

GENERAL COMMENTS AND OBSERVATIONS ON THE CODE IN ITS ENTIRETY

The Code review process

The WADC is not only the core document that harmonizes anti-doping policies, rules and regulations within the sport movement around the world. The Code is the key tool in the global fight against doping in sport. We commend WADA for having established clear and consistent rules regarding WADC compliance for Signatories, and we are pleased that WADA is open to constructive overall views as to how other parts of the Code could be improved and thus has initiated this Code review process. We are grateful for the opportunity to offer our contribution in this regard, and we remain confident that our remarks will be **received in the good faith in which they are delivered. We fully share WADA's notion that** constructive views are instrumental to ensuring that the Code is robust and strengthened over time to secure protection of clean sport.

As a consequence of how the sport organisation in Norway is structured, 1,3 million persons are currently under our jurisdiction and thus subject to the WADC. This being the consequence of their individual membership in sport clubs affiliated to our 54 national sports federations. We have implemented an internal review process within our organisation, the outcome of which was presented to our Executive Board on the 22. March, serving as the basis for the comments made in this document.

On a general note it would be highly appreciated if the document "2021 World Anti-Doping Code Review: Questions to Discuss and Consider" had been more explanatory in form, to clarify the questions that are raised by WADA. For the current and future reviews, we believe that this recommendation would facilitate a smoother, consistent and more cohesive review process.

Reasons for amendments

We urge WADA to provide reasons for any amendments in WADC 2021 1.0. It is a challenging task for the stakeholders to give opinions on an alteration without knowing the rationale behind the proposed amendments. If the Code is amended, the amendment must be reasoned, as the legislative background is useful in the interpretation of the Code, securing that similar cases are considered within the same context.

The complexity requires further emphasis on the protection of the legal rights of the athletes

The Code and the Standards are increasingly becoming more extended and complex with detailed wording. The complexity itself requires further emphasis on the legal rights of the athletes. This may be mitigated by WADA implementing more specified requirements on the hearing process and other means to guarantee due process. We believe this would safeguard the Code and further strengthen the efforts of protecting clean sport. Please confer below on Article 8.

The legal status of the comments

According to Article 24.2 the comments annotating various provisions of the Code shall be used to interpret the Code. However, we find some of these comments to be too vague, some too descriptive and some not designed to serve as a comment to a legally binding text. We believe that comments should merely be clarifications to the articles, and comments should be made to all articles of the Code that may give rise to interpretation difficulties. We urge WADA to establish a separate document where all provisions are accompanied by an

explanatory note/comment, with additional reference to relevant case law. Such document should be revised and published by WADA, ready and available whenever the need arises. We also recommend that WADA considers establishing a database containing all decisions rendered according to the WADC.

CAS' jurisprudence

The WADC was established, not only to protect the athletes' fundamental right to participate in doping-free sport, but also to ensure harmonized anti-doping programs at the international and national level. Against this backdrop we advise WADA to consider how to also ensure harmonized jurisprudence. Today there are hundreds of hearing bodies rendering decisions based on the WADC, and there is no doubt a need for an appeal body whose decisions are considered binding for the various hearing bodies, and further also a source of precedence and guidance in deciding subsequent cases with similar legal issues or facts. We are concerned that CAS panels, as individual arbitral tribunals, are not structurally equipped for ensuring such uniformity of jurisprudence. Please confer below on Article 13.

ARTICLE 4: THE PROHIBITED LIST

Article 4.3: Criteria for including substances and methods on the Prohibited List

Firstly, any sanctioning rule must have legitimacy both in its essence and in its effect. Doping **is, amongst ordinary people, perceived as an athlete's use of prohibited substances or** methods to improve sport performance damaging the overarching standard of fair play. The definition of doping in the WADC is wider, as doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10. Performance enhancing potential is not a requirement when considering including a substance or a method in the Prohibited list. It is sufficient that the substance or the method has a potential health risk and contravenes the Spirit of Sport. We, representing the sport movement, are concerned about this divergence, and the risk that it may create confusion among the public and thus, in the long run, could be damaging to the legitimacy of the anti-doping rules and detrimental to the important fight against doping in sport. We are also concerned that the wide definition of doping, where all athletes are being characterized as **"cheaters", does not sufficiently differ between athletes that use prohibited performance** enhancing substances, and athletes that use an unhealthy, non-performance enhancing substance.

Secondly, as we are of course strongly in favor of protecting the athletes' health, we have concerns regarding the criteria for including substances and methods on the prohibited list, and the classification of substances into categories. As protecting the health, according to the Code, is equally important to protecting the clean athletes and a level playing field, we fear that the public in general does not understand why not more unhealthy substances are prohibited. And, as protecting the health, again according to the Code, is equally important to protecting the clean athletes and a level playing field, we fear that the public in general will not understand why unhealthy substances as narcotics and cannabinoids are prohibited only in-competition and not out-of-competition, i.e. the remaining part of the year.

In our opinion, the fight against doping in sport is too important to risk having the public questioning the rationale behind the Prohibited list and its substances and methods. In light of these concerns, we call on WADA to consider whether it is better to address health issues outside the scope of the Code, for example by adopting a separate set of rules aimed at protecting the health of the athletes but with other requirements and reactions/sanctions. This may also serve as a standard towards the general public, as we recognize the actuality of addressing these issues outside the scope of organized sport.

According to Article 9 an anti-doping rule violation in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition in addition to following consequences. The mere presence of a prohibited substance will be sufficient to cause the disqualification of the results. This is because the athlete assumingly had a potential advantage over the other athletes. However, the AAF could be caused by an unhealthy non-performance enhancing substance. Hence, we ask WADA to consider amending this rule adding the same requirement as found in Article 10 (1), cf. if the athlete **establishes that he bears no fault or negligence for the violation, the athlete's individual result shall not be disqualified, unless the athlete's results in the competitions in which the anti-doping rule violation occurred were likely to have been affected by the athlete's anti-doping rule violation.**

ARTICLE 5: TESTING AND INVESTIGATIONS

To protect the integrity of sport while simultaneously ensuring that athletes are treated equally, the testing and the subsequent analysis must be flawless. Today there are several bodies responsible for collecting doping samples, for example NADOs, IFs, ITA as well as private commercial companies. Each ADO is responsible for the education and accreditation of DCOs, and although all must comply with the Code and the International Standards, given the obvious impact a failure in the doping control procedure could have on the outcome, we worry that this is not enough to protect our athletes. Hence, we allow ourselves to suggest that WADA establishes procedures to ensure that all DCOs have the same high quality level of education, training and competence.

In the document "2021 World Anti-Doping Code Review: Questions to Discuss and Consider", WADA refers to a **"continuing debate involving which organizations have the right to conduct result management in different circumstances."** Assuming this has reference to testing procedures, please allow us to make the following remark: We worry that such questions about jurisdiction draw the attention away from what should be our focus; protect the clean sport and the clean athletes. Hence, we ask WADA to consider whether a solution to this could be establishing one single organisation responsible for all testing. By doing so, no questions of jurisdiction will be addressed. Furthermore, this body may be linked to the effort to ensure that all DCOs have the same high level of competence, mentioned above. If all Signatories provided funding, such organisation could collect doping samples across the world and all athletes would be subject to the same and equally competent testing regime. We ask WADA to consider whether the already established ITA could extend its mandate and fulfill this role, or alternatively establish a similar structure.

ARTICLE 6: ANALYSIS OF SAMPLES

As mentioned under Article 5, protecting the athletes, requires that the analysis of samples must be flawless. Today there are several WADA-accredited laboratories responsible for these analyses. Again, given recent historic events, we worry that this is not sufficient, and that it might be necessary to centralize also the analysis of samples, i.e. establish one organisation responsible for distributing the A- and B-samples randomly to various WADA-accredited laboratories. We ask WADA to consider whether the already established ITA could extend its mandate and serve to fulfill this role as well, or alternatively establish a similar structure.

ARTICLE 7: RESULT MANAGEMENT

Please confer Article 5 above.

ARTICLE 8: RIGHT TO A FAIR HEARING AND NOTICE OF HEARING DECISIONS

Requirements of the hearing bodies

The Code and the Standards are increasingly becoming extended and complex with detailed wording. The complexity itself requires further emphasis on the protection of the legal rights **of the athletes. Hence, the athlete's fundamental right to legal protection and due process** must be further strengthened. Legal protection is secured through several means and methods such as ensuring transparent processes, independence and competent hearing bodies.

According to Article 8, *“each anti-doping organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be Publicly disclosed as provided in Article 14.3.”*

Firstly, we recommend that the Code uses the accurate phrasing found in the ECHR Article 6.1., cf. *“fair and public hearing within a reasonable time by an independent and impartial tribunal.”* **We strongly believe that public hearings secure transparency which is crucial to** provide legitimacy to the judicial procedures. Hence, we suggest that hearings should be public unless there are exceptional circumstances that justify a non-public hearing, and that this is introduced as an added requirement. Article 14.3.3 must in this case be amended accordingly. Furthermore, we suggest that the Code should require that dissents are publicly disclosed.

Secondly, the mechanism of the disciplinary process is left largely to the ADOs under the Code, provided that these minimum procedural safeguards are met. We urge WADA to strengthen these safeguards by implementing more specified requirements. In the following we will present additional examples of safeguards that are currently enshrined in our Statutes, and we ask WADA to consider implementing similar requirements in the Code:

- Every case shall be decided as quickly as possible. The hearing body shall ensure that the case is not unduly delayed and may set deadlines, exclude evidence and carry out other preparatory proceedings. Every case shall be thoroughly considered before a decision is made.
- If oral statements are taken from parties or witnesses, the parties shall be notified and be entitled to be present with an advisor if necessary.
- The decision shall be based exclusively on the evidence submitted in the case and of which both parties have been informed.
- If the athlete or person charged needs an interpreter, this shall be provided by the hearing body.
- If the hearing body has decided on a provisional suspension, the hearing body shall, for the further handling of the case, if possible be set with other members than the ones who decided the provisional suspension.
- No person in the hearing body may participate in the preparation of, or deciding the case if he or she is an interested party, has submitted a complaint or participated in the proceedings at a lower level, previously has publicly made known his or her opinion on the case, or if there are other reasons likely to undermine confidence in his or her impartiality.

- In addition, according to our Statutes, judicial competence for members of the hearing bodies is required, the hearing bodies may appoint expert witnesses, and the reasoned decision is public unless the hearing body decides otherwise due to special circumstances.

First instance hearing bodies

In ordinary criminal proceedings, each case is assessed individually based on the specific circumstances of the case. Although the Code explicitly states that it has been drafted giving consideration to the principles of proportionality and human rights, it makes use of non-flexible regulations and basically only allows some mitigation of sanctions based on the degree of fault.

The use of non-flexible regulations may be based on a general concern and caution regarding the quality of the first instance hearing bodies. However, this issue requires individual attention. We fully understand and support the need for harmonization of the rules and the jurisprudence, however the absence of discretionary assessment is likely to contravene basic legal principles such as equal treatment and proportionality. Considering this, we suggest that WADA will consider establishing a similar arrangement in all doping cases as was done during the Olympic Games in PyeongChang, with CAS acting as a first-instance hearing body and as an appeal body. If established, we trust that the Code can be amended providing more room for discretionary assessment, and we trust that WADA will recognize that anti-doping work is organized differently in each country and amend WADC accordingly, allowing more flexibility to Signatories that apply the Code to all level of athletes. **Please confer below on Article 10 and on the definition of "Athlete".**

ARTICLE 9: AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

Please confer Article 4. An automatic disqualification of results could be more severe for an athlete than a period of ineligibility, depending on when period of ineligibility is endured. If the mere presence of a prohibited substance is sufficient to cause the disqualification of the results, and the prohibited list does not require substances to have a possible performance enhancing potential, an automatic disqualification seems unnecessarily harsh. We ask WADA to consider amending this rule adding the same requirement as is found in Article 10 (1), cf. if the athlete establishes that he bears no fault or negligence for the violation, the **athlete's individual result shall not be disqualified, unless the athlete's results in the competitions in which the anti-doping rule violation occurred were likely to have been affected by the athlete's anti-doping rule violation.**

ARTICLE 10: SANCTIONS ON INDIVIDUALS

Please confer Article 8 and "First-instance hearing bodies", and Article 13.

ARTICLE 13: APPEALS

Even though CAS is the final hearing body and it is of utmost importance for the athletes how these proceedings are managed, the Code does not contain any procedural rules for the proceedings before CAS. CAS has its own rules and is not part of the Code-requirement. We deem it important for the athletes that also the procedural rules are found in the Code. Hence, we advise WADA to ensure that the procedural rules of appeals to CAS in accordance with the Code, are integrated into the Code.

In addition to a possible restructure of CAS in a first instance and appeal body, please confer with the above, we also ask WADA to consider whether proceedings brought before CAS in accordance with the Code require a remodeling of CAS. As a court of arbitration, there is an

underlying contractual nature which defines CAS' mission as resolving the dispute at hand irrespective of any doctrine of binding judicial precedent. However, as mentioned under **“General Comments and Observations on the Code in its Entirety”** and **“CAS jurisprudence”**, CAS must be a court of precedence. In fact, rendering decisions that are binding on or persuasive for other judicial bodies deciding subsequent cases with similar issues or facts, is the reason of existence for CAS as the final appeal body in the Code. Hence, it is important that CAS is organized as a supreme court of sport that harmonizes the adjudication of doping disputes, and we call on WADA to consider how to evolve CAS into a proper court of precedence for anti-doping cases. For example, WADA should consider whether doping proceedings should be organized by an antidoping division in both first and second instance with a limited number of arbitrators. WADA should also consider introducing plenary hearings in cases dealing with fundamental questions or interpretations of the Code.

The principle of equality of arms is an essential part of the right to a fair trial. However, the cost of CAS proceedings is of such a level that only the most affluent athletes are in a position to engage lawyers, experts etc. We therefore call upon WADA to consider the costs of CAS proceedings for the athletes, including strengthening the legal aid available to the athletes.

ARTICLE 14: CONFIDENTIALITY AND REPORTING

Article 14.3.3

Please confer above regarding Article 8 and the **“Requirements of the hearing bodies.”**

DEFINITIONS

Provisional Suspension

The definition of “provisional suspension” needs clarification as to the restrictions laid on an athlete during a period of provisional suspension.

Athlete

The definition of an athlete is a key point in the Code. In Norway, NIF has chosen to apply anti-doping rules to athletes on all levels. We call on WADA to amend the definition thus recognizing that anti-doping work is organized differently in each country and provide the necessary flexibility to Signatories that want to apply the Code on lower level athletes that compete under its authority. For this group of athletes, the current use of non-flexible regulations could easily lead to disproportionate sanctions.

As we have 1,3 million members under our jurisdiction that are subject to the WADC, we find it unnecessary and inexpedient to support a mandatory requirement of whereabouts information from our lower level athletes.