

## **2021 World Anti-Doping Code Review: Questions to Discuss and Consider <sup>1</sup>**

### **ARTICLE 2**

- Fraudulent Conduct Which Does Not Involve “Doping Control”. Address the problem of Athletes or Athlete Support Personnel lying or submitting fraudulent documents during an investigation or during the results management process. Perhaps this could be addressed in the definition of Tampering.
- Consider clarification of some overlapping definitions of some of the terms used in this Article 2.

### **ARTICLE 4**

- Consider whether WADA’s determination of “decision limits” should benefit from the same presumption as other Prohibited List decisions (Article 4.3.3).

### **ARTICLE 5**

- Clarification that Anti-Doping Organizations may require whereabouts information from lower level Athletes. (Article 5.6 and definition of Athlete).

### **ARTICLE 6**

- Retesting and Ownership of Samples. The substantial increase in retesting stored samples (Article 6.5) has been a very positive development for anti-doping. However, a number of issues have arisen involving the retesting process and ownership of samples in relation to which organizations have the right to direct retesting and which organizations are responsible for retesting results management.

### **ARTICLE 7**

- Authority to Conduct Results Management. Although the general principles of Results Management (Article 7) are well accepted, there is continuing debate involving which organizations have the right to conduct results management in different circumstances.

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<sup>1</sup> As per the decision taken by the WADA Foundation Board on 16 November 2017 in Seoul, Korea.



## ARTICLE 10

- Contaminated Products and Food Contamination (meat). The possibility to reduce the otherwise applicable sanction when an Adverse Analytical Finding has resulted from a contaminated product (10.5.1.2) continues to be a major focus of litigation under the 2015 Code. In particular, CAS Panels have not been consistent in explaining the evidence, which an Athlete must bring forward in order to establish the cause of contamination.
- A related, but different, problem involves meat consumed in Mexico and China, which is contaminated with small amounts of Clenbuterol. At present, laboratories cannot tell whether a low level Adverse Analytical Finding for Clenbuterol is the result of meat contamination or whether it is the tail end of the excretion period for Clenbuterol doping. This situation and other forms of environmental contamination may need to be better addressed in the Code.
- Establishing the Source of a Prohibited Substance in an Athlete's Sample. There are several Code Articles where mitigation of sanction depends on the Athlete's ability to establish how a Prohibited Substance entered his or her body. Contaminated Products (Article 10.5.1.2); Out-of-Competition use of a Prohibited Substance, which appears in an In-Competition test (Article 10.2.3); No Significant Fault and unintentional doping. (It is difficult for the Athlete to establish absence of fault or intent when there is no explanation of how the Prohibited Substance entered his or her body.) CAS Panels have not taken a uniform approach in addressing these issues.
- Further Clarification of the Application of No Significant Fault. There have been some CAS Panels which have attempted to classify how the principle of No Significant Fault should be applied in different types of cases. We expect considerable debate about whether these classifications should be codified in a Code amendment or whether No Significant Fault should be left as a more general principle as is the case in the current Code.
- Areas Where Minors Bear the Burden of Proof to Reduce a Sanction. Concern has been expressed that minors should not have the burden to establish that their use of a non-Specified Substance was not intentional to avoid a 4-year period of ineligibility (Article 10.2.1). Similarly, there is concern that minors should not bear the burden of establishing the source of a Prohibited Substance in their urine in order to mitigate a sanction.
- Timely Admission (Article 10.11.2) and Prompt Admissions (10.6.3). While there seems to be a consensus that some credit to mitigate a sanction should be considered when the Athlete "admits" a violation, there remains considerable debate over what that admission must include. For example, is it sufficient that the Athlete admits the existence of an Adverse Analytical Finding, but contests any sanction being imposed?
- Minor changes to the Multiple Violations article (Article 10.7) may be needed to address the situation where an Athlete commits another Anti-Doping Rule Violation while serving a period of ineligibility. Broadening the ability to consider prior unknown Anti-Doping Rule Violations might also be a good idea.



- Article 10.11.1 prescribes that a period of Ineligibility may be started before the final hearing decision where there have been substantial delays not attributable to the Athlete. While in principle this makes sense, considerable concern has been expressed that CAS Panels have allowed Athletes to benefit from investigation delays caused by their own efforts to conceal doping.

### **ARTICLE 13**

- The notification provisions in Article 13 may need to be strengthened to ensure that WADA is notified when a party appeals to CAS.
- In Article 13.1.2, the language that “CAS shall not defer to the finding being appealed” may need to be repeated in the text of that Article, which currently uses the term “may”.

### **ARTICLE 14**

- There is an apparent inconsistency between Article 14.3.1 which says that an Anti-Doping Organization may publicly disclose the identity of an Athlete who has committed an Anti-Doping Rule Violation and Article 14.3.5 which says that no Anti-Doping Organization may comment on the specific facts of a pending case except in response to statements by the Athlete.
- Data Protection. It is not yet certain that changes will be required but a particular attention shall be paid to this field while reviewing the Code, in particular in light of the new European Law that enters into force next year.

### **ARTICLE 15**

- Mutual Recognition of Sanctions (Provisional Suspension). The basic principle of Article 15.1 remains unchanged – that all decisions rendered under the Code shall be recognized by all Signatories. Some fine-tuning may be necessary to ensure that this recognition is automatic and does not require the “recognizing Anti-Doping Organization” to issue a recognition decision. Further, the question of the recognition of Provisional Suspensions may need to be addressed.

### **ARTICLE 18**

- Education. The establishment of a new International Standard will likely trigger the need to make some adaptations in the Code.

### **ARTICLE 20**

- Responsibility of Officials to be Bound by the Code. Roles and Responsibilities of the different Anti-Doping Organizations (Articles 20.1-20.4) should require that all officials agree to be bound by the provisions of the Code. Consider requiring better tracking of Athlete Support



Personnel. Also, consider imposing duty on Anti-Doping Organizations to investigate a matter when requested to do so by WADA.

- New Signatories. The process to be followed upon reception of an application by an organization to become Code signatory should probably be better detailed in the Code.
- Laboratories. Article 22.6 may require changes based on the recommendations to be issued by the WADA ad hoc Laboratory Working Group.

### **COMPLIANCE**

- How should WADA's own Code compliance be monitored and enforced? In fact, WADA is not a Code Signatory and its structure, jurisdiction and mandate are not compatible with those of a Code Signatory.
- Should the consequences for Signatory non-compliance currently set out in the International Standard for Code Compliance by Signatories (ISCCS) be incorporated into the Code (e.g., as part of Code Article 12)?
- Whether the role of the Compliance Review Committee (CRC) should be specifically mentioned in the Code.
- What precisely is expected of Signatories in terms of monitoring and enforcing Code compliance by their members/recognized bodies (in particular, clarification of the respective roles of IFs and NOCs/NPCs in monitoring and enforcing Code compliance by National Federations)?
- Whether certain minimum good governance standards impacting anti-doping activities should be made a Code requirement for all Signatories.
- Whether individuals who are responsible for, or complicit in, non-compliance by a Signatory should be subject to sanction under the Code.
- Incorporate in Article 10.6.1 (Substantial Assistance) that providing information on non-compliance can lead to a partial suspension of a sanction, in the same way as providing information on an anti-doping rule violation?

### **WADA GOVERNANCE**

- The recommendations that will be issued by the WADA ad hoc Working Group on Governance may require some changes in the Code, in particular in Article 20 (Roles and Responsibilities of Signatories).



### **INDEPENDENT ANTI-DOPING SERVICE PROVIDERS**

The questions relating to the status of independent anti-doping services providers need to be discussed and may lead to some changes in the Code (Article 20, 23.1.)

### **WHISTLEBLOWER PROTECTION**

- Should whistleblowers be recognized or protected in the Code, other than under Article 10.6.1 (Substantial Assistance)?

### **OTHER SUGGESTIONS**

Other suggestions and/or proposed amendments to other Code provisions or on questions not addressed above may be inserted in this section.