

# Key changes to the 2015 World Anti-Doping Code

The 2015 World Anti-Doping Code was approved at the World Conference on Doping in Sport in South Africa during November. It will come into force on 1 January 2015. In this article, Antonio Rigozzi and Brianna Quinn consider how the new Code will achieve the World Anti-Doping Agency's stated aim of 'intensifying the fight' against doping, and potential issues that could arise in attempting to do this. Rigozzi is a professor of international arbitration law and sports law at the University of Neuchâtel Law School and a Partner at Lévy Kauffman-Kohler. Quinn is a specialist in sports arbitration currently working with Lévy Kauffman-Kohler.

On 15 November 2013, WADA's Foundation Board unanimously approved revisions to the World Anti-Doping Code (the Code)<sup>1</sup> and the International Standards thereto (IS)<sup>2</sup>. With the significant changes made to the Code (and a new President appointed to oversee its implementation<sup>3</sup>), it is clear that the anti-doping landscape may be considerably altered come 1 January 2015<sup>4</sup>. In terms of the general theme of the revisions, the 'Johannesburg declaration' expressed a clear intent on the part of its signatories to:

'[reaffirm] that the ultimate objective of the fight against doping in sport is the protection of all clean athletes and that all concerned parties should commit all required resources and resolve to achieve that objective by intensifying the fight'<sup>5</sup>.

The present article seeks to briefly cover the key changes to the anti-doping rule violations (ADRVs) under the new Code and the new sanctions for same<sup>6</sup>, as well as some other key changes. Notably, this article is not intended to be a comprehensive review of the new Code<sup>7</sup>, but rather to serve as food for thought on how the new Code might achieve the stated aim of 'intensifying the fight' and the issues that might arise in attempting to do so.

## Strengthening the code

One of the key themes of the revision of the Code was 'longer periods of Ineligibility for real cheats, and more flexibility in sanctioning other specific circumstances'<sup>8</sup>. That said, the Code has also been 'strengthened' in other ways. The following section sets out a number of these key changes.

### Strengthened sanctions

At the conclusion of its three 'consultation phases'<sup>9</sup>, WADA

stated that there was a 'strong consensus among stakeholders, and in particular, Athletes, that intentional cheaters should be Ineligible for a period of four years'<sup>10</sup>. The new Code has, as a result of this 'consensus', therefore strengthened sanctions primarily by raising the period of ineligibility in Article 10.2 to four years where:

- The substance is a Prohibited Substance, unless the Athlete<sup>11</sup> can establish that the violation was not intentional<sup>12</sup>;
- The substance is a Specified Substance<sup>13</sup> and the relevant Anti-Doping Organisation (ADO) can prove that the violation was intentional<sup>14</sup>.

Where an Athlete can prove that the use of a Prohibited Substance was not intentional, or the relevant ADO cannot prove intention in relation to a Specified Substance, the default period of ineligibility will be two years<sup>15</sup>.

The concept of 'intent' is quite important in the new Code (as will be seen in 'Providing flexibility for the Code' later on in this article) and is defined as:

'[M]eant to identify those Athletes who cheat. The term, therefore, requires that the [Athlete] engaged in conduct which he or she knew constituted an [ADRV] or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An [ADRV] resulting from an Adverse Analytical Finding [AAF] for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition. An ADRV resulting from an AAF for a substance which is only prohibited In-Competition shall not be considered intentional



if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.<sup>9</sup>

In addition to the increased period of ineligibility for certain cases, the Code has also 'strengthened' sanctions for intentional offences by providing that an Athlete potentially subject to a four year sanction may only receive a reduction in his or her sanction for 'prompt admission following notification' if both WADA and the relevant ADO approve the proposed reduction<sup>16</sup>.

How the new sanctioning regime will operate (and thus whether it will be consistent with the athletes' fundamental rights and the paramount principle of proportionality) will depend on the way in which CAS Panels ultimately interpret the notion of intent and the degree of proof in that respect. For instance, it will be interesting to see how CAS Panels will treat the situation of a positive test with a Prohibited Substance in circumstances where it is very unlikely that it was used for doping purposes, but the athlete genuinely has no idea how the substance entered his or her body and is thus factually prevented from establishing that he or she did not use it intentionally.

CAS arbitrators will therefore have a great deal of responsibility in fashioning balanced and reasonable case law<sup>17</sup>. It is hoped the first cases will concern athletes with the resources to defend their cases so that all relevant arguments will be considered before a line of jurisprudence (from which it will then be difficult to depart) is created<sup>18</sup>.

Strengthened Code in general  
The new Code has also intensified the fight against doping through

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the addition and/or amendment of certain ADRVs and breaches of sport disciplinary rules.

#### **Athlete Support Personnel and Amendments to ADRVs**

The most significant additions in this respect concern Athlete Support Personnel (ASP)<sup>19</sup>:

- the Code now provides for a specific violation for 'prohibited association'<sup>20</sup>. This means that an Athlete may be sanctioned for 'association'<sup>21</sup> with any ASP who:
  - is serving a period of ineligibility for an ADRV;
  - has been convicted or found to have engaged in conduct which would constitute an ADRV; or
  - is serving as a front or intermediary for such an individual.

Whilst prohibiting an Athlete's association with a particular ASP is certainly a significant imposition on the Athlete's freedom, WADA has attempted to minimise such imposition by providing that:

- the Athlete must have been informed in writing of the ASP's disqualifying status; and
- the provision shall not apply when the Athlete cannot reasonably avoid the association. Nevertheless, the burden shall be on the Athlete to demonstrate that any association is not in a professional or sport-related capacity.
- The new Code then goes even further by providing that ASPs themselves 'shall not Use or Possess any Prohibited Substance without valid justification'<sup>22</sup>. Whilst a breach of this provision shall only (as per the comment to Article 21.2.6) be subject to 'sports disciplinary sanctions', one must nevertheless question whether this provision is excessive. The rationale that ASPs 'should not engage in personal conduct which conflicts with their responsibility to encourage their Athletes not to dope' is certainly

legitimate, however it is questionable whether regulating the use of 'recreational drugs' by ASPs and requiring them to justify (i.e. disclose and explain) their use of medication which might be related to an embarrassing medical condition is truly necessary to achieve the aim of intensifying the fight against doping in sport.

Accordingly, considering the significant impositions contained in the ASP-related provisions, unless they are implemented carefully and with appropriate flexibility and restraint, such amendments may potentially be considered to be disproportionate to WADA's legitimate aim of intensifying the fight against doping.

Contrary to the above, the amendments to the already existing violations (whilst providing more clarity) do not significantly widen the scope of the Code and are therefore not considered in detail here<sup>23</sup>.

#### **Other general changes**

In addition to increasing the statute of limitations from eight years to ten years<sup>24</sup>, the Code has also introduced other provisions which may assist in identifying and prosecuting ADRVs:

- the provisions on 'substantial assistance'<sup>25</sup> now make it more attractive for an Athlete to provide information leading to another ADRV (or criminal/other proceedings). In particular, the new Code provides for WADA to agree to greater reductions in sanctions and even, in exceptional circumstances, to completely eliminate an Athlete's period of ineligibility<sup>26</sup>.
- WADA has also provided protection for an Athlete who provides assistance insofar as:
  - no ADO may challenge WADA's decision to reduce the period of ineligibility<sup>27</sup>; and



• WADA may authorise the limitation/delay of the disclosure of the assistance provided or the agreement made<sup>28</sup>.  
 Further, the new Code expressly provides for the relevant ADO to 'reinstate' a period of ineligibility where the Athlete fails to continue to cooperate and provide complete and credible assistance<sup>29</sup>.

**Providing flexibility for the Code**

Whilst the key aim of the revisions was to 'intensify' the fight against doping, WADA has also retained some flexibility in the sanctioning of Athletes:

- As noted, Article 10.2 provides different burdens of proof for 'intentional' violations involving Prohibited Substances as compared to Specified Substances;
- The definition of 'intention' itself specifically provides for:
  - ADRVs for Specified Substances only prohibited In-Competition to be rebuttably presumed not to be intentional if the Athlete can establish that the substance was used Out-of-Competition; and
  - ADRVs for Prohibited Substances only prohibited In-Competition to be considered to be unintentional if the Athlete can establish that the substance was Used Out-of-Competition in a context unrelated to sport performance.
- Whilst the current Article 10.4 has been deleted, the new Code now provides for an Athlete to reduce his or her sanction by proving:
  - No Fault or Negligence<sup>30</sup>;
  - No Significant Fault or Negligence:
    - for Specified Substances: where the period of ineligibility may be completely eliminated and, at a maximum, be two years<sup>31</sup>;
    - for Contaminated Products (whether they contain a Prohibited or Specified Substance): where the



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period of ineligibility may be completely eliminated and, at a maximum, be two years. Noting, however, that the definition of Contaminated Products<sup>32</sup> may be somewhat problematic, bearing in mind the different standards that might be expected of different athletes (and in particular their access to internet-based information)<sup>33</sup>; and

- in other circumstances where the above does not apply: where the period of ineligibility may be reduced, however not by more than one half of the period otherwise applicable<sup>34</sup>.

- Finally, the approach to 'recreational drugs' has been (somewhat) relaxed through both:
  - the application of the concept of intent with respect to Prohibited Substances used Out-of-Competition (for example Cocaine); and
  - the revised Technical Document TD 2013DL, which increased the decision limit for reporting an AAF for marijuana 'thus addressing the concern expressed by many [ADOs] that a disproportionate share of their resources were being used in the results management of low-level marijuana cases, which were not consistent with In-Competition Use'<sup>35</sup>.

Notably, specific provisions were considered for insertion into the Code in relation to 'recreational drugs' or, rather, 'substances of abuse', however ultimately were not included in the final draft of the Code. Given the general lack of performance-enhancing intent in the use of such substances, one would hope that a specific approach shall be considered again in the future<sup>36</sup>.

**Financial consequences and appeals to CAS**

The two final amendments to be briefly discussed in this overview are: financial sanctions; and

appeals to the Court of Arbitration to Sport (CAS):

- Article 10.10 of the Code now expressly provides for ADOs to 'provide for appropriate recovery of costs [however only to] impose financial sanctions in cases where the maximum period of Ineligibility otherwise applicable has already been imposed' and states that no recovery of costs or financial sanction may be considered as a basis for reducing a period of ineligibility.

- With respect to the CAS, the Code now provides for a number of positive developments:

- where all parties agree, a single hearing may be held immediately before the CAS (in order to avoid lengthy and costly first instance proceedings)<sup>37</sup>; and
- the Code now expressly provides for some exceptions to the limitations in the CAS Code, including that:
  - CAS Panels' scope of review is not limited<sup>38</sup>;
  - CAS Panels need not give deference to the first instance decision and, according to the comment to Article 13.1.2, 'prior proceedings do not limit the evidence or carry weight in the hearing before CAS'<sup>39</sup>; and
  - Cross Appeals and other subsequent appeals are allowed, which as per the comment to Article 13.2.4 is necessary 'because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an [ADO] appeals a decision after the Athlete's time for appeal has expired'<sup>40</sup>.

**Conclusions**

A number of other significant amendments have been made to the Code, in particular in relation to smarter testing of Athletes. That said, the authors consider that the amendments presented above are the most relevant to Athletes, Federations and practitioners alike.



Whilst it remains to be seen whether the amendments will truly achieve the aim of 'intensifying the fight' - whilst retaining a degree of flexibility in sanctioning at the same time - one can only hope that any significant impositions are implemented with caution and that the new Code can in fact achieve its aim of strengthening the fight against the 'real cheats' and protecting clean athletes in doing so.

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1. The final draft of the 2015 WADC is available at: [www.wada2013.org/images/documents/conference/2015-WADC-final-draft-EN.PDF](http://www.wada2013.org/images/documents/conference/2015-WADC-final-draft-EN.PDF).
2. See <http://playtrue.wada-ama.org/news/governments-sports-adopt-resolution-at-world-conference-to-strengthen-fight-against-doping-in-sport/>.
3. See <http://playtrue.wada-ama.org/news/wada-appoints-sir-craig-reedie-as-its-new-president/>.
4. The 2015 Code is set to take effect on 1 January 2015.
5. The Johannesburg Convention is available at <http://wada2013.org/documents/WADA-WCDS-2013-Jburg-Declaration-FINAL.pdf>.
6. For a brief introduction to further changes to the Code please see the WADA Document, 'Significant Changes Between the 2009 Code and the 2015 Code, Version 4.0' (hereinafter referred to as the Overview) available at <http://bit.ly/1c6j342>
7. Nor shall it consider the different approaches in all four versions of the draft Code published by WADA. However, for such a comprehensive review see: Antonio Rigozzi, Marjolaine Viret and Emily Wisnosky, 'Does the World Anti-Doping Code Revision Live up to its Promises?', Jusletter 11 November 2013: see [www.lk-k.com/data/document/rigozzi-viret-wisnosky-does-the-wadc-revision-live-up-to-its-promises-jusletter-11-november.pdf](http://www.lk-k.com/data/document/rigozzi-viret-wisnosky-does-the-wadc-revision-live-up-to-its-promises-jusletter-11-november.pdf)
8. See Theme One to the Overview.
9. Comments from stakeholders for each of the three consultation phases can be accessed at: [www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-](http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-)



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- Review/Code-Version-4-0/  
 10. See the Overview, Theme One, paragraph one.
11. Whilst the Code refers to 'Athlete or other Person' throughout the document, in the interests of brevity the Authors use 'Athlete' to identify both.
12. See Article 10.2.1.1.
13. Specified Substances are set out in the WADA Prohibited List pursuant to Article 4.2.2. of the Code. Notably the comment to Article 4.2.2. now reads: '[Specified Substances] should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance'.
14. See Article 10.2.1.2.
15. See Article 10.2.2.
16. See Article 10.6.3 of the new Code. In Article 10.6 of the 2009 Code, an athlete could avoid a four year sanction (i.e. an increased sanction due to aggravating circumstances) automatically by admitting the ADRV as asserted promptly after being confronted with it and this reduction was not subject to approval from WADA or the relevant ADO.
17. The same applies to concerned lawyers and scholars, who will have the time to study the draft and publish their analysis before the entry into force on 1 January 2015.
18. Arguably, this is not what happened with the first version of the Code, in particular with the concepts of 'how the substance entered the athlete's body' and 'absence of (significant) fault or negligence'.
19. Defined as: 'Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other Person working with, treating or assisting an Athlete participating in or preparing for sports Competition'.
20. See Article 2.10 of the Code.
21. 'Association' is not defined, however the comment to Article 2.10 provides that it need not involve any form of compensation and may include the following examples: 'obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Personnel to act as an agent or representative'.
22. See Article 21.2.6.
23. For further information on such amendments, see the text of Articles 2.3, 2.5 and 2.9 of the new Code and the explanation of the changes made thereto in Part One, Theme One, of the Overview.
24. See Article 17 of the new Code.
25. Now Article 10.6.1 and previously Article 10.5.3 in the 2009 Code.
26. See Article 10.6.1.2 of the new Code.
27. See Article 10.6.1.1 of the new Code. Notably, this provision is stated by WADA to be in favour of the Athletes (as no ADO can attempt to increase the period of ineligibility), however it also suggests that an ADO will not have the right to challenge WADA's decision where the ADO considers that the reduction should in fact be greater than that agreed to by WADA.
28. See Article 10.6.1.3.
29. See Article 10.6.1.1.
30. See Article 10.4 of the new Code.
31. See Article 10.5.1.1. Importantly, the Comment to Article 10.4 limiting its application to 'exceptional circumstances' shall not apply to this provision, giving CAS (and/or other) Panels more flexibility to apply the provision to certain cases where previously they were hesitant to do so (for example the use of supplements).
32. 'A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search'.
33. See Article 10.5.1.2.
34. See Article 10.5.2.
35. See page 7 of the Overview.
36. It is worth mentioning that the Swiss Federal Authority Supervising Foundations has been asked to rule on whether WADA has failed to comply with the requirements under its Statutes in electing not to include the specific provision on substances of abuse in the final draft of the Code: see <http://bit.ly/1cLqzj7>. While the petition has slight chances of success, this unprecedented move illustrates that recreational drugs are indeed a difficult issue. That said, it is understood that WADA's decision to withdraw the specific provision on substances of abuse was due to intense lobbying by national governments.
37. See Article 8.5 of the new Code.
38. See Article 13.1.1 of the new Code.
39. See Article 13.1.2 of the new Code.
40. See Article 13.2.4 of the new Code.