The World Anti-Doping Code 2015 – Major Changes

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1. The World Anti-Doping Code 2015 ("**Code**") contains significant changes to the anti-doping regime applicable in New Zealand and throughout the sporting world. This third version of the Code since 2003 has been produced after an extensive review and submission process[1]. The 2015 Code has been incorporated into New Zealand delegated legislation made under the Sports Anti-Doping Act 2006 – the Sports Anti-Doping Rules 2015 which bind New Zealand national sporting organisations and came into force on 1 January 2015 like the 2015 Code[2].

2. The best way to examine the changes to the Code in detail is to review the document on the WADA website which shows the 2015 Code against the 2009 Code in red-lined format. WADA has also produced a document which summarises the changes in the 2015 Code under 7 themes – longer periods of ineligibility for real cheats, consideration of the principles of proportionality and human rights, support for the increasing importance of investigations and use of intelligence, increased application to athlete support personnel, greater emphasis on smart test distribution and planning, balancing the interests of international federations and national anti-doping organisations and making the Code clearer and shorter.

3. Alongside the changes to the Code, the International Standards[3] (which are incorporated into the Code/SADR by reference) have also been amended. This means that a consideration of all the amendments which came into effect on January 1 2015 requires a book rather than a short presentation. However, the constraints of time and space force a natural focus on what I think will be the more important changes for those bound by and working with the Code and for some comment on the general effect which the changes to the Code seem likely to have on the operation of the anti-doping regime.

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[1] The WADA paper summarising the changes to the Code says that 315 submissions were received and that the submissions recommended a total of 3,987 changes to the Code. The production of the 2015 Code involved the production of more than 50 working drafts for consideration. Ultimately there appear to have been 2269 changes to the text of the Code.

[2] The numbering of the SADR has been aligned with that of the Code. This paper uses the Code designation. The SADR numbering is the same.

[3] The International Standards covering TUEs, Laboratories, Testing and Investigations and Privacy and the Prohibited List have all been amended with the amended versions coming into effect on 1 January 2015. Again red-lined versions showing the changes from the earlier Standards can be reviewed on the WADA website.

4. The core of any anti-doping regime remains the range of violations that can be investigated and alleged and the sanctions that can be applied if a violation is established. From the outset the Code has sought to find a balance between an appropriate level of strict liability and punishment for violations and a measure of flexibility as to sanctions. The changes of the sanctions provisions between the different versions of the Code reflect this ongoing quest for a balanced, proportionate approach. In providing for greater flexibility the 2009 Code became quite complex and the provision for sanctions in respect of violations involving specified substances under Article 10.4 gave rise to significant issues in relation to its interpretation and application.[4] The 2015 Code makes significant amendment to the sanctions regime to increase the standard penalty to deal appropriately with "real cheats" and to make simpler provision for the circumstances in which the period of ineligibility applicable if the increased standard penalty is not applicable may be reduced.

Amendments to Article 2 - Violations

5. The list of violations under the Code is set out in Article 2. Amendments of a relatively minor nature have been made to Articles 2.3, 2.4, 2.5 and 2.9. Article 2.3 has been amended to include the more general concept of evading sample collection. This gives the Article a broader approach and allows the violation to catch those who deliberately avoid a doping control official to evade notification or testing.

6. Article 2.4 has been amended to provide that a combination of 3 missed tests or filing failures within 12 months will give rise to a breach of the whereabouts requirements. The substance of the whereabouts regime is still set out in the International Standard for Testing and Investigations. The reason for this change in the period for counting failures from 18 months to 12 months was that a period of 12 months was seen as enough time for 3 whereabouts

[4] Article 10.4 raised significant issues for tribunals in particular how to interpret and apply the requirement that the athlete had to prove that he or she had no intention to enhance sporting performance. This gave rise to differing approaches and uncertainty in national tribunals and CAS. See the various awards following the different approaches to Article 10.4 as exemplified in *CAS 2010/A/1207 Oliveira v USADA* and *CAS A2/2011 Foggo v NRL.*

failures to accumulate against an athlete who was avoiding testing. The consensus was also that the shorter 12 month period would make it less likely that athletes who were careless with their paperwork would be found to have committed a violation under the Code.[5]

7. Article 2.5 has been amended to provide expressly that tampering will be established where a person intentionally interferes with or attempts to interfere with a Doping Control Official, provides fraudulent information to an anti-doping organisation or intimidates or attempts to intimidate a potential witness.

8. Article 2.9 has been expanded to expressly include "assisting" and "conspiring" within the forms of complicity covered. The Article now makes it clear that any form of intentional complicity in an anti-doping rule violation or attempted violation or violation of the terms of the period of ineligibility by another person will give rise to a violation. The penalty for a violation under Article 2.9 is between 2 and 4 years depending on the seriousness of the violation.

Prohibited Association

9. Article 2.10 adds a new violation of prohibited association. This Article was the subject of considerable discussion and debate in the submission and review process. Amendments were made on the advice of the legal expert engaged by WADA to review a draft of the 2015 Code for compliance with accepted principles of international law and human rights.[6] The further amendments were directed at making Article as clear as possible and allowing protection for the individuals potentially affected – the athlete and athlete support person. The aim of the new Article 2.10 is to try and address the problem of athletes and others bound by

[5] We have had 2 recent whereabouts cases in New Zealand. In *CAS 2014/A/12 DFSNZ v Gemmell* the decision of the Sports Tribunal that G had not committed a violation was reversed by CAS. G was held not to be able to rely on the then proposed changes to Article 2.4 in the 2015 Code to avoid liability under the Code/SADR which applied at the time of his breaches, but was allowed to apply for and obtain a reduction in the period of ineligibility under SADR 18.2.1 after the 2015 Code had come into effect. In *ST03/14 DFSNZ v Ciancio* the athlete carried out a systematic plan to avoid whereabouts obligations and a period of 8 years ineligibility was imposed for a second SADR breach.

[6] For the legal opinion from Jean Paul Costa assessing the amendments to the 2015 Code against accepted principles of international law and human rights, see WADA website.

the Code working with athlete support personnel who have operated in a manner which breached the Code or which would have breached the Code, if the Code had applied to them.

10. The violation will be committed by the athlete or other person bound by the Code if he or she associates in a professional or sport- related capacity with any Athlete Support Personnel who is serving a period of ineligibility or, if the support person is not subject to the authority of an anti-doping organisation and where ineligibility has not been addressed under the Code, the person has been convicted of, or found to have engaged in, conduct by a court or professional or disciplinary tribunal which would have been a violation of the Code if the person had been subject to the Code. The Article also provides that associating with an athlete support person who is a front for another person who is an athlete support person falling within the provisions in the Article will be in violation. For Article 2.10 to apply the athlete or other person alleged to be in breach has to have been given prior notice of the potential disqualifying status of the athlete support person and the consequences of associating with him or her. In addition the anti-doping organisation has to make reasonable efforts to notify the athlete support person who is the subject of the notice to the athlete that he or she may come forward within 15 days and explain that the criteria for a prohibited association do not apply to the relationship with the athlete or other person. The disqualifying status of the athlete support person is either 6 years from the time of the finding of conduct which would have been contrary to the Code or the length of any disqualification imposed whichever is the longer.

11. The requirements for this violation have been formulated in order to have a provision which is sufficiently clear and includes provisions which protect the rights of athletes and athlete support persons (who are likely to be significantly affected in their profession by a notice under Article 2.10). Although the definition of athlete support person under the Code is broad, the Article seems likely to have its most obvious application in relation to medical professionals who are not subject to the Code but who have been found to breach professional obligations and/or the criminal law in providing prohibited substances or methods

to athletes. Anti-doping organisations are under an obligation to report to WADA providing details of Athlete Support Persons who meet the criteria under Article 2.10 and WADA has the power to notify of a prohibited association in addition to the anti-doping organisation with jurisdiction over the athlete. It remains to be seen how much anti-doping organisations will be to act and give the required notices to bring the provision into operation but it would seem that situations in which the Article may be invoked may rise more often as anti-doping organisations focus more on investigations into doping activities (as they are obliged to do by Article 5.8.3 of the Code and under the International Standard for Testing and Investigations).

Amendments to Sanctions under Article 10

12. Article 10 on Sanctions has been significantly revised. While there are many amendments, the principal amendments seek to:
    - Provide for a 4 year standard period of ineligibility for 'real cheats',
    - Change the basis upon which the period of ineligibility of 2 years applicable for a violation involving a specified substance (if the 4 year period is not applicable), can be reduced by replacing Article 10.4 of the 2009 Code with Article 10.5.1.1.
    - Provide expressly for a contaminated product defence under Article 10.5.1.2.

    Although the revised Article 10 retains the familiar defences of "**no fault**" and "**no significant fault**" as defined under earlier versions of the Code, the "**no significant fault"** defence is applicable in different circumstances under Articles 10.5.1.1 and 10.5.1.2. The overall result of the amendments is a much changed sanctions regime which those working with the Code and Tribunals hearing allegations will have to work through.

Article 10.2 – 4 years as the standard period of ineligibility

13. The 2015 Code provisions on sanctions reflect a consensus that the Code should deal with "real cheats" more severely. The fundamental change has seen the introduction of a 4-year period of ineligibility for the presence or use or possession of prohibited substances where

that use is intentional. Similarly the period of ineligibility for a breach of Article 2.3 (evading) or Article 2.5 (tampering) will be 4 years (unless the athlete can establish that the breach was not intentional as that term is explained and defined in in Article 10.2.3.)

14. If a prohibited substance which is not a specified substance is involved, the period of ineligibility will be 4 years, unless the athlete proves that his or her violation was not intentional. Where a specified substance is concerned it will be for the anti-doping organisation to prove that the breach was intentional for the 4 year period to apply. The burden and standard of proof in Article 3.1 will be applicable.

15. If the anti-doping organisation does not seek to establish the breach was intentional or does not prove this element, the period of ineligibility will be 2 years under Article 10.2.2 (subject to the athlete establishing any applicable ground for a reduction).

16. Article 10.2.3 sets out what the requirement of intention seeks to achieve and provides a definition. The term is described as intended to identify those athletes who cheat. Proof of intention requires that the athlete or person alleged to have committed the violation engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might be or result in an anti-doping rule violation and manifestly disregarded that risk. A violation relating to a substance banned in-competition only is to be presumed not to be intentional if the athlete can establish that the substance was used out-of-competition. A violation resulting from an adverse analytical finding for a substance which is prohibited in-competition will not be considered intentional if the athlete can establish that the prohibited substance was used out-of-competition in a context unrelated to sport performance.

17. The definition of intention refers to subjective intent which requires actual knowledge that conduct amounts to a violation or subjective awareness of the significant risk that conduct may result in an anti-doping rule violation and conscious disregard for that risk. Anti-doping

organisations and tribunals will have to work through this definition and apply it in a range of circumstances. There have already been some cases at national level in Ireland and the UK where the requirements have been considered[7]. It is to be anticipated that generally there will be more hearings at which the evidence of the athlete and his or her answers to cross-examination as to knowledge of the consequences of actions or of the risks involved in conduct will be crucial. While it will be possible for an athlete to claim, say, that he or she took an unmarked pill given by someone to help with pain which turned out to contain steroids without intending to commit an anti-doping rule violation and was not conscious of the risk in that conduct, it is suggested that the credibility of this kind of explanation may be very difficult to maintain when it is set alongside the now well-known responsibilities of athletes under the Code.

Article 10.4 2009 Code removed

18. The old Article 10.4 in the 2009 Code produced many cases before national tribunals (such as the Sports Tribunal) and before CAS on both the requirement to prove the absence of intent to enhance sport performance and on the assessment of fault, where the requirement was established. That Article has been replaced by Article 10.5.1.1 which provides for a different threshold test and involves a different assessment of fault if the threshold is met. Where an anti-doping rule violation under Article 2.1, 2.2 or 2.6 involves a specified substance, if the athlete or person who has committed the violation can establish no significant fault the tribunal can assess the period of ineligibility by reference to the fault of the athlete and impose a period of ineligibility ranging from a reprimand to 2 years. It is important to appreciate that "no significant fault" and "no fault" remain as defined under the 2009 Code. The requirement to show "no significant fault" will involve the athlete or person showing that in the particular circumstances of the case and in context of the regime under the Code under which those bound have to take all reasonable steps to avoid positive tests that his or her

[7] See for example *GAA Anti-Doping Committee Re:Thomas Connolly* (no intent on the evidence) and *UK Anti–Doping v Riddiford* (intent established in relation to taking supplement on the basis of awareness of risks).

fault can properly be regarded as not significant. This is a fairly difficult requirement to establish. If it is established, the Tribunal will have to assess the level of fault[8] in the circumstances of the case (from within the range of fault which is not significant) in arriving at the period of ineligibility. This is a different process from that which under the old Article 10.4 where the assessment of fault could cover significant fault and old cases on fault under Article 10.4 will not really help on reaching the appropriate period of ineligibility. It should be noted that it is a pre-requisite for any defence of no significant fault that the athlete establishes how the prohibited substance entered his or her system. This requirement does not apply where the athlete is a minor.

19. Article 10.5.1.2 contains a specific defence relating to contaminated products which also allows a reduction of the 2 year period of ineligibility applicable under Article 10.2.2 where the athlete can establish "no significant fault" and that the detected prohibited substance came from a contaminated product. A contaminated product is one that contains a prohibited substance that is not on the product label or in information available on a reasonable internet search. Again it will be for the athlete to establish the requirements for the defence on the balance of probabilities. If the requirements are established the tribunal will have to arrive at the period of ineligibility by considering the degree of fault of the athlete. It is again important to keep in mind the nature of the regime and the obligations which it imposes on athletes in considering the application of the defence. While cases will depend on the particular circumstances, the nature of the Code and the obligations under it mean that it may be difficult to establish no significant fault in many cases where the general risk with many products is well known and the marketing of many products should put a reasonable athlete on alert.

20. Overall, the important point on these defences is that the requirements for their application are fairly onerous. While tribunals and CAS will have to work through the requirements in

[8] **"Fault"** is defined in defined in terms of breach of duty or lack of care in a particular situation. The definition picks up wording which was in the notes to the 2009 Code and refers to the assessment of fault being specific and relevant to explain the departure from the expected standard of behaviour under the Code.

particular circumstances, I do not think that the defences make it easier to reduce the period of ineligibility of 2 years which applies where the increased sanction of 4 years does not – in fact the opposite appears to be the case when the definition of no significant fault is properly considered.

21. There are several other areas of change in both Article 10 (prompt admission, amendments to substantial assistance, multiple violations) and in the Code overall. I should mention recreational drugs. In the process of review there was considerable support for an amendment to the criteria for the inclusion of substances on the Prohibited List which would have made potential to enhance sport performance a mandatory requirement for inclusion of a substance on the List (thereby bringing about the possibility of the removal of cannabis from the List). WADA decided to maintain the approach to the criteria under Article 4.3 which means that cannabis remains on the Prohibited List. However, the revised Technical Document TD 2013 DL increased the decision limit for laboratories reporting a positive test for cannabis. While this might be said not to be a principled approach to the issues raised it should mean that there will be far fewer positive tests for cannabis and fewer cases which have to be taken through the results management process.

22. While we are likely to see fewer cases involving cannabis I would expect that the new sanctions regime will require careful consideration by national tribunals and CAS if a clear and consistent approach to the proof of intent and to the requirements of the new defences is to be established. I would also expect that the trend which can be seen nationally and internationally of more cases of a non-analytical nature being investigated and brought to continue given the focus of the Code and revised International Standard for Testing and Investigations.