

# The 2015 World Anti-Doping Code in practice: IF Adoption

1 January 2015 saw the latest version of the World Anti-Doping Code (the '2015 Code') take effect. The focus now shifts to the implementation stage, with several of the international federations (IFs) having already incorporated the reforms into their respective Anti-Doping Rules ('ADR'). Emily Wisnosky and Marjolaine Viret, attorneys and legal researchers in sports law for the University of Neuchâtel involved in a project to create a commentary of the World Anti-Doping Code, as well as speakers in next month's conference 'Tackling Doping in Sport', undertake a comparative analysis of the revised ADRs of some of the major IFs and provide valuable insights into the future of the Code.

## Background

On 1 January 2015, the World Anti-Doping Agency ('WADA') brought into force its revised Code, touting several key changes designed to better equip stakeholders to effectively combat doping in sports. These key changes are meant to lengthen sanctions for anti-doping rule violations for 'real cheats', encourage innovative and strategic means to detect doping, and create a framework to better collaborate and share information among anti-doping organisations and state governments.

In order for the Code to create binding obligations, it must be incorporated into the rules of the code's 'signatories'. While signatories are required to comply with the Code, and are offered a set of Model Rules created by WADA to aid in drafting compliant regulations, they need not



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incorporate the Code verbatim into their own rules. The Code 'is intended to be specific enough to achieve complete harmonisation on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented'. Thus, while the most important provisions of the Code (such as the list of anti-doping rule violations, the burdens of proof and the sanctions for anti-doping rule violations) must be implemented 'without substantive change', signatories retain a great deal of discretion in implementing the other principles provided for by the Code<sup>4</sup>. In practice, signatories, in particular IFs, have adopted unique and sometimes innovative approaches to anti-doping that are specifically tailored to the needs of their own sport.

We highlight some discrete aspects of the Code related to the consequences for anti-doping rule violations with a view to providing a snapshot of the different approaches adopted by some of the major IFs.

In particular, we discuss the approaches to implementing the 2015 Code taken by the Union Cycliste Internationale ('UCI') and its 2015 Anti-Doping Rules (the '2015 UCI ADR'), the International Association of Athletics Federations ('IAAF') and its 2015 Anti-Doping and Medical Rules ('IAAF Rules'), International Basketball Federation ('FIBA') and its 2015 Internal Regulations Governing Anti-Doping ('2015 FIBA ADR'), International Weightlifting Federation ('IWF') and its 2015 Anti-Doping Rules ('2015 IWF ADR'), and Fédération Internationale de Natation ('FINA') and its Doping Control Rules 2015 ('2015 FINA DCR').

## Comparative analysis of IF

## ADRs

### Financial sanctions

Like the 2009 version of the Code, the 2015 Code explicitly leaves the question of financial sanctions to the discretion of its signatories (within certain defined boundaries). Undoubtedly influenced by the various discussions regarding proportionality and financial sanctions by CAS panels in recent history, WADA added two new express limitations: (i) any financial sanction must be proportionate<sup>5</sup>; and (ii) a financial sanction can only be applied where the maximum applicable period of ineligibility has already been imposed. The first of these two requirements is a formalisation of CAS practice<sup>6</sup>. The second reinforces the provision in the 2009 Code prohibiting financial sanctions from being used as a basis for reducing an otherwise applicable period of ineligibility or other sanction (this provision remains in place in the 2015 Code)<sup>7</sup>.

Some IFs chose not to implement financial sanctions into their applicable rules, whilst others included only optional financial sanctions. For instance, the IAAF and IWF opted to leave out individual financial sanctions altogether in their 2015 rules<sup>8</sup>. FIBA and FINA maintained their approach of providing for discretionary financial sanctions, while both taking steps to more closely regulate them in their 2015 rules. In this respect, FIBA has newly incorporated a maximum limit of CHF 50,000 into its rules, whereas in the previous version the quantum of the sanction was left to the discretion of the sanctioning body. FINA has reduced the magnitude of the maximum allowable fine, from US \$50,000 in the 2013 FINA DC to US \$10,000 in the 2015 FINA DC.

The UCI's approach to financial consequences stands out. The 2015 UCI ADR imposes a mandatory fine on a rider or other person 'exercising a professional activity in cycling' for 'intentional' violations (according to the new definition in Article 10.2.3)<sup>9</sup>. The fine is equal to the rider or other person's net annual income from cycling, capped at a maximum of CHF 1.5 million. Previously, a similar fine was imposed for violations drawing a two year (or higher) period of ineligibility<sup>10</sup>, whether intentional or not, with some flexibility allowed to reduce it. While the CAS has repeatedly confirmed that financial sanctions are not per se disproportionate, the UCI's previous regime had been subject to some criticism for its lack of flexibility. The new regime removes a regularly challenged (and occasionally overruled) provision that attempted to cap a reduction of a fine at 50% of the automatically proscribed amount<sup>11</sup>. In the 2015 UCI ADR, hearing panels can now reduce the amount of a fine in consideration of a number of listed circumstances, with no limit on the maximum reduction available<sup>12</sup>.

#### Team sanctions

The 2015 Code obliges all IFs governing 'team sports'<sup>13</sup> to include additional sanctions for teams when individual members commit anti-doping rule violations. The Model Rules suggests wording for the provision governing sanctions for 'true' team sports as well as an alternative approach for other types of team disciplines, such as relay events and doubles tennis. The proposed wording for team sports is rather permissive, only requiring that these additional sanctions be 'appropriate.' The alternate language in the Model Rules for other types of team disciplines is stricter, proposing, for

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example, automatic team disqualification of results obtained in a competition for violations arising from individual in-competition tests<sup>14</sup>.

Some IFs chose to specifically define sanctions for team sports in their 2015 anti-doping rules, while others left them open to be defined on a case-by-case basis. The 2015 FIBA ADR takes the latter approach, providing that teams may be subject to 'disqualification or other disciplinary action' when more than one team member is found to have committed a violation, thus affording the sanctioning body considerable flexibility in defining an appropriate penalty<sup>15</sup>. FINA, in a somewhat hybrid approach, has laid out specific minimum sanctions for its team sport, while still leaving the possibility open for further sanctions at the discretion of the relevant ruling body<sup>16</sup>.

The UCI's approach to team sanctions, like its approach to financial sanctions, is arguably more involved than that of other IFs. Having been confronted in the past with cases involving multiple allegations of anti-doping rule violations within the same team, the UCI took steps in its 2015 rules to provide a legal basis for being more proactive towards penalising teams in the future. In the new rules, when two riders (or 'other persons within a team registered with the UCI') within a twelve month period are notified of a severe violation of the anti-doping rules<sup>17</sup>, the team is suspended from participation in international events for up to 45 days. The sanction is 'immediately enforceable' and non-appealable, but can be lifted under certain circumstances<sup>18</sup>. This provision strikes a balance between the need to take immediate action and the legal principle that no one should be punished without fault, in

particular when the fault is somebody else's. Further violations within a twelve month period can draw a suspension from participation in international events for up to one year.

The new UCI ADR also provides for automatic financial sanctions for teams<sup>19</sup>. If two riders are sanctioned for anti-doping rule violations that occurred within a twelve month period, the team must pay a fine equivalent to 5% of the annual team budget. Additional fines are levied when more than two riders are sanctioned within the same twelve month period. The UCI's innovative approach provides a clear incentive to the teams to take all reasonable measures to prevent individual anti-doping rule violations, both to avoid suspensions and to reduce the risk of financial sanctions.

#### Harmonisation of sanctions within a particular sport

Another aspect of anti-doping in which IFs are granted considerable latitude is in creating tools to ensure harmonised application of sanctions for anti-doping rule violations within their respective sports. IFs employ a variety of methods, with some choosing to intervene at an early stage, funneling first instance decisions through a central tribunal. Others allow their member federations to take a first instance decision, then provide for an appeal or decision-review process at the IF level. There are also others who rely almost exclusively on CAS to review their member federation decisions regarding international level athletes.

IWF, FINA, FIBA, and the UCI all take an early, active role by directing (mostly international-level) first instance cases arising in their respective sports towards a central tribunal. IWF, FINA, and FIBA employed this approach in

their previous versions of the rules, but for the UCI it is a new development.

In some sports, the IFs carve out opportunities to intervene in national proceedings at the member federation level as well, especially in cases of substantial delay. The IAAF, FIBA, and FINA set concrete time periods after which they can take on a proactive role<sup>20</sup>. The UCI takes a broader approach, providing itself authority to bring cases before its Anti-Doping Tribunal where 'there is a failure by another organisation to initiate or diligently pursue a hearing process' or where it considers it appropriate in order to ensure a fair hearing<sup>21</sup>.

FIBA takes a particularly original path towards overseeing harmonisation through a formal review process for decisions issued by member federations or other ADOs as a prerequisite to their international recognition<sup>22</sup>. In its 2015 ADR, FIBA continues its practice of offering its Secretary General the opportunity to review decisions issued by other ADOs before adopting them for the purposes of FIBA events.

### Conclusion

The unique structure of anti-doping, governed in principle by a common Code and in practice by the multiple manifestations of this Code in signatories' rules, leads to a terrain full of contours moulded to fit the needs of the many different sports involved. In some instances, the rules chosen by the IFs influence the development of anti-doping policies in the sport. Conversely, in other instances the specificities of the sport itself appear to be the dominant factor in shaping policies and rules. In awareness of these realities, this article sought to highlight some discrete aspects that reflect these variations and to provide a glimpse

at what anti-doping looks like on a practical level.

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1. The lack of 'direct effect' of the Code has been discussed and confirmed repeatedly by the CAS. See, e.g. *Hui v. IWF*, para. 98; See also *Overvliet v. IWF*, para. 7.5. The Code defines signatories as '[t]hose entities signing the Code and agreeing to comply with the Code' as provided by the relevant provision. 2015 Code, Appendix 1.
2. 2015 Code, Preamble, para. 2.
3. 2015 Code, Art 23.2.2.
4. 2015 Code, Introduction, para. 2.
5. In the 2009 Code, the Comment to Art 10.12 has been interpreted to take into account the proportionality of a financial sanction, but neither the provision nor its Comment contained an explicit reference to the principle of proportionality. See, e.g. CAS 2011/A/2325 (23 December 2011) *UCI v. Paulissen*, para. 176.
6. See e.g. CAS 2011/A/2325 (23 December 2011) *UCI v. Paulissen*; CAS 2011/A/2349 (29 December 2011) *UCI v. Sentjens*; and CAS 2011/A/2684 (14 September 2012) *UCI v. Muto*.
7. Essentially, the Code is making it clear that an athlete cannot 'buy their way' out of a period of ineligibility following an anti-doping rule violation.
8. They do provide for some financial liabilities, such as the repayment of prize money, but this is not considered to be a 'financial sanction' as contemplated under Article 10.10 of the 2015 Code.
9. 2015 UCI ADR, Art 10.10.1.1.
10. 2012 UCI ADR, Art 326 (1)(a).
11. See, e.g. *UCI v. Paulissen*, supra note 10.
12. The circumstances listed in the 2015 UCI ADR share some similarities with those set forth by the Paulissen CAS panel in its proportionality analysis, see *UCI v. Paulissen*, supra note 10 at para. 187.
13. 'Team sports' are defined as '[a] sport in which the substitution of players is permitted during a Competition.'
14. This provision, WADA Model Rules, Art 11.2.1 (Alternative 2) mirrors the language in Art 9 that provides for automatic disqualification of individual results and other associated consequences for an anti-doping rule violation in connection with an in-competition test.
15. 2015 FIBA ADR, Art 11.2. The 2015

FIBA ADR includes the limitation that for 'main official competitions of FIBA' only the Secretary General may take a decision regarding team sanctions. 16. The 2015 FINA DC, Art 11.3. 17. 2015 UCI ADR, Art 7.12.1. The provision regarding obligatory team suspension is applicable to certain Adverse Analytical Findings, Adverse/Atypical Passport Findings, and violations of Arts 2.5, 2.6, 2.7, 2.8, 2.9, or 2.10. The minimum period of suspension is 15 days. 18. 2015 UCI ADR, Art 7.12.1 (a)-(c). 19. 2015 UCI ADR, Art 11.3. 20. See, 2015 IAAF ADMR, Rule 38(3); 2015 FINA DCR, Art DC 8.2.6; and 2015 FIBA ADR, Arts 13.3.2 & 13.8.5. 21. 2015 UCI ADR, Art 8.2. 22. FIBA's review process is set forth in 2015 FIBA ADR, Art 13.8., and the universal recognition provision mentioned is 2015 FIBA ADR, Art 15.1.

*Emily Wisnosky and Marjolaine Viret will be speaking at our conference Tackling Doping in Sport between 12:15pm and 1:00pm on 18 March on the topic, 'Does 2 + 2015 = 4 years: doing the math under the new WADC sanctioning regime'. For more information about the conference, please visit [www.tacklingdopingsport.com](http://www.tacklingdopingsport.com)*