

Implementation issues arising from the 2015 WADA Code

During a workshop at the 2016 edition of the Tackling Doping in Sport Conference, organised by *World Sports Law Report*, Dr Marjolaine Viret and Emily Wisnosky, researchers from the University of Neuchatel, asked stakeholders to discuss the issues they have experienced in implementing the 2015 World Anti-Doping Code ('Code'). The goal was to get a sense of the most common or most serious issues faced by stakeholders during the first year of implementation, with a view to identify priorities for future revisions. Recent announcements by the World Anti-Doping Agency ('WADA') suggest that a new formal revision process is not on the immediate horizon; in particular, no adoption of a revised Code is contemplated for the next 2019 World Conference. Nevertheless, the exercise was an important indicator of 'where we are now' that can contribute to the discussion of future anti-doping policy. This article is not intended to be a comprehensive analysis of the state of anti-doping; rather, it presents a collection of feedback received, chosen to provide members of the anti-doping community with food for thought.

Sanctioning

Lost flexibility to sanction violations involving Specified Substances

Several stakeholders mentioned that the 2015 Code's approach to sanctioning violations involving Specified Substances leaves them with less flexibility than previously. Under the 2009 Code, once it was



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established that the Athletes lacked the intent to enhance performance, panels had considerable flexibility to assign an Ineligibility period between 0 to 2 years. Under the 2015 Code, in order to reduce a sanction below a two year Ineligibility period at all, the Athlete must show that he or she had No Significant Fault or Negligence, which appears to be interpreted by certain stakeholders as exhibiting 'utmost care.' According to the stakeholders, the result is that Athletes who were accepted not to have 'cheated' but who did not exhibit 'utmost care' are left without any option to reduce the sanction below two years. This was seen as contrary to the goal of providing more flexibility when it could be established that the Athlete did not intend to cheat. Along these same lines, more general comments were received about the difficulty in accounting for an Athlete's degree or level of Fault given the construction of the new provisions for Specified Substances and Contaminated Products.

More flexibility for harsher sanctions

One stakeholder sought more flexibility on a different aspect: capacity to punish a series of intentional violations more harshly. Article 10.7.4.1 of the 2015 Code provides that if a second violation was committed prior to receiving notice for a first violation, both violations will be considered together as a single violation and punished according to the violation that carries the more severe sanction. Thus, for situations in which it is discovered later that an Athlete committed two, rather than one, violations prior to notification, the resulting sanction would not be in the order of twice as long, but only incrementally larger, if at all.

Intelligence and investigations

Limitations of Substantial Assistance as defined in the Code

Perhaps the most discussed aspect of the 2015 Code in the workshop, also a lively topic of discussion throughout the Conference, concerned the shortcomings of the current Substantial Assistance regime to reduce an otherwise applicable sanction. Stakeholders criticised the provisions governing Substantial Assistance for lack of clarity and effectiveness, and for failing to give adequate guarantees for Athletes who wish to provide Substantial Assistance. These shortfalls were considered by some to lead to a system that does not incentivise Athletes to provide Substantial Assistance at all. Stakeholders called for more guidance as to how to apply this provision, in particular a framework that would help harmonise the reductions granted based on the information received. One stakeholder proposed the possibility of an "informant matrix" (similar to a system used in UK law enforcement) that would evaluate the Substantial Assistance based on its outcome and accuracy and tie these two factors to the amount of reduction available.

Some stakeholders questioned the current limitations on the types of information that would qualify as Substantial Assistance. One example provided was that information on the modalities of doping conducts, such as use of new substances or innovative methods, could be extremely valuable for Anti-Doping Organisations, but does not currently qualify as Substantial Assistance. It was acknowledged, however that providing a reduction for information on innovative or intricate doping conduct could amount to offering a greater award

to athletes who engaged in more complex doping activities than those who engaged in more traditional doping practices or were merely negligent.

Finally, stakeholders highlighted a perception problem surrounding Substantial Assistance, especially in those countries and sports with 'organised' doping programmes. The example given was the negative reaction in the media to a relatively minor reduction a Russian Athlete received for providing valuable Substantial Assistance. Stakeholders called for a shift in how these deals were portrayed, emphasising the benefit to the system and steering reactions away from the impression that 'serious' dopers were getting off too easily.

Encouraging cooperation in investigations

While the 2015 Code places a strong emphasis on investigations, stakeholders have felt held back by a lack of coercive powers arising from the Code to encourage the cooperation of Athletes, and Athlete Support Personnel, in these investigations. Stakeholders mentioned various provisions in the Code (in particular the Comment to Articles 2.5, Article 21.1.6, and Article 21.2.5), that encourage Signatories to provide for disciplinary consequences for failure to collaborate in investigations or for offensive conduct during Doping Control, but the Code does not itself set forth consequences for Athletes or Athlete Support Personnel in these situations. The suggestion was made that violations for lack of cooperation should be enshrined directly in the Code, possibly as a new category of anti-doping rule violation.

Adjudication of doping disputes

The suggestion was further made that parties should not be given the choice to declare an award confidential, as is currently the case under the CAS Code for appeal arbitration proceedings

Publication of all doping awards

Stakeholders called for the publication of all Court of Arbitration for Sport ('CAS') awards dealing with doping matters, pointing to the disadvantages that parties who do not have access to the significant number of unpublished awards face when going up against parties that do have these decisions. The suggestion was further made that parties should not be given the choice to declare an award confidential, as is currently the case under the CAS Code for appeal arbitration proceedings.

Possibility for shifting first instance doping procedures to the CAS

In light of the International Olympic Committee's ('IOC') proposal that the CAS should become the central adjudication forum for imposing sanctions at first instance, the IOC's recent announcement that the ad hoc division of the CAS would hear doping disputes arising during the Rio Olympics¹ and the recent announcement that the CAS would substitute as the first instance forum for eight Russian doping disputes², workshop participants were asked to weigh in more generally on the possibility of the CAS assuming a greater role as a first instance tribunal for doping disputes³. The general sentiment of stakeholders towards shifting doping disputes to the CAS at the first instance was that this was not a priority structural change in the system. To the contrary, most appeared to have the impression that the first instance hearings offered by International Federations and National Anti-Doping Organisations ('NADOs') work well in practice and are cost-efficient.

One of the concerns expressed regarding the possibility that CAS

should rule at first instance, is the fact that hearing panels currently are able to adapt to the individual situation of the Athlete or other person charged with an anti-doping rule violation. Most importantly, if the Athlete is not represented and obviously lacks resources to make an appropriate defence, hearing panels would try and attempt to compensate somewhat that imbalance by being more proactive in the proceedings and make sure that the Athlete's case can be properly heard.

Science

Rethinking the 'quota system' approach to Testing
Stakeholders challenged the efficacy of the 'quota system' introduced by Technical Document 2014 SSA that aims to ensure 'an appropriate and consistent level of analysis' by setting mandatory Minimum Levels of Analysis per sport/discipline that instruct Anti-Doping Organisations what percentage of all eligible tests in their Test Distribution Plan must be analysed for Erythropoiesis Stimulating Agents (e.g. EPO), Growth Hormones and related substances. Stakeholders commented that these Minimum Levels of Analysis did not always mesh well with the reality of drug use in their sport (e.g. stakeholders in more 'power' oriented sports questioned the requirement to test at all for Erythropoiesis Stimulating Agents that primarily are abused in 'endurance' oriented sports). Especially in smaller International Federations, some stakeholders perceived the Minimum Levels of Analysis as forcing them to unnecessarily order expensive tests, rather than making their own decisions as to the best use of their limited resources.

Better support for the collection

and shipment of blood Samples
Stakeholders reported practical difficulties in regards to the collection and shipment of blood Samples, which would make it practically impossible to achieve compliance, especially in regions such as South America, Asia and Africa. This may be due either to certain countries making the collection of blood difficult to achieve legally, or transporting blood Samples from the point of collection to a WADA accredited or approved lab, exceeding the ideal timing provided for in WADA technical rules.

Miscellaneous issues

Two main themes emerged outside of the four categories we presented: coherence and complexity of the World Anti-Doping Programme and the consequences of (non-) compliance for Signatories.

Coherence and complexity of the World Anti-Doping Programme
Stakeholders renewed the call for a clearer regime made during the 2015 Code review process⁴. Stakeholders commented on the general lack of coherence among the many documents comprising the World Anti-Doping Programme, including internal inconsistencies or contradictions that exist within these documents. The problem of finding a balance between harmonised solutions and stakeholders' duty to abide by national laws was also raised in this context. More generally, stakeholders were not confident that the World Anti-Doping Programme is comprehensible to its users and ultimate addressees (i.e. in particular the Athletes). One stakeholder described the impression that, generally speaking, Athletes are not well-informed of the full extent of their anti-doping obligations, and rarely get educated until they find

themselves defending an anti-doping rule violation. Proposals for improvement included step-by-step guides that would explain concretely what Athletes must do to avoid an anti-doping rule violation and/or to be eligible for a finding of No (Significant) Fault or Negligence, and generally enhance preventative education efforts.

(Non-)Compliance by Signatories

Consistent with current events in Russia in regards to anti-doping, stakeholders called for a better framework to describe the evaluation of and consequences for non-compliance. Stakeholders proposed the possibility of presenting standard solutions, possibly contained in the Code itself or enshrined in Guidelines that would help clarify the meaning of 'compliance,' particularly whether 'compliance' extends beyond 'rules' to the existence of having quality anti-doping programmes in place.

General impressions

In a rapidly evolving environment, some concerns expressed by stakeholders may have been addressed by WADA, or, to the contrary, exacerbated in the few months that have elapsed since the workshop. Nevertheless, the workshop proved an excellent occasion to gather general 'live' stakeholder reactions and to discuss issues they routinely need to deal with. After collecting and compiling stakeholders' views, we are left with the following impressions:

- Stakeholders are committed to designing and implementing efficient solutions, but a general feeling of frustration is palpable;
- Stakeholders, especially from NADOs, seem concerned that they are being monitored for compliance with rules that they either feel are not appropriately

tailored to their needs, or that they find obscure and wish were explained to them, or that they do not have the means/legal power to enforce, so their efforts are invested into trying to achieve compliance rather than focus on what they feel would be their priorities; and

- The general perception that the ultimate addressees of the rules, i.e. the Athletes/support personnel, are insufficiently educated still regularly appears in interventions on the Athlete's side. Suggestions for having documents that clarify the regulatory regime for Athletes and help Athletes determine what line of conduct they should follow to be 'on the safe side' indicate that: either existing tools for education are inadequate, or Athletes are not properly informed of their existence.

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As announced to the participants of the workshop, we will not reproduce the names of the individuals or organisations that made the relevant comments, other than by category of stakeholder where appropriate.

1. Press Release, IOC, <https://www.olympic.org/news/the-ioc-takes-decisive-action-to-protect-the-clean-athletes-doped-athletes-from-beijing-london-and-sochi-all-targeted>
2. Media Release, CAS, The Court of Arbitration for Sport (CAS) to Substitute for the All-Russia Athletics Federation (ARAF) In Adjudicating Eight Anti-Doping Rule Violations.
3. Article 8.5, which allows for a single hearing at the CAS upon agreement by relevant parties, is a novelty in the 2015 Code.
4. WADA, Significant Changes Between the 2009 Code and the 2015 Code, Version 4.0, p. 6 (revision theme 7).



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