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Latest Changes to the 2015 WADA Code – Fairer, Smarter, Clearer… and not quite Finished

Addendum to the Article: «Does the World Anti-Doping Code Revision Live up to its Promises? A Preliminary Survey of the Main Changes in the Final Draft of the 2015 WADA Code»

In this addendum to their Preliminary Survey published in November 2013 that discussed the key changes in the 2015 WADA Code revision, the authors present and analyse three last-minute amendments that were made to the final draft of the Code eventually approved. These three amendments are of significance, since they touch, in particular, upon the treatment of social drugs in anti-doping.

Rechtsgebiet(e): Sport; Arbitration; Contributions

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I. Introduction

[Rz 1] The present article is an addendum to the recent preliminary survey of the main changes in the draft of the 2015 World Anti-Doping Code («2015 WADA Code» or the «Code») published in the November 11, 2013 edition of Jusletter (the «November 2013 Preliminary Survey»)[1], which chronicled and commented on the revision of the 2009 WADA Code. This revision process was slated to culminate in November 2013 with the approval of the revised 2015 WADA Code at the World Conference on Doping in Sport in Johannesburg, South Africa (the «Johannesburg Conference»).

[Rz 2] Amidst an air of resounding stakeholder support and calls for a renewed and unified commitment to the anti-doping movement, approval was granted in Johannesburg as expected. However, the Final Draft version 4.1 of the 2015 Code («Final Draft») approved by the Foundation Board of the World Anti-Doping Agency («WADA») and published on WADA's website following the Johannesburg Conference varies in substance from the version 4.0 that was published as part of the materials distributed at the Johannesburg Conference and upon which we based our November 2013 Preliminary Survey[2]. As a result, we felt compelled to publish this addendum for the sake of thoroughness. In particular, three amendments of consequence were made in the Final Draft that form the subject of this follow-up article. Following a brief overview and comment on the context in which these amendments were made, we will present each of these three amendments and offer a perspective on concerns that they might raise in practice. This approach is congruous to the one taken to describe and discuss the key changes reflected in the 2015 WADA Code in our November 2013 Preliminary Survey based on version 4.0. A conclusion will also be offered, summarizing our assessment of the latest amendments and the context in which they were made.

II. Context in which the Final Draft of the 2015 WADA Code Was Released

[Rz 3] The mere existence of three new substantive amendments at this point in the Code revision process was unforeseen. According to WADA's Code Review Plan, which outlines the revision process, the final draft of the 2015 Code was to be circulated to stakeholders in October 2013[3]. Indeed, on October 18, 2013 a new version 4.0 of the 2015 Code was published on WADA's website[4]. Following the release of this «final» draft, the next (and last planned) step was to be its tabling for approval at the Johannesburg Conference. This approval occurred on the closing day of the Conference, following what WADA described as «three full days discussing and debating the future of anti-doping in sport»[5]. The Review Plan makes no indication that the approved Final Draft would differ from the announced «final» draft circulated to stakeholders in October 2013, nor was there any notice that there might be further steps following the approval of the Code in Johannesburg. However, the fact is that the Final Draft published on WADA's website following its acceptance on November 15 at the Johannesburg Conference is not the same as the version 4.0 that was made available in the Conference materials. Nor was the content of the Final Draft (namely the differences) emphasized or well publicized to the conference attendees and stakeholders[6]. While we are fully aware of the complexity of the revision process and that unexpected difficulties may arise at the last hour, the departure from the proclaimed revision process is certainly not ideal in terms of good governance.

[Rz 4] Stakeholders who wish to initiate the implementation of the Code should take note of two particular aspects of this

1 Antonio Rigozzi, Marjolaine Viret, and Emily Wisnosky, Does the World Anti-Doping Code Revision Live up to its Promises? A Preliminary Survey of the Main Changes in the Final Draft of the 2015 WADA Code, in: Jusletter 11 November 2013. Note also that like this original article all terms that are both capitalized and italicized in this article represent defined terms in the 2015 WADA Code final version 4.1 or in the 2015 International Standards.

2 The 2009 WADA Code and each of the five versions of the 2015 WADA Code are all available on WADA's website (http://www.wada-ama.org).

3 WADA Code Review Plan, http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202011-2013/WADA-Code-Review-Plan-Nov2011-EN.pdf. WADA's Executive Committee and Foundation Board in November 2013 are identified as the entities with responsibility for approving the final version of the Code.

4 WADA, Publication of Draft 2015 World Anti-Doping Code, Version 4.0, Play True Magazine, 18 October 2013, *available at* http://playtrue.wada-ama.org/news/publication-of-draft-2015-world-anti-doping-code-version-4-0/.

5 WADA, World Conference on Doping in Sport Review, Play True Magazine, 22 November 2013, *available at* http://playtrue.wada-ama.org/news/world-conference-on-doping-in-sport-review/.

6 The envisaged changes to version 4.0 were not emphasized throughout the course of the Johannesburg Conference, with the notable exception that they appear to have formed the basis for the joint presentation describing the review process overview delivered by members of the WADA Code Drafting Team (Richard Young and Ulrich Haas) on November 13, 2013. However, no clear indication was given throughout the course of the conference as to the existence of a new version of the Code beyond version 4.0.

Final Draft. First, a disclaimer on the cover page grants the Code drafters an open-ended mandate to «make additional housekeeping changes without significant substance». No indication is provided as to when stakeholders might expect a truly final version of the 2015 WADA Code. The disclaimer language does not prohibit changes of substance, provided that these changes are not «significant». Second, stakeholders should apply particular caution since, unlike earlier versions of the 2015 WADA Code, and as far as we are aware, no accompanying documents or explanations were published that highlight the changes made to this Final Draft as compared with earlier versions[7]. This lapse of documentation is especially notable considering that the amendments discussed below touch upon two highly discussed aspects of the new Code – the definition of «intentional» and WADA's treatment of social drugs.

III. Review of Substantive Amendments made in the Final Draft of the 2015 WADA Code

[Rz 5] Two of the three amendments made to the 2015 WADA Code in the Final Draft touch upon the treatment of social drugs. In our November 2013 Preliminary Survey we suggested that the exception carved out of Article 10.2.3 in the definition of intentional provided some insight into WADA's intended policy on these social drugs[8]. These first two amendments provide more pieces to this puzzle. The third amendment expands the scope of the provision regarding prompt admissions in cases of (potentially) intentional doping thus introducing more flexibility for sanctioning these types of violations.

1. Amendment 1: *Differentiated Treatment Based on the Type of Substance Banned In-Competition in the Definition of «Intentional»*

[Rz 6] The revised 2015 WADA Code explicitly conditions the severity of the sanction upon the «intentional» character of the anti-doping rule violation (Article 10.2). The first amendment in the Final Draft touches upon the definition of what is to be considered «intentional» within the meaning of the Code (Article 10.2.3).

[Rz 7] As discussed in section 4.2.A.d of our November 2013 Preliminary Survey, the 2015 WADA Code version 4.0 set forth an exception for all substances banned *In-Competition* only, which read as follows (Article 10.2.3):

> *An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered «intentional» if the Athlete or other Person can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*

[Rz 8] This provision created a form of an irrebuttable presumption (or legal fiction) that the anti-doping rule violation was not committed intentionally if a substance prohibited *In-Competition* only were «*Used Out-of-Competition*» and «in a context unrelated to sports performance». Social drugs (*e.g.* cocaine and Cannabinoids) largely fall under the category of substances prohibited *In-Competition* only.

[Rz 9] The Final Draft creates an additional differentiated treatment regime based on the type of substance (*Specified* or non-*Specified*) involved in the violation. In the Final Draft, the relevant portion of Article 10.2.3 reads as follows:

> *An anti-doping rule violation resulting from an Adverse Analytical Finding 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 anti-doping rule violation resulting from an Adverse Analytical Finding 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.*

[Rz 10] The Final Draft hence maintains the approach employed in version 4.0, but only with respect to non-*Specified Substances*[9]. For *Specified Substances*, under Article 10.2.3 an *Athlete* can trigger a rebuttable presumption that the violation was not intentional by establishing that the substance was *Used Out-of-Competition*. The *Athlete* is not required to demonstrate that the *Specified Substance* was «*Used* in a context unrelated to sports performance». On one hand, compared to the treatment of non-*Specified Substances*, the burden on the *Athlete* with respect to establishing the basis for the presumption is reduced. On the other hand, however, the strength of the presumption is also reduced (namely the presumption received is rebuttable instead of effectively irrebuttable).

[Rz 11] Generally speaking, the Code aims to treat *Specified Substances* with more flexibility than non-*Specified Substances* and substances prohibited *In-Competition* only with more

[7] For easy reference, we have included a redlined version of these three amended sections in the Final Draft of the 2015 WADA Code as Appendix 1 to this article.

[8] See in particular para. 109 where we discuss the link between the mention of substances banned only *In-Competition* in the definition of intentional set forth in Article 10.2.3 to WADA's policy on social drugs.

[9] Of note, the reference to «other *Person*» was removed from this exception in the Final Draft.

flexibility than substances prohibited at all times. The ultimate rationale, clearly reflected during the revision process, is to avoid unduly harsh penalties for using substances outside of a context related to sport performance, namely as social drugs. It is not immediately evident that this amendment to Article 10.2.3 described is aligned with these objectives.

[Rz 12] First, if the substance banned *In-Competition* only is classified as *Specified*, the best that the *Athlete* can strive for under Article 10.2.3 is a rebuttable presumption that the violation was non-intentional, rather than the irrebuttable presumption that is available in the context of non-*Specified Substances*. The provision contains no explicit indication on the requirements for the rebuttal of the presumption and the examples in Appendix 2 of the WADA Code provide little guidance[10].

[Rz 13] Second, the change reinforces the risks of confusion already highlighted in our Preliminary Survey; this risk arises from Article 10.2.3 mingling the intentional character of the conduct (*i.e.* the athlete's awareness of taking a *Prohibited Substance*) with the purpose of such conduct (*i.e.* ingestion in a context related to sport performance). Ironically, a strict application of Article 10.2.3 in its final version could make the situation for an *Athlete* accused of a violation involving the *Use* of a *Specified Substance* banned *In-Competition* more difficult than for an *Athlete* accused of a violation involving the *Use* of a *Specified Substance* banned at all times. Under Article 10.2.1.2, which applies to *Specified Substances* (with no distinction based on *In-Competition* or *Out-of-Competition*), the burden is placed on the *ADO* to establish that the violation was committed intentionally[11], thus in effect creating a rebuttable presumption that the violation was non-intentional. In contrast, Article 10.2.3 in the Final Draft requires the additional hurdle of proving the substance was *Used Out-of-Competition* in order to place the burden of proof on the *ADO* to establish that the *Use* was intentional. In other words, the sanctioning regime now comprises the confusing reality that two separate provisions (Article 10.2.1.2 and Article 10.2.3) each define a different standard for an *Athlete* to receive a rebuttable presumption that the *Use* of a *Specified Substance* banned only *In-Competition* was non-intentional.

[Rz 14] Unless CAS panels support a convincing interpretation of the interplay between Articles 10.2.1.2 and 10.2.3 that respects the objective of granting a privileged treatment for traces of drugs detected *In-Competition* as a result of *Out-of-Competition* social use, there is a risk that the ambiguous drafting of these provisions could jeopardize the ultimate goal of enhancing flexibility in this context.

[Rz 15] On a more general note, the new formulation does not lift uncertainties surrounding the intended interaction between the presumptions in Article 10.2.3 and the grounds of reduction based on *No Significant Fault or Negligence*. As an illustration, a delicate situation may arise for social drugs banned *In-Competition* only. More often than not, *Athletes* are perfectly aware that they were consuming these drugs. The question is whether the new regime allows those *Athletes* to establish *No Significant Fault or Negligence*, and therefore reduce an otherwise applicable two year period of *Ineligibility*, in case of such willful use of a social drug (thus «intentional» within the traditional legal understanding) when such *Use* is deemed to be «non-intentional» through the mechanism of Article 10.2.3. If so, one also wonders in these circumstances of deliberate social drug use, how the *Athlete*'s degree of *Fault* will be evaluated in the context of reducing a period of *Ineligibility* under Article 10.5.

[Rz 16] Ultimately, trying to interpret the new sanctioning regime in a manner that is aligned with all of WADA's stated objectives will require the hearing panels at the Court of Arbitration for Sport («CAS») to determine how the new concept of «intentionality» interacts with the traditional concepts of *Fault or Negligence* found in the WADA Code, which may prove a difficult enterprise and could result in different lines of precedents detrimental to legal security.

2. Amendment 2: *Special Treatment for Cannabinoids in the Comment to the Definition of No Significant Fault or Negligence*

[Rz 17] This second amendment adds the following language as a Comment to the definition of *No Significant Fault or Negligence* (found in Appendix 1):

> *For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.*

[Rz 18] This amendment presumably creates a pathway for *Athletes* testing positive for Cannabinoids to avoid both a finding that the violation was committed intentionally (thus replacing the pathway removed from the exception to Article 10.2.3, as described above) and to provide an easier pathway to the finding of *No Significant Fault or Negligence* for these types of drugs.

[Rz 19] As a first observation, this amendment is a welcome facilitation for the treatment of Cannabinoids, which account for a large percentage of all positive tests and are usually said to have a tenuous link to the enhancement of sports performance. However, this amendment is part of a

[10] Example 2 deals with Article 10.2.3 to a certain extent, but has not been amended to reflect the latest change made to the provision in the Final Draft.

[11] Article 10.2.1.2 provides that the period of ineligibility shall be four years where «The anti-doping rule violation involves a *Specified Substance* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional».

new system that creates a regrettably piecemeal treatment of social drugs. As discussed in section 4.3.E of our November 2013 Preliminary Survey, versions 1.0 and 2.0 contained a provision that specifically addressed the sanctioning of violations arising from «substances of abuse». This provision capped the length of the initial period of *Ineligibility* for these types of substances at one-year, provided a lack of intent to enhance performance could be established. While aspects of this provision were heavily criticized by stakeholders it had the advantage of providing a cohesive approach and serving as a clear guide to stakeholders as to WADA's policy towards social drugs. In contrast, stakeholders seeking to understand this intended policy under the Final Draft must read between the lines and assemble the various provisions that allude to social drugs in an attempt to formulate some semblance of a cohesive policy. The difficulty of this exercise is compounded by the fact that social drugs (*e.g.* cocaine, Cannabinoids and heroin) are subject to no less than three distinct treatments under the Final Draft[12]. One wonders if the same end result could not have been achieved in a manner that more squarely addressed the topic and would thereby provide more straightforward guidance.

[Rz 20] As a second observation, the provision itself raises some interesting interpretational questions. This definition is the only provision in the Code that requires that the elements are «clearly demonstrated» rather than the more commonly used expression «established». This choice of language raises the question as to whether a different, possibly higher standard of proof is envisioned. If this is the intent, however, Article 3.1 (which addresses standards and burdens of proof) presents a likely fatal obstacle to achieving that goal. Article 3.1 only defines a standard of proof for situations where an *Athlete* or other *Person* is required by the Code to **establish** facts or circumstances and is silent on what could be intended by the phrase «clearly demonstrating». In addition, Article 3.1 makes clear that the standard of proof on the *Athlete* or other *Person* is always «by a balance of probability» and the reservation that allowed for a different standard where the Code explicitly so provides was removed during the 2015 revision process. We would venture that without an explicit reference to a higher burden placed on the *Athlete*, the phrase «clearly demonstrating» should nevertheless be interpreted as synonymous to «establish by a balance of probability» to ensure a consistent interpretation and harmonized approach.

[12] For example, cocaine as a non-*Specified Substance* banned *In-Competition* only is subject to the exception in Article 10.2.3 that grants an irrebuttable presumption of non-intentionality. Heroin is a *Specified Substance* banned *In-Competition* only, so is subject to a rebuttable presumption of non-intentionality under Article 10.2.3, if the *Athlete* can establish that it was *Used Out-of-Competition*. Cannabinoids are also *Specified Substances* banned *In-Competition* only, so are subject to the same exception in Article 10.2.3 as heroin, but are also subject to the exception set forth in the definition of *No Significant Fault or Negligence* in Appendix 1.

3. Amendment 3: *Expansion of the Scope of the Provision concerning Prompt Admissions*

[Rz 21] The third amendment made in the Final Draft expands the scope of the prompt admission provision (Article 10.6.3), which is a mitigating ground upon which a sanction can be reduced. Previously, in version 4.0, only those potentially exposed to a four-year period of *Ineligibility* for an intentional violation of Articles 2.1, 2.2, and 2.6 under the general provision of Article 10.2.1 were eligible for a reduction based on prompt admission (see Article 10.2 *in initio*). The Final Draft expands this list of violations to include Evading or Refusing to submit to *Sample* collection (Article 2.3) and *Tampering* or *Attempted Tampering* with any part of Doping Control (Article 2.5), which are both subject to a four-year sanction.

[Rz 22] The new version of Article 10.6.3 reads as follows:

> *Prompt admission of an anti-doping rule violation after being confronted with a violation sanctionable under Article 10.2.1 or 10.3.1.*
>
> *An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization, and also upon the approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the severity of the violation and the Athlete or other Person's degree of Fault.*

[Rz 23] As discussed in section 4.2.B of our November 2013 Preliminary Survey, the revised formulation of the prompt admission provision in the 2015 WADA Code will likely only be applied in exceptional cases, given the rather stringent conditions that must be met in order for it to apply and the discretion of the relevant *ADO*s with respect to the measure of the reduction of the sanction (which in any event must remain a minimum of two years). Nevertheless, expanding the scope of the provision to encompass other intentional violations can only create additional flexibility to the sanctioning regime. Indeed, no apparent reasons could justify excluding the violations targeted by Article 10.3.1 from the scope of the prompt admission, given that these violations entail a four-year violation and were given a separate treatment simply because they are inherently intentional and did not fit into the categories of violations involving S*pecified Substance* versus non-*Specified Substance* underlying the system of Article 10.2.

[Rz 24] By contrast, violations of *Trafficking* (Article 2.7) or *Administration* of a *Prohibited Substance* or *Method* (Article

2.8) remain excluded from the ambit of the prompt admission reduction, even though these violations also trigger an ineligibility period of a minimum of four years (Article 10.3.3).

IV. Conclusion

[Rz 25] While the late-addition of the amendments to the 2015 WADA Code was unanticipated from a procedural perspective, unquestionably the intent of the WADA Code drafters was to make final improvements to accomplish the goals of a smarter, fairer, and clearer Code. The first cases brought before hearing panels under the new regime in 2015 will show to what extent the three amendments contribute to achieving this goal.

[Rz 26] One can only hope that these amendments will not compromise the high level of stakeholder buy-in and support that exists for the Code. The revision process has been praised by WADA for its transparency and openness to stakeholder input. In reality, the three most recent drafts of the Code (versions 3.0, 4.0, and 4.1 [Final Draft]) were not subject to stakeholder comment and included many changes that have a considerable impact on some of the most controversial aspects of the anti-doping movement. With the Final Draft, the *Signatories* of the Code are obliged to implement less than a year from now a document that was only published after they expressed their approval by acclamation at the Johannesburg Conference and is still open to further changes for an undetermined period of time.

V. Appendix

- Marked-up version of Summary of changes made in the Final Draft version 4.1 of the 2015 WADA Code as compared to version 4.0 – PDF

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Appendix 1: Summary of changes made in the Final Draft version 4.1 of the 2015 WADA Code as compared to version 4.0

The changes made in the "Final Draft" version 4.1 of the 2015 WADA Code are shown below in red font.

Amendment 1: *Differentiated treatment based on the type of substance banned In-Competition in the definition of intentional*

Article 10.2.3 in the Final Draft:

> *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person 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 constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not ~~be considered "~~intentional~~"~~ if the substance is a Specified Substance and the Athlete ~~or other Person~~can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding 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.*

Amendment 2: *Special treatment for Cannabinoids in the Comment to the definition of No Significant Fault or Negligence*

Definition of *No Significant Fault or Negligence* in Appendix 1 of the Final Draft:

> *No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*
>
> *[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]*

Amendment 3: *Expansion of the scope of the provision concerning prompt admissions*

Article 10.6.3 in the Final Draft:

> *Prompt admission of an anti-doping rule violation after being confronted with a violation sanctionable under Article 10.2.1 or 10.3.1. An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1~~,~~ or 10.3.1 (for evading or refusing Sample Collection or tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization, and also upon the approval and at the~~–~~ discretion of both WADA and the Anti-Doping Organization with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the severity of the violation and the Athlete or other Person's degree of Fault.*