

WADA Conference Madrid 2007  
IRB Submissions/Comments

**The quest for certainty of application and implementation**

The WADA Code ("Code") is intended to be universal and will therefore be applied by a diverse range of legal, medical and other experts across a wide range of territories, sports and disciplines. This can make harmonisation, certainty and consistency difficult to achieve. Yet these features are integral to the overall credibility of the fight against doping in sport.

Wherever possible/practicable the Code should seek to eliminate conditions, policies and provisions that may create uncertainty and/or inconsistency of application.

In this regard the IRB would note the following three points.

1. The application of sanctions for Specified Substances

The new Code envisages a significantly heightened level of flexibility in the application of sanctions for various anti-doping rule violations.

Under the Specified Substance regime, for example, where an Athlete or Other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sports performance or mask the use of a performance enhancing substance the period of Ineligibility of two years may be replaced with "*At a minimum, a reprimand and no period of ineligibility from future events, and at a maximum two (2) years ineligibility.*"

Checks and balances are incorporated in the Code in order to demonstrate the comprehensive nature of the evidence required to meet the thresholds set out in this provision and the level of satisfaction that needs to be achieved. However, notwithstanding these provisions and the commentary incorporated into the Code there is a danger that in the absence of a more prescribed guideline as to the process by which this sanctioning discretion should be applied there could be significant inconsistency of sanctioning in cases with substantially similar factual circumstances.

A warning to two years Ineligibility constitutes a wide area of discretion in the sanctioning range and it seems likely that there will be an increase in the extent of submissions made by representatives in connection with the sanctioning power and how it should be exercised. Adjudicators (and representatives) that are familiar with local national law sanctioning policies may apply (or seek to have applied) contrasting principles/processes of sanctioning and different approaches to what weight should be given to factors such as contrition, good record and other so-called mitigating features.

It would be preferable to fill the void by creating a sports/Code specific approach with recognised/established sanctioning principles being identified that are appropriate/relevant to a sports anti-doping setting. By way of illustration, should the starting point for assessment of a sanction where the thresholds have been established and the discretion applies be "two years down" or "zero up"? This could be easily stated and avoid potentially protracted sanctioning debates.

Possible solutions to this issue include the provision of additional sanctioning guidelines within the Code (in the form of commentary or otherwise) and/or to ensure that an appropriately constituted adjudication body whether the Court of Arbitration for Sport or otherwise issues, on an expedited basis, a lead judgement setting out the manner in which sanctioning principles/processes are to be applied.

Such provisions, guidelines or judicial pronouncements would hopefully help eliminate inconsistency in sanctioning (which in the eyes of sporting stakeholders is likely to be the most critical factor), enhance the efficiency of hearings (preparations and submissions) and avoid the need for many cases to be appealed in order to bring clarity to the appropriate sanctioning approach.

2. Violation of applicable requirements regarding athlete availability for out of competition testing including Filing Failure and Missed Tests which are declared based on rules which comply with the international standard for testing

Since any combination of three missed tests and/or filing failures (being a Whereabouts Failure) within an 18-month period constitutes an anti-doping rule violation for which the period of Ineligibility is a minimum one year and at a maximum two years based on the Athletes degree of fault (Article 2.4), it is important

that there is absolute clarity in both the process establishing the Whereabouts Failure and in the application of sanctions for such violations.

It is assumed that the process outlined in the International Standard for Testing regarding the establishment of a Whereabouts Failure must be completed in respect of any three Whereabouts Failures before the relevant judicial process for an alleged Anti-Doping Rule Violation pursuant to Article 2.4 is commenced. Any uncertainty in this regard should be eliminated.

In terms of the sanctions for such violations, the proposed range is two years to one year based on the circumstances of the case. This regime again provides a high level of subjectivity and discretion to the applicable adjudicating body which may be exercised differently depending on the legal socialisation/location/sport of those making the adjudications.

In the circumstances therefore it would be preferable for additional guidelines on the application of this regime to be provided within the Code and/or for the first competent adjudicating body seized of an action, where this violation/issue is a relevant consideration, to issue a guiding judgement with a view to achieving the level of certainty required.

This element of the Code is potentially further complicated by the fact that under Article 2.4 it is possible (in appropriate circumstances) that missed tests or filing failures may also constitute an anti-doping rule violation under Article 2.3 refusing, or failing without compelling justification to submit to sample collection after notification as authorised in applicable anti-doping rules, or otherwise evading sample collection. The sanction for which is two years.

In the absence of such certainty of terms there could be (as between various cases) significant inconsistency in the anti-doping rule violation pursued, the manner in which an offence is determined to be established (if any) and the applicable sanctioning regime, even if the factual circumstances of such cases are substantially similar. This would damage the level playing field and credibility of the system.

### 3. Clarity in the application of the Consequences of Anti-Doping Rule Violations in Team Sports

The Consequences of a finding that an Anti-Doping Rule Violation has been committed require in addition to the Athlete's results in a particular Competition or Event being invalidated that there is forfeiture of any medals, points and prizes. In the context of Team Sports it would be helpful if the Code could provide specific clarification that any removal of points (where applicable) will not have any impact on the playing result to the Team, so that for example where a try is scored by an Athlete who commits an Anti-Doping Rule Violation that try cannot be invalidated. Any Team Consequences can be adjudicated separately pursuant to the provisions in Article 11.

#### **Moving forward**

Moving forward it seems inevitable that sanctioning issues/Articles will be increasingly scrutinised/tested. It is certainly an area Lawyers will focus on to a greater extent. The credibility of the Code depends upon an effective consistent and harmonised sanctioning policy and outcomes. The danger of rogue decisions and/or poor precedents being used to arrive at decisions within sports and/or across sports cannot be underestimated and wherever possible should be addressed pro-actively. Such rogue decisions/poor procedures can arise from an erroneous approach/process to sanctioning issues and inappropriate use of/reliance on precedent.

Sports stakeholders do not wish to see the anti-doping system mired in highly legalistic arbitration processes and/or hearings. This diverts financial resources and personnel away from the sports. The need for proportionality is understood, but that must be viewed in the appropriate sports setting by reference to the expectations of all sports stakeholders, who by and large favour certainty and consistency. The IRB would therefore like to see the suggestions advanced above pursued to help achieve these critical objectives.