THE WORLD ANTI-DOPING CODE –

CURRENT ISSUES

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"DRAWING THE LINE: ETHICS IN SPORT"

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1. The World Anti-Doping Code ("**Code**") has played a very important part in bringing about a global harmonised approach to doping. As with any agreement which seeks to provide a common internationally applicable set of rules, the challenge which the Code faces is to maintain an approach which all concerned parties support. In recent times, there has been a developing debate between those who consider that the regime under the Code perhaps produces too many "unfair" results involving athletes who cannot be said to be cheats, and those who consider that the Code is, in fact, not strict enough. We will hear both sides of this in our discussions today.

2. This is a good time to consider the way in which the Code has been working since its implementation in 2003 because, in 2012, it will go through its third revision process. There are a number of drafting points which can be made but this paper focuses on the broader challenges facing the regime.

The process of evolution and amendment of the Code

3. WADA is responsible for overseeing the evolution and improvement of the Code and for initiating amendments to the Code under Article 23.6. Where WADA puts forward amendments, it must institute a consultation process under which athletes, Signatories and governments provide their comments on the proposed amendments. After the required consultation process has taken place, the proposed amendments must be approved by a two-thirds majority of the WADA Foundation Board, with a majority of the public sector and Olympic movement members' casting votes, in order to be adopted. Amendments come into effect three months after approval, and Signatories to the Code must implement applicable amendments within one year of approval by the WADA Foundation Board.[1]

4. WADA initiated amendments to the Code in 2005, and a consultation process took place over the next eighteen months. This culminated in the meeting of the WADA Foundation Board in Madrid in November 2007 at the World Conference on Doping. At this meeting, amendments to the Code were approved which became the 2009 Code.[2]

[1] See Article 23.6.3 of the Code.

[2] At the same time the International Standard for Testing 2009 was implemented which introduced the detailed requirements for the implementation and administration of the whereabouts regime.

5. The process of considering amendments to the 2009 Code will begin in early 2012. It may be that this stage in the history of the development of the Code is the right time to take stock and consider whether the Code is operating effectively overall.

6. At a general level, there can be little doubt that the Code has transformed the approach to doping in sport. It has been very important in standardising a strict anti-doping regime which is based upon the fundamental obligation imposed on athletes to take the utmost caution to take all possible steps to avoid ingesting prohibited substances. There do appear, however, to be some challenges for the Code, if it is to continue to strike an effective balance.

7. One concern expressed is that the operation of the Code produces too many alleged violations which arise as a result of positive tests in-competition for recreational drugs, or for positive tests for substances which, while they are capable of enhancing sporting performance, have been taken in circumstances where the athlete had no intention of enhancing sporting performance. The experience in New Zealand (which may be mirrored in many other jurisdictions) is that many of anti-doping rule violations detected involve mistakes by an athlete involving varying degrees of fault in such matters as dealing with a medical professional or taking supplements or the intentional or reckless taking of recreational substances.[3]

8. The approach taken in the 2009 Code was to broaden the scope for the exercise of a measure of discretion in imposing sanctions by enlarging the application of Article 10.4. Since its adoption in 2003, the Code has had to chart a path between a clear, strict regime founded on strict liability and a standard sanction and a measure of flexibility as to sanctions. Initially, under the 2003 Code, flexibility was very limited with Article 10.5.1 and 10.5.2 only available in exceptional circumstances and the regime for specified substances having a limited role because there were relatively few specified substances. The 2009 Code sought to provide increased flexibility as regards sanctions by increasing the range of specified substances and thus the possible application of Article 10.4. The aim was, no doubt, to allow tribunals to arrive at fairer outcomes.

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[3] Perhaps roughly 15% of the anti-doping rule violations dealt with by the Sports Tribunal from 2004 might be described as involving "cheating" by taking prohibited substances to enhance performance or refusing tests.

More discretionary decisions

9. The broadening of the potential application of Article 10.4 in the 2009 Code has seen an increase in discretionary decisions on fault. It is inevitable that each case will ultimately be decided on its own facts with other decisions only capable of providing limited assistance (see, the observations of the CAS Panel in CAS 2011/A/2495, *FINA v Cielo and others*). With so many different sporting tribunals and CAS Panels dealing with differing factual situations worldwide, it is inevitable that some of the certainty of outcome will be lost. The potential for many diverse outcomes may well not be a reason to revert to a stricter approach, but it does underline the need to have a Code which works with as much global certainty as is possible. The range of outcomes is the result of the broad range of substances contained in the List, some of which are either not performance enhancing or which occur commonly in other substances in a way which makes mistaken ingestion quite commonplace. If the focus of the Code can be tightened in some way, it may be easier to maintain consistent, predictable outcomes.

Tightening the focus of the Code

Recreational substances

10. Where recreational substances are concerned, there seem to be 2 main questions:

- Whether recreational substances should be included in the Prohibited List and be within the Code.

- Whether the Code's provisions (in particular Article 10.4) work logically in relation to such substances.

11. Currently, the Prohibited List encompasses a wide range of substances included by the application of the criteria in Article 4.3. The application of the criteria means that the category of prohibited substances encompasses substances which can enhance performance and those which cannot. The reason a substance is listed is not stated in the List but the different bases for the inclusion of substances creates logical difficulty in the operation of Article 10.4.

12. Where an athlete uses a substance such as a recreational drug which is not performance enhancing in a private setting, he or she may have difficulty

establishing the absence of an intent to enhance sport performance in the manner required by Article 10.4. If this pre-condition is established, on a proper approach to the assessment of fault (which, the notes to the Code explain must be specific and relevant to explain the athlete or other person's departure from the expected standard of behaviour), it can often be difficult to see how an athlete who intentionally or recklessly takes a recreational substance can bear anything other than a high level of fault. The difficulties with Article 10.4 and the nature of the substance detected can lead tribunals to adopt an approach which is not consistent with the requirements of 10.4 and impose sanctions which are seen as just and proportionate given the nature of the substance taken, rather than truly reflecting fault and the process under Article 10.4. However, the basic point is that the terms of Article 10.4 do not really work properly with these substances.

Can the Code's focus be narrowed?

13. One possible solution for recreational substances lies at a fundamental policy level – change the criteria under Article 4.3.1 and remove substances which are not capable of enhancing sport performance from the List and the Code. This has been put forward in the past but is unlikely to occur.

14. An alternative would be to create a clear set of rules for those substances which are included in the List because they represent, under the Article 4.3.1 criteria, an actual or potential risk to the health of the athlete and are considered contrary to the spirit of the sport (as described in the introduction to the Code). If a substance was listed on this basis and this was identified, then a simple form of tariff system might be adopted by specific rules involving loss of result and a further standard penalty.

Substances which can enhance performance

15. The other area in which concern is expressed lies in those situations where athletes make negligent mistakes with substances (particularly specified substances) which can be performance enhancing. With such violations the integrity of sport can only be safeguarded by having a hearing process at which an athlete, who is found to have the potentially performance enhancing substance in his or her system, has to satisfy an independent tribunal that there was no intent to enhance sport performance. One way of dealing with some substances, which might simplify matters, might be to have a stipulated minimum level with only readings above that

level leading to consideration of a sanction under the Code (Article 10.4). Detection of specified substances at a lower level might possibly be dealt with by an administrative system of warnings and fixed penalties similar to that which might apply to the substances which are listed but which are not performance enhancing.

Further challenges

16. The regime under the Code needs to address 2 further major challenges – delay in the hearing process in arriving at decisions in relation to anti-doping allegations where the outcome will change the result of events and races, and, the problem of different approaches from sporting organisations which seek to implement tougher rules. In the first area, consideration should be given to mandatory timeframes for the resolution of all cases which can only be departed from in exceptional circumstances. CAS will need to be involved in developing procedures in this area. Article 8.1 and Article 13.2.2 provide for "timely" hearing but, perhaps, the Code might be amended to include some fixed time limits for the hearing process.

17. The second concerns the implementation of rules by sporting organisations such as IOC Rule 45 which reflect a desire to adopt a tougher approach to violations under the Code. This kind of "eligibility rule" has recently been held in an advisory opinion from CAS (after earlier differing advisory opinions) to amount to imposing an impermissible further period of ineligibility on an athlete in breach of Article 23.2.2 of the Code.[4] The consensual nature of the Code (which is both a strength and weakness) means that, ultimately, the only truly effective way to address the potential for lack of harmony created by this kind of development is for the parties involved to reach an agreement on the approach which is to be adopted so that it can be incorporated, if possible, within the Code.

Concluding comment

18. The overall continuing challenge for the Code is to maintain a regime with sufficient certainty of outcome which harmonises responses to doping (in particular the sanctions) while providing for some flexibility to allow for proportionate responses to violations in particular circumstances. There will always be a tension between these 2 objectives. At this stage in its development, it seems that the Code might

[4] CAS 2011/O/2422, *USOC v IOC*.

benefit from some narrowing of its focus. The process of debating possible amendments is very important to the maintenance of the standing of the Code in sport worldwide and all with an interest should be encouraged to participate.

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