals Committee found that the Player had committed a violation of Article 24 of the 2008 HFF Disciplinary Code for taking the prohibited substances detected at the April Control; it imposed, nonetheless, the reduced sanction foreseen by Article 24 Chapter C para. 2 of the 2008 HFF Disciplinary Code for no significant fault.

On 24 July 2009 the Player filed with the Court of Arbitration for Sport (CAS) an appeal to challenge the First AC Decision. The appeal arbitration proceedings so started were registered by the CAS Court Office as CAS 2009/A/1918 *Jakub Wawrzyniak v. Hellenic Football Federation* (the “1918 CAS Proceedings”). As a result of the proceedings, an award was issued on 15 December 2009, which, in its operative part, reduced the period of ineligibility from one year to three months. The full award containing the grounds was issued by the CAS on 21 January 2010 (the “1918 CAS Award”).

Before the April Control, however, the Player had undergone doping controls on 21 February 2009 (after his team’s game against PAE Panionios) and on 22 March 2009 (following his team’s game against Asteras Tripolis) (the “Prior Controls”). After initial negative findings, the laboratory analysis revealed the existence of the substance Methylhexanamine also in the Player’s urine sample collected at the Prior Controls. The findings were communicated to the Player on 10 June 2009.

As a result of the adverse analytical findings related to the Prior Controls, new disciplinary proceedings were started against the Player (the “Second Disciplinary Proceedings”).

On 23 July 2009, the Disciplinary Committee of the HFF issued the decision No. 203/2009 (the “Second DC Decision”), imposing on the Player a two-year disqualification.

In the Second DC Decision, the Disciplinary Committee applied Article 24 of the 2008 HFF Disciplinary Code, as well as Articles 47.1, 47.4 (c) and 52.6 of the 2009 FIFA ADR, to justify the sanction imposed as “*proportional to his [the Player’s] degree of fault*”. At the same time, it rejected the claim of the Player that it was violating the maxim *ne bis in idem*, since the anti-doping rule violation in the Second Disciplinary Proceedings was the same as that in the First Disciplinary Proceedings, “*given that it does not have the same background since this concerns a new document of the ... Eskan ... and different matches*”.

On 27 July 2009, the Player filed with the Appeals Committee of the HFF an appeal against the Second DC Decision.

The Appeals Committee on 7 October 2009 issued the decision No. 211/7-10-2009 (the “Second AC Decision”). The Second AC Decision set aside the Second DC Decision and imposed on the Player, as a sanction, a one-year ineligibility period “*according to section 2, Chapter C, article 24 of the Disciplinary Code, in view of the fact that he bears no significant liability, this decision being justified by the fact that*

*the detected substance methylhexaneamine is not included in the stimulating substances of the list but it is forbidden due to the fact that it has similar pharmacological qualities and chemical structure with the special reference substance tuaminobeptane mentioned in the list”.*

The Second AC Decision was notified to the Appellant on 4 December 2009.

On 21 December 2009, the Player filed a statement of appeal with the CAS, pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the Second AC Decision (the “Decision appealed against”), naming the HFF as respondent. The statement of appeal contained also an application for provisional measures, seeking the stay of the Decision appealed against, and the appointment of Mr Piotr Nowaczyk as arbitrator.

On 4 January 2010, the Appellant filed his appeal brief.

On 21 January 2010, the Deputy President of the Appeals Arbitration Division of the CAS issued an order accepting the request for a stay of the Decision appealed against filed by the Appellant together with his statement of appeal.

On 17 February 2010, the Appellant informed the CAS Court Office that, according to his opinion, a hearing would not be necessary in this case due to the fact that all crucial evidence had been collected in the files of the 1918 CAS Proceedings.

In the absence of response by the Respondent, the CAS Court Office sent a letter on 10 March 2010 to the parties informing them that the Panel had decided to issue an award on the basis of the submitted information only (including the file of the 1918 CAS Proceedings).

The Respondent, although formally and timely invited to do so, did not submit an answer to the appeal pursuant to Article R55 of the Code, nor did it express itself during the course of the present proceedings.

On 12 April 2010, the CAS Court Office invited both parties, pursuant to Article R44.3 of the Code, to provide the CAS Court Office with some additional information (*inter alia*, the date of the notification of the result of the analysis of the sample collected on 21 February 2009, together with a document attesting the date, the date of the notification of the result of the analysis of the sample collected on 22 March 2009, together with a document attesting the date, the date of the notification of the result of the analysis of the sample collected on 5 April 2010, together with a document attesting the date, the Second DC Decision, together with an English translation, and the Greek original version of the Decision appealed against).

The Parties filed the documents requested by letters dated 19 April 2010, 21 April 2010 and 6 May 2010.

Although the following does not comprise every contention put forward by the parties, it does, however, include all claims put forward as well as the main arguments and has carefully considered all submissions, even if no explicit reference to those submissions is made in what follows.

In his statement of appeal, the Appellant requested from the CAS, in addition to the stay of its execution (above), that the Second AC Decision *“be annulled in its entirety”*.

The relief sought was confirmed in the appeal brief dated 4 January 2010.

In his submissions, the Appellant acknowledged that he had been ingesting the slimming preparation Tight Extreme (which contained the prohibited substance Methylhexaneamine) in order to reduce weight and not enhance his sporting performance, since February 2009. The Appellant, however, maintains that, before taking Tight Extreme, he had carefully verified its components and that none of the ingredients listed on the product were present on the List of Prohibited Substances: the substance in question (Methylhexaneamine) was in fact officially added by the World Anti-Doping Agency (WADA) to the List of Prohibited Substances only for the year 2010.

In conclusion, the Appellant summarizes his position as follows:

- *“the anti-doping rules were retroactively approached in the present case as the act of the Appellant took place on 21st February 2009 and on 22nd March 2009, whereas methylhexaneamine has been considered prohibited by ESKAN not earlier than on 30th March 2009”*;
- *“the anti-doping rules violation by the Appellant has already been judged and final award of CAS has been delivered on 15th December 2009, so in the light of the above the challenged decision violates ne bis in idem principle”*;
- *“the Appellant bears no fault or negligence in the case at hand, what leads to a conclusion that 3 months’ ineligibility period imposed on him by CAS and served on 5th July 2009 is a correct sanction for what the Appellant has done (...)”*;
- *“No aggravating circumstances occur in the present case as the Appellant voluntarily and promptly admitted that he ingested Tight Xtreme preparation containing methylhexaneamine (with no intention or negligence)”*.

Although officially and timely invited to do so, the HFF did not submit an answer to the appeal pursuant to Article R55 of the Code, nor did it express itself during the course of the proceedings.

In any case, and in accordance with Article R55 of the Code, if the Respondent fails to submit its answer within the applicable time limit, the Panel may nevertheless proceed with the arbitration and deliver the award.

## LAW

### CAS Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS is not disputed by the HFF and was based *in casu* on Article R47 of the Code. It is further based on Article 63.1 of the FIFA Statutes (2008 edition) and on Article 63 of the 2009 FIFA ADR, in force at the time the appeal was filed, according to which
  - “1. *In cases arising from participation in an international competition or in cases involving international-level players, a final decision within FIFA’s, the confederation’s or the association’s process may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*
  2. *The following parties shall have the right to appeal to CAS:*
    - a) *the player or other person who is the subject of the decision being appealed (...)*”.

### Appeal Procedure

2. As these proceedings involve an appeal against a decision in a dispute relating to an anti-doping rule violation, issued by a federation (HFF), with respect to rules that provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of an international nature, in the meaning and for the purposes of the Code.

### Admissibility

3. The Player’s statement of appeal was filed within the deadline set in Article R47 of the Code and Article 63.1 of the FIFA Statutes (2008 edition). It further complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

### Scope of Panel’s Review

4. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance.
5. In this respect, the Panel confirms that, by using its full power to review the facts and the law, it can consider all the elements of the dispute, and review the decision rendered by the Appeals Committee of the HFF, and determine whether a separate anti-doping rule violation has been committed by the Player and, in the event an infringement can be established, decide on the proper sanction to be imposed on the Player.

## Applicable Law

6. The law applicable in the present arbitration is to be identified by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (“PIL”), the arbitration bodies appointed on the basis of the CAS Code being international arbitral tribunals having their seat in Switzerland within the meaning of Article 176 of the PIL (Article R28 of the CAS Code).
7. Pursuant to Article 187.1 of the PIL,  
*“The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected”.*
8. Article 187.1 of the PIL constitutes the conflict-of-law system applicable to arbitral tribunals, which have their seat in Switzerland, and recognizes the traditional principle of the freedom of the parties to choose the law that the arbitral tribunal has to apply to the merits of the dispute.
9. The freedom of the choice of law in favour of the parties, based on Article 187.1 of the PIL, is confirmed by Article R58 of the CAS Code.
10. Pursuant to Article R58 of the CAS Code, the Panel is required to decide the dispute  
*“according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
11. In the present case, the question is which “*rules of law*”, if any, were chosen by the parties, i.e., whether the parties chose the application of a particular law, and, if yes, what is the role of the “*applicable regulations*” embedded in Article R58 of the Code.
12. To address this question the Panel has to consider the following:
  - the dispute was heard, and the Second AC Decision was issued, by a disciplinary body of the HFF that applied some provisions of the 2008 HFF Disciplinary Code; but
  - the Appellant made, in his briefs in these arbitration proceedings, no reference to any Greek rules or regulations, applicable within the HFF system, or to Greek law: indeed, the Appellant based his submissions on provisions of the WADC, without further specifications, while in the previous proceedings (which lead to the 1918 CAS Award) the Appellant referred to the 2009 FIFA ADR and the FIFA Disciplinary Code, 2009 edition (the “2009 FIFA Disciplinary Code”).
13. In the Panel’s view, this dispute has to be discussed on the basis of the relevant Greek regulations, taking into account the FIFA rules referred to by the Appellant and applied by the Disciplinary Committee and the Appeals Committee, as well as the WADC. In any case, the

Panel notes that the provisions of the 2008 HFF Disciplinary Code applied in the decisions issued by the HFF disciplinary bodies have the same content as the corresponding FIFA rules.

14. The Panel, at the same time, is of the view that some problems may be caused by the succession in time of the pertinent rules that have evolved since the Player underwent the doping controls during which he tested positive. Indeed, the applicable FIFA and HFF regulations were modified following the modifications of the WADC, from its 2003 edition (the “2003 WADC”) to its 2009 edition (the “2009 WADC”). In fact
- at the time the doping control took place the following regulations (corresponding to the 2003 WADC) were in force:
    - the FIFA Doping Control Regulations of 2004 (the “2004 FIFA DCR”), which defined the actions constituting anti-doping infringements;
    - the FIFA Disciplinary Code of 2007 (the “2007 FIFA Disciplinary Code”), which in its Articles 63-70 set the sanctions for the anti-doping infringements indicated in the 2004 FIFA DCR;
    - the 2008 HFF Disciplinary Code;
  - but, thereafter, following the adoption of the 2009 WADC,
    - the 2009 FIFA ADR entered into force on 1 May 2009,
    - the 2009 FIFA Disciplinary Code entered into force 1 January 2009,
    - the 2009 edition of the HFF Disciplinary Code (the “2009 HFF Disciplinary Code”) entered into force on 13 June 2009.
15. The Panel identifies the applicable rules by reference to the principle “*tempus regit actum*”: in order to determine whether an act constitutes an anti-doping rule infringement, the Panel applies the law in force at the time the act was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future. As stated in a CAS precedent (CAS 2000/A/274 *S v. FINA*, award dated 19 October 2000, *Digest of CAS Awards II (1998-2000)*, p. 389 at 405), in fact,
- “under Swiss law the prohibition against the retroactive application of Swiss law is well established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time that the facts at issue occurred ...”.*
16. The principle of non-retroactivity is however mitigated by the application of the “*lex mitior*” principle. In this respect the Panel fully agrees with the statements contained in the advisory opinion CAS 94/128 rendered on 5 January 1995, *UCI and CONI (Digest of CAS Awards (1986-1998))*, p. 477 at 491), which read (in the English translation of the pertinent portions) as follows:
- “The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime. It is established, for example, by Swiss law (art. 2 para. 2 of the Penal Code) and by Italian law (art. 2 of the Penal Code). This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must*



*enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel's opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res iudicata, provided that it has not yet been fully executed.*

*The Panel considers that [...] the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions”.*

17. In light of the above, the Panel shall apply the 2004 FIFA DCR to which the 2008 HFF Disciplinary Code referred in Article 24 Chapter 1 para. 1 (according to which “*Doping and doping rule violations are determined according to the FIFA Regulations on Doping Control for in- and out-of-competition*”). In any event, according to the principle of *lex mitior*, the Panel shall also apply the rules subsequently entered into force (i.e. the 2009 FIFA ADR) to the extent that those are more favourable to the Player.

18. More precisely, the rules which are relevant to the case at hand are the following:

*I Article II (Anti-Doping Rule Violations) of the 2004 FIFA DCR*

*The following constitute anti-doping rule violations:*

*1. The presence of a prohibited substance or its metabolites or markers in a player's bodily sample.*

*1.1. It is each player's personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily or conscious use on the player's part be demonstrated in order to establish an anti-doping violation under part II article 1.*

*Individual Case management is obligatory and is not affected by this regulation. (...)*

*II Appendix A of the 2004 FIFA DCR (as in force in April 2009)*

*Substances and methods prohibited in competition*

*In addition to the categories ... defined above, the following categories are prohibited in competition:*

*Prohibited Substances*

*S6. Stimulants*

*All stimulants ... are prohibited ....*

*Stimulants include:*

*... tuaminobeptane and other substances with a similar chemical structure or similar biological effect(s).*

*A stimulant not expressly mentioned as an example under this section should be considered as a specified substance only if the player can establish that the substance is particularly susceptible to unintentional anti-doping rule violations because of its general availability in medicinal products or is less likely to be successfully abused as a doping agent.*

*Specified Substances*

*“Specified substances” are listed below:*

*... tuaminobaptane and any other stimulant not expressly listed under section S6 for which the player establishes that it fulfils the conditions described in section S6.*

III *Article 24 Chapter C para. 1 (a) of the 2008 HFF Disciplinary Code*

*Any violation of Chapter II.1 (The presence of a prohibited substance or its metabolites or markers) [of the 2004 FIFA DCR] ... shall incur a two-year suspension for the first offence and a lifelong ban in the case of repetition.*

provision corresponding to Article 65.1 (a) of the 2007 FIFA Disciplinary Code.

IV *Article 24 Chapter C para. 1 (b) of the 2008 HFF Disciplinary Code*

*If any specified substances contained in the list of prohibited substances and methods (cf. appendix A of the Doping Control Regulations for FIFA Competitions and Out of Competition) are detected, for which proof can be produced that the specific substances were not intended to enhance sporting performance, at least a caution shall be given for the first offence and a two-year suspension in the case of repetition. A third offence shall incur a lifelong ban.*

provision corresponding to Article 65.1 (b) of the 2007 FIFA Disciplinary Code.

V *Article 47.1 of the 2009 FIFA ADR*

*Where a player can establish how a specified substance entered his body or came into his possession and that such specified substance was not intended to enhance the player's sporting performance or mask the use of a performance-enhancing substance, the period of ineligibility imposed under art. 45 shall be replaced with the following: at a minimum, a reprimand and no period of ineligibility from future competitions, and at a maximum, two years of ineligibility.*

*To justify any elimination or reduction, the player must produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the FIFA Disciplinary Committee the absence of intent to enhance sporting performance or mask the use of a performance-enhancing substance. The player's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility.*

VI *Article 24 Chapter C para. 1 (c) of the 2008 HFF Disciplinary Code*

*If the suspect can prove in an individual case that he bears no fault or negligence, the sanction otherwise applicable under the terms of para. 1 becomes irrelevant.*

provision corresponding to Article 65.3 of the 2007 FIFA Disciplinary Code.

VII *Article 24 Chapter C para. 2 of the 2008 HFF Disciplinary Code*

*If the suspect can prove in each individual case that he bears no significant fault or negligence, the sanction may be reduced, but only by up to half of the sanction applicable under para. 1; a lifelong ban may not be reduced to less than eight years.*

provision corresponding to Article 65.2 of the 2007 FIFA Disciplinary Code.

VIII *Article 52.5 of the 2009 FIFA ADR*

*For the purpose of imposing sanctions under this article, an anti-doping rule violation will only be considered as a second violation if FIFA can establish that the player committed the second anti-doping rule violation after he had received notice pursuant to Chapter VIII of the first anti-doping rule violation, or after FIFA had made reasonable efforts to give notice thereof. If FIFA cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (f. Art. 51).*

provision corresponding to Article 10.7.4 (first paragraph) WADA Code

IX *Article 52.6 of the 2009 FIFA ADR*

*If, after the establishment of a first anti-doping rule violation, FIFA discovers facts involving an anti-doping rule violation by the player that occurred prior to notification regarding the first violation, then FIFA shall impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time.*

*To avoid the possibility of a finding of aggravating circumstances (cf. Art. 51) on account of the earlier-in-time but later-discovered violation, the player must voluntarily admit the earlier anti-doping rule violation in a timely manner after notice of the violation for which he is first charged. The same rule shall also apply when FIFA discovers facts involving prior violation after the establishment of a second anti-doping rule violation.*

provision corresponding to Article 10.7.4 (second paragraph) WADA Code.

## Merits

19. The Player, in order to have the sanction for the anti-doping rule violations committed on 21 February 2009 and on 22 March 2009 cancelled or reduced, is challenging the Second AC Decision under several perspectives.
20. The Panel notes that the Player's claims raise two fundamental questions:
  - does the presence of Methylhexaneamine in an athlete's body constitute an anti-doping rule violation?
  - in the event the Panel holds that the presence of Methylhexaneamine in an athlete's body constitutes an anti-doping rule violation, should the finding of Methylhexaneamine in the Player's body following the Prior Controls be considered to be the same doping offence as the one established following the April Control? If so, what are the legal consequences of this conclusion?
21. Additional questions are indeed posed by the Player's submissions (e.g., whether Methylhexaneamine is to be considered, and treated as, a "specified substance", or whether a doping offence been committed by the Player without fault or negligence), which would

require a response only in the event the Panel held that the finding of Methylhexaneamine in the Player's body following the Prior Controls was a new doping offence.

- A. *Does the presence of Methylhexaneamine in an athlete's body constitute an anti-doping rule violation?*
22. It is undisputed that the Prior Controls showed the presence of Methylhexaneamine in the Player's body. Consequently, in order to establish whether an anti-doping rule violation has taken place (according to Article II.1 of the 2004 FIFA DCR), the Panel needs to clarify whether Methylhexaneamine was prohibited at the time when the doping control took place.
23. The issue, indeed, has already been addressed in the 1918 CAS Proceedings. This Panel sees no reason to depart from the conclusions reached in such respect in the 1918 CAS Award (§§ 71-81).
24. In the 1918 CAS Award the Panel found that
- Methylhexaneamine was not explicitly included in Appendix A of the 2004 FIFA DCR, in force in February-March 2009 (the "2008 Prohibited List"), at the time the Player underwent the Prior Controls;
  - Methylhexaneamine, however, was a substance similar to a prohibited substance – and therefore prohibited under the principle that not only are the listed substances prohibited, but also any "*other substances with a similar chemical structure or similar biological effect(s)*" are forbidden. More exactly
    - a. it was noted that the determination of similarity to substances expressly listed on the list of prohibited substances requires:
      - the similarity to one (or several) of the listed substances, and
      - the fulfilment of any two of the three criteria (established in Article 4.3 of the 2003 WADC and of the 2009 WADC for the inclusion of a substance in the list of prohibited substances): (a) the potential performance enhancement; (b) the potential health risk; and (c) the violation of the spirit of sport, and
    - b. concluded that such conditions had been satisfied.
25. In conclusion, also in the current case the Panel adopts the view that Methylhexaneamine must be considered as a prohibited substance similar to the Tuaminoheptane, a specified prohibited stimulant specifically mentioned in the 2008 Prohibited List. As a result, the presence of Methylhexaneamine in the Player's bodily samples collected at the Prior Controls constitutes an anti-doping rule violation.

- B. *In the event the Panel holds that the presence of Methylhexaneamine in an athlete's body constitutes an anti-doping rule violation, should the finding of Methylhexaneamine in the Player's body following the Prior Controls be considered the same doping offence as the one established following the April Control? If so, what are the legal consequences of such conclusion?*
26. The above conclusion leads the Panel to the examination of the next issue. The Player, in fact saw a sanction imposed on him for the anti-doping rule violation related to the April Control as a result of the First Disciplinary Proceedings and the 1918 CAS Award. The question, then, is whether the anti-doping rule violations relating to the Prior Controls must be considered, for the purpose of imposing a sanction, as new anti-doping rule violation, or, conversely, whether we are in presence of one violation irrespective of the number of times the Player tested positive to the aforementioned substance.
27. According to Article 52.5 of the 2009 FIFA ADR *“for the purpose of imposing sanctions (...), an anti-doping rule violation will only be considered a second violation if FIFA can establish that the player committed the second anti-doping rule violation after he had received notice (...) of the first anti-doping rule violation, or after FIFA had made reasonable efforts to give notice thereof. If FIFA cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances”*.
28. The Panel notes, in this respect, that the Player was notified of the adverse analytical finding related to the samples collected at the Prior Controls well after the April Control and the notification of its adverse finding. In fact:
- the Prior Controls were conducted on 21 February 2009 and 22 March 2009;
  - the April Control was conducted on 5 April 2010;
  - the results of the April Control were notified on 6 May 2009;
  - the results of the Prior Control were notified on 10 June 2009.
29. As a result of the above, the Panel holds that those violations have to be treated as one single first violation under Article 52.5 of the 2009 FIFA ADR: the Player, in fact, committed the violation considered in the Second Disciplinary Proceedings (based on the Prior Controls) before any notification of the violation based on the April Controls (object of the First Disciplinary Proceedings) had occurred. The Second AC Decision, to the extent it treated the violations detected at the Prior Controls as distinct violations, did not properly apply the relevant rules and must therefore be reversed.
30. The Panel notes that Article 52.6 of the 2009 FIFA ADR as well comes into play in this case. This provision, in fact, considers the discovery, *“after the establishment of a first anti-doping rule violation”*, of *“facts involving an anti-doping rule violation ... that occurred prior to notification regarding the first violation”*. Under Article 52.6, an additional sanction can be applied, *“based on the sanction that could have been imposed if the two violations had been adjudicated at the same time”*, as a result, for instance, of the application of the rule on aggravating circumstances (Article 51 of the 2009 FIFA ADR). To avoid the possibility of a finding of aggravating circumstances on account of

the earlier-in-time but later-discovered violation, the player *“must voluntarily admit the earlier anti-doping rule violation in a timely manner after notice of the violation for which he is first charged”*.

31. The aforementioned provision seems to correspond to the facts of the present case: the HFF established a first anti-doping rule violation for the positive results of the April Control; then, after the notification of such results, and upon the retesting of the samples of the Prior Controls, the HFF found them to be positive for the substance Methylhexaneamine.
32. Therefore, according to Article 52.6 of the 2009 FIFA ADR, the Panel should impose an additional sanction based on the sanction that could have been imposed if the violations discovered at the Prior Controls had been adjudicated at the same time as the violations discovered at the April Control, unless it finds that the Player has voluntarily admitted the earlier anti-doping rule violation in a timely manner after notice of the violation for which he was first charged.
33. In light of the above, the Panel has now to find whether the condition for the exemption of the additional sanction (i.e. the voluntary timely admission of the earlier anti-doping rule violation) is fulfilled in the case at hand.
34. In this respect the Panel holds that the Appellant, through his statements in the First Disciplinary Proceedings, as recorded by the First DC Decision and the First AC Decision, had unequivocally and voluntarily admitted that he had been taking the nutritional supplement Tight Xtreme (which contained the prohibited substance Methylhexaneamine) from time to time since January 2009. Indeed, in the course of the First Disciplinary Proceedings, started following the April Control, the Player admitted using the nutritional supplement containing the prohibited substance Methylhexaneamine at the time of the Prior Controls. The fact that the Player had maintained that such action did not constitute an anti-doping rule violation seems to be irrelevant in this context: the fact had been admitted voluntarily, even though its legal characterization was disputed.
35. On the other side, the Panel does not find that a single adjudication of all the adverse analytical findings related to the Player would have led to a different, larger sanction: the characterization of Methylhexaneamine as a prohibited substance would have been the same; the degree of negligence to be found in the Player's behaviour would not have changed.
36. The Panel, therefore, finds that no sanction, additional to the ineligibility applied by the 1918 CAS Award, has to be imposed on the Appellant.

## **Conclusion**

37. In the light of the foregoing, the Panel holds that the appeal is to be granted and the decision rendered by the Appeals Committee of the HFF on 7 October 2009 is to be set aside.

**The Court of Arbitration for Sport rules:**

1. The appeal filed by Mr Jakub Wawrzyniak against the decision issued on 1 July 2009 by the Appeals Committee of the Hellenic Football Federation is upheld.
2. The decision adopted by the Appeals Committee of the Hellenic Football Federation on 7 October 2009 is set aside.

(...)