DOPING AUTORITEIT

WADA
attn. Mr D. Howman
PO Box 120
H4Z 1B7 Montreal (Quebec)
Canada

Capelle a/d IJssel 5 October 2012

Reference HR/BF/087

Subject Submission The Netherlands to 1st draft 2015 Code (shared submission of four stakeholders)

Dear Mr Howman,

We would like to thank WADA for this opportunity to provide feedback to the first draft of the revised Code, and to congratulate WADA on the success of the Code in the fight against doping in sport on a global level.
With this letter, we provide you with input from four Dutch stakeholders:

- The Ministry of Health, Welfare, and Sports;
- The Netherlands Olympic Committee*Netherlands Sports Confederation (NOC*NSF);
- The NOC*NSF Athletes' Commission; and
- Anti-Doping Authority Netherlands.

Below you will find a set of detailed observations and recommendations. The most important proposed amendment, however concerns the change to the criteria for including substances on the Prohibited List.

Yours sincerely,
Anti-Doping Autoriteit Nederland

Herman Ram
CEO

Stichting Anti-Doping Autoriteit Nederland
Cypresbaan 21
2908 LT Capelle aan den IJssel

Postbus 5000 2900 EA Capelle aan den IJssel
Telefoon (+31)(0)10-2010150
Fax (+31)(0)10-2010159

Doping Infolijn 0900-2001000 (€0,10/min.)
www.dopingautoriteit.nl
www.eigenkracht.nl

1. Requirement of potential performance enhancement as a necessary criteria for inclusion of a substance on the Prohibited List (art. 4.3)

1.1. This proposal could be present one of the most significant changes to the anti-doping policy since the Code came into force in 2004. It will significantly increase the focus of the anti-doping work, and also contribute to a more cost-effective approach.

1.2. The proposed amendment will be instrumental in:
a. focusing our attention to athletes who are trying to cheat;
b. increasing the credibility of the fight against doping; and
c. conducting effective testing.

1.3. We note that:
a. the proposal does not change the status of potential health risk as being one of the three List criteria;
b. the proposal is identical to the current wording in the sense that it is WADA's (and only WADA's) decision and discretion to include substances and methods on the Prohibited List;
c. the wording of the proposal is appropriate in the sense that it refers to (i) the "potential" to enhance performance, (ii) sport in general as opposed to one particular sport, (iii) sport performance, i.e. the in-competition effect;
d. the rule on Substances of Abuse (article 10.4.3) has been introduced;
e. the Prohibited List, nor WADA's sole discretion in including substances and methods on the Prohibited List has never been challenged in court since the Code came into force in 2004.

Recommendation:
We strongly welcome this proposal and compliment WADA for emphasizing the element of performance enhancement as the key element for including substances and methods on the Prohibited List.

---

2. Purpose of the Code

Draft version 1.0 has introduced a reference that the Code shall be applied in a manner that respects the principles of proportionality and human rights.

Comment:
We welcome this reference, as the Netherlands has repeatedly emphasized the relevance of human rights and the principle of proportionality.

---

3. Consultation revision International Standards

3.1. Consultation with stakeholders is of key importance before new or revised International Standards, Technical Documents or other requirements are adopted by WADA. We find that the current reference to consultation in the Code does not reflect the importance of the consultation process.

Doping Infolijn 0900-2001000 (€0,10/min.)
www.dopingautoriteit.nl
www.eigenkracht.nl

3.2. The text regarding the revision of International Standards in the 2009 Code has not been amended in draft version 1.0. Hence, the concerns about sufficient and timely consultation (and, possibly, the discrepancy with the French text) remain.

Recommendation:
1. The wording regarding consultation in the Code (currently: "reasonable consultation with the Signatories and governments") should be is strengthened and clarified, and more emphasis should be placed on the transparency of consultation process;
2. The term "signatories" should be replaced by the more appropriate term 'Stakeholders', as WADA-accredited laboratories are not Signatories to the Code, but should be included in the consultation process;
3. The English and French versions of this text should be brought in line with each other. The current wording in English ("reasonable consultation") is not identical to the wording in French ("consultations suffisantes").
4. We also recommend to harmonise the revision cycles and timetables of the Code and the International Standards in the future, in order (i) to allow integration of changes in one document to be reflected in other relevant documents and (ii) to provide sufficient time for consultations.

---

4. Elimination of the B sample (art. 2.1.2)

4.1. We are unsure whether the suggested positive effects (*possible* reduction of costs, expedited results management process) outweigh the perceived negative effects of eliminating the B sample.

4.2. It must be taken into account here that the B sample is considered crucial by the majority of stakeholders. The B sample is considered by athletes as an irrevocable right of an athlete to challenge an adverse finding, by ADOs as an instrument to obtain a result which is above any kind of reproach, and by laboratories as the possibility to prove that they do not make intentional or unintentional mistakes.

Recommendation
Before such significant change can be made to the current system of A and B samples as proof for doping under article 3, all pros and cons (e.g. costs, in how many cases does the B sample analysis play a relevant role) must be determined and evaluated, including the possible alternative confirmation options in case the B sample is indeed eliminated.
Without any clear explanation and clarification on the rationale behind eliminating the B sample, and without any indications on possible alternatives, we find that we cannot at this point support this proposed amendment to the Code.

---

5. Prohibited Association (article 2.10)

5.1. There is an issue with the wording of the proposed article 2.10. One of the effects of the proposal is that athlete support personnel who have been found guilty of a violation *in the past* are basically barred for the remainder of their professional life from working with athletes, also when they have already served their punishment.

5.2. It is not clear whether it is the intention of this article to apply this article to athlete support personnel also after they have served their criminal or disciplinary sentence, or an (undesired) side effect. In any case, this (side) effect is considered disproportionate.

5.3. We also wonder whether the proposed article is an attempt to indirectly exercise more control over a group (i.e. athlete support personnel) which does not always fall within an ADO's jurisdiction.

5.4. The vagueness of the wording ("[...] have been involved with doping [...]"), as well as establishing the level of intent and knowledge on the part of the athlete, will make this article very difficult to apply in practice.

Recommendation:
We recommend that:

a. *the option of blacklisting athlete support personnel who have been found guilty of being involved in doping in the past and who have served their sanction, is removed;*
b. *the wording of this article is improved in order to make the scope and intentions of this article clear and specific;*
c. *the necessary actions regarding the communication of sanctions to relevant parties (ADOs and athletes) are secured.*

---

6. Athlete's required to avoid prohibited substances (comment to art. 4.3.1)

6.1. The comment to article 4.3.1 contains the following remark:

> *It is each Athlete's responsibility to avoid substances on the Prohibited List.*

6.2. This requirement is rather broad and undefined, taking into account that many substances included on the List are regular medication that people may from time to time come into contact with.

6.3. This requirement is unspecified, has an unclear rationale, and has undesired consequences. For example, an athlete who has a child with asthma will be violating his responsibility under this comment just by providing asthma medication to his child.

Recommendation:
We recommend removing the comment to article 4.3.1 from the draft Code.

---

7. Relationship between High Priority Athlete Pools (formerly Registered Testing Pools) and Test Distribution Plan (art. 5.1.3)

We welcome the increased emphasis that the draft version 1.0 places on proportionality with respect to establishing the "High Priority Athlete Pool".

Recommendation:
(1) We recommend that in order to make clear and transparent to all relevant parties (athletes, NADOs, International Federations) which athletes are included in the High

Priority Athlete Pool and which athletes are considered International-Level Athletes, the Code places more emphasis on IFs fulfilling their obligations under the Code with respect to communicating:

a. *which athletes are included in the IF's High Priority Athlete Pool;*
b. *what is considered by an IF as the international level (see definition of International-Level Athlete) for that sport;*
c. *which events are considered International Events;*
d. *which athletes and which events require an IF TUE.*

(2) We recommend that risk analysis is expressly mentioned in the Code as the key instrument in establishing and maintaining the "High Priority Athlete Pool", and that the size of the "High Priority Athlete Pool" shall always:

a. *be proportionate; and*
b. *correspond with the out-of-competition testing that will be conducted on athletes in the "High Priority Athlete Pool".*

---

8. Unless otherwise approved by WADA for specific sports, laboratories must test all samples for all prohibited substances using all methods available to the laboratory (art. 6.4)

8.1. We have discussed the consequences of the attempt in article 6.4 to match the cost of special testing with the likely risk in particular sports. We understand that the *intended* effect of this proposed amendment is that ADOs in high risk sports do fewer tests, but those tests which they do conduct will focus on the prohibited substances at the greatest risk of abuse in their sports.

8.2. However, we conclude that the *guaranteed* effect for NADOs will be that:

a. the (higher) costs of analysis for hGH, EPO, CERA, etc. will significantly impact the amount of tests that can be carried out under the National Testing Programs of NADOs;
b. NADOs will have to conduct blood sampling in sports like curling and archery, and will have to analyse samples from non- or low-risk sports for EPO, CERA and hGH, which will not contribute to the credibility of the fight against doping.

Recommendation:
We recommend that the proposed amendment is reconsidered with these risk factors in mind, and that WADA, in order to create a sensible approach to the issue of testing menus, should focus on differentiating between different kinds of sports, National-Level Athletes and International-Level Athletes, NADOs and IFs and between testing on the national level and on the international level.

---

9. Automatic disqualification of individual results (art. 9)

Article 9 continues to disqualify results, also where an athlete establishes both (i) no fault or negligence and (ii) that the presence of a prohibited substance in his system could not have provided a performance-enhancing advantage. We find that this is not in line with the increased emphasis on proportionality.

Recommendation:
We recommend that article 9 is amended in order to provide that where an athlete establishes both (i) no fault or negligence and (ii) that the presence of a prohibited substance in his system could not have provided a performance-enhancing advantage, then the results in a competition in which he tested positive would not be automatically disqualified.

---

10. Sanction for Filing Failures and Missed Tests (art. 10.3.3)

10.1. The comment to article 10.3.3 establishes that the flexibility between 1-2 years ineligibility is not available where a pattern of last-minute whereabouts changes or other conduct indicates that the athlete was likely trying to avoid being available for testing.

10.2. We note that last-minute whereabouts changes are allowed under the IST, and by themselves cannot constitute a reason for imposing a heavier sanction.

Recommendation:
We recommend that the wording is amended in order to make it (more) clear that last-minute whereabouts changes only cannot lead to a standard 2-year ban. The last-minute whereabouts changes should be a pattern establishing that the athlete was trying to evade sample collection.

---

11. Special flexibility for contaminated products (art. 10.4.2)

We note that article 10.4.2 applies also to non-specified substances, where the athlete under the current rules in all cases would face a minimum period of ineligibility of one year (under article 10.5.2). We also note that this article applies to other contaminated products, like meat.

Recommendation:
We welcome this proposal and compliment WADA for this proposed amendment, as it applies also to non-specified substances, where the athlete under the current rules in all cases would face a minimum period of ineligibility of one year (under article 10.5.2) even where an athlete took reasonable precautions.

---

12. More flexible sanctions for substances of abuse (art. 10.4.3)

12.1. We conclude that the possibility of offering treatment and rehabilitation to athletes is an option that could be recommended, but that the current scope and application of this proposal is too vague to fully evaluate. First, it is not clear or known which prohibited substances will be deemed 'substances of abuse'. Second, the proposal does not identify or limit to what extent the period of ineligibility that otherwise would have been imposed, may be replaced by participation in a program of rehabilitation. The only limitation appears to be that the period of ineligibility may not

be replaced in its entirety. Third, the question who will carry the costs for such programs.

12.2. We agree that flexibility is of great importance when applying the possibilities under this article.

Recommendation:
We request clarification with respect to:

a. *the question whether this article under the current wording is only available to 'rich' athletes, and whether this is desirable;*
b. *the costs associated with this program of rehabilitation, and who will carry these costs;*
c. *criteria and guidance with respect to how this article may be applied, (especially with respect to the range of sanctions, i.e. how the otherwise applicable period of ineligibility may be reduced under this article).*

---

13. Standard 4-year ban for aggravating circumstances (art. 10.6)

13.1. We note that one of the consequences of the proposed amendments is that for the same offences (presence, etc.) another standard period of ineligibility is introduced, next to the existing standard two-year ban that exists under article 10.2. Introducing two separate standard sanctions for the same first anti-doping rule violation[1] requires clear language and sufficient explanation in order to ensure:

- the correct and harmonized application of this rule by disciplinary panels; and
- that the objective is realised: harsher sanctions only for the real doping cheats (e.g. the most serious intentional dopers).

13.2. It is questionable whether the objective of only applying article 10.6.1 to the real cheaters will be reached under the proposed wording of articles 10.6.1 and 10.6.2. One of the reasons for this is that there is no longer a possible increase to 4 years, but an automatic increase in case of the occurrence of one of the options listed in article 10.6.1.

13.3. We have discussed several examples of cases where the outcome of the proposed amendments to article 10.6 would not lead to proportionate sanctions. For example:

- an athlete tests positive for multiple substances, one of which is a specified substance. In such cases article 10.4 is not applied, because results management will focus only on the substance that carries the more severe sanction. In any case, the athlete will have to establish for the application of articles 10.4 and 10.5.2 how both substances entered his body. If he cannot establish this for both substances, article 10.6.2 is not applicable, unless the athlete is able to establish that he did not commit the ADRV intentionally or recklessly. However, this may prove difficult for an athlete to establish, especially when one of the substances involves a steroid, or when the athlete used multiple food supplements without applying any caution.
- an athlete tests positive for multiple non-specified substances. When an athlete in such a case cannot establish how all these substance entered his body, article 10.5.2 cannot apply. In that case article 10.6.2 is not applicable, unless the

[1] For example, for the sole purposes of establishing an ADRV under article 2.1 (Presence) it is irrelevant whether an athlete tests positive for one or five prohibited substances. The violation still counts is a single ADRV.

athlete is able to establish that he did not commit the ADRV intentionally or recklessly. Again, this may be difficult for an athlete to prove. If he cannot meet his burden of proof, the automatically applicable sanction is four years ineligibility.
- An athlete tests positive for a steroid, but cannot establish how it enter his body. Since steroids are normally used on multiple occasion in order to attain effect, a steroid finding may in such a case be treated "by the nature" as being used on only a single occasion. This brings all such steroid findings at least in principle under the range of a four-year ban under article 10.6.

13.4. These examples point out that the current wording of article 10.6 appears to lack the flexibility necessary to fully realise its objective of only applying to real cheaters.

13.5. Also, some of the examples listed in article 10.6.1 raise questions:
- The fifth bullet mentions "blood transfusion". Unlike the other listed examples (anabolic steroid, EPO, hGH and gene doping) a blood transfusion can very well be applied only once in order to get an unfair edge over the other competitors. Hence, this example may have to be deleted;
- The third bullet is in need of clarification. The use of one single prohibited substance may lead to the presence of several metabolites in one's urine, which may separately be prohibited according to the Prohibited List. The laboratory may therefore list these metabolites separately[2], and results management may be started for the separate metabolites. Under the application of the proposed article 10.6.1, this could lead to an athlete being sanctioned with a four-year ban.

Recommendation:
Taking into account the concerns regarding proportionality and flexibility, We recommend to either:
a. *introduce the necessary flexibility (sanction range of 2-4 years) to enable proportionate sanctioning; or*
b. *amend the wording of article 10.6.1 and especially article 10.6.2 so that it only applies to the real cheaters.*

---

14. Return for Training (art. 10.10.2)

We welcome this amendment to the Code.

Recommendation:
We welcome this proposal and compliment WADA for clarifying and regulating an athlete's return for Training.

---

15. Limiting participation in future Olympic Games (art. 10.15)

[2] When reporting an adverse analytical finding, laboratories may report the main metabolite and at other times report several metabolites. The members of a disciplinary panel may not always be aware of such subtle differences. Examples are methamphetamine (which will lead to both methamphetamine and amphetamine in urine) and 19-norandrostenedione (which will lead to 19-norandrosterone, 19-norethiocholanolone and 19-norepiandrosterone in urine).

15.1. We note that this additional sanction *in addition* to the proposed amendment to article 10.6 could effectively prevent an athlete from participating in three consecutive Olympic Games.

15.2. We note that, similar to article 10.6, article 10.15 contains an automatic increase of the otherwise applicable sanction.

15.3. We conclude that due to its automatic and mandatory nature, article 10.15 lacks the necessary flexibility to allow this provision to be applied in a proportionate manner.

15.4. In addition, we note that the effect of this rule is that athletes in Olympic sports will be treated differently from athletes in non-Olympic sports. We agree that this is not in line with the purpose of the Code to achieve harmonisation, especially of sanctions, across all sports.

Recommendation:
(1) We recommend that article 10.15 is amended to ensure:
- *a. that this provision is not automatically applied, but rather applied by disciplinary panels on a case-by-case basis;*
- *b. the necessary flexibility to evaluate individual cases;*
- *c. proportionate sanctions;*

(2) We recommend that the current proposal, under which only athletes in Olympic sports face an additional ban and they are thereby treated unequally from athletes in non-Olympic sports, is amended to ensure the equal treatment of all athletes across all sports. Equal treatment could be achieved, e.g. by introducing a ban for the next edition of the top event for each sport or discipline.

---

16. Minimum consequences for teams (art. 11.2)

16.1. We note that the scope of this article is limited to participating members in team sports. We note that the term "Team" is intended as a defined term under draft version 1.0, but that no definition of 'Team' can be found in Appendix 1.

16.2. We note the deep impact this rule will have. If the definition of "team" includes national teams in, for example, football, then a one-year period of ineligibility in fact has a much longer and broader effect.

- Example 1: Two players of one national football team receive a one-year ban for violations which have occurred during the UEFA European Championship in 2012. This national team will consequently be suspended for one year.[3] As a result, this national team is not allowed to participate in the qualification matches for the FIFA World Championship in 2014, which start in September 2012. This results in the national team effectively being barred from participating in the World Championship in 2014. The effective sanction in this case then is:
  - (i) disqualification from the 2012 UEFA European Championship;
  - (ii) a period of ineligibility for all matches of the national team for a period of one year;

[3] In addition to being excluded from the 2018 edition of the UEFA European Championship.

(iii) the national football team being ineligible for the next editions of both the FIFA World Championship (2014) and the UEFA European Championship (2016);
(iv) the national football team being barred from playing any official qualifying matches for European and World Championship for an effective period of five years (2012-2016).

Such a ban for a national team may have an impact on society or the economy on a national level. It also may affect the (transfer) value and income of a large amount of football players who are being banned from international matches for a significant part of their career. These consequences are triggered by a violation by two players (that could even have been caused by inadvertent use of food supplements);

- Example 2: Two players of one European football club receive a one-year ban for violations which have occurred during the national competition. If the national competition is considered an event (which is possible under the definition in the Code) the club is disqualified for the running football season[4] and excluded from participation in the upcoming season. Hence, the effective ban covers two national football seasons. This also results in this club not being able to gain results which would qualify the club for participation in the UEFA Euro League or Champions League the following two years. This will have a severe financial impact on both the club and its players.
- If a European club is barred from playing in the next edition of the UEFA Champions League (which could be considered an event under the current definition in the Code) for one year, this would cost a club several millions of Euros and could significantly impair a club's financial health and stability.

16.3. We note that under article 11.3, the ruling body for an event may elect to impose even stricter consequences for team sports than those mentioned in article 11.2 (which are already listed as minimum sanctions) for purposes of the event.

Recommendation:
(1) We recommend that article 11.2 is reconsidered, because its effect is not proportionate. Factors that should be introduced are flexibility, and the existence of a performance enhancing effect on the team performance.

(2) We recommend that, if the revised Code will contain a provision on team sanctions, this provision should introduce relevant criteria, e.g. clear performance enhancement benefits for the team, or a link between the 'doped' athletes and actions by the team's athlete support personnel, or by the club itself.

(3) We recommend that the term 'Team' is defined and included in Appendix 1.

---

17. Special provisions for minors (definition of minor, article 14.3.6 and article 10.4.1.1)

17.1. To clarify: We do not wish to introduce or support a differentiation in the Code between athletes who are minors and athletes who are not.

---

[4] Which will lead to serious huge practical and logistical problems for the National Federation which is organising the competition.

17.2. However, we note that the provisions in the Code that were introduced to protect children under the draft Code only apply for children aged 13 and under. We consider this is highly undesirable and not compatible with the increased emphasis on proportionality.

17.3. Under the 2009 Code (comment to article 10.5.2), youth is a relevant factor to be assessed in determining the athlete's fault under article 10.5.2, as well as articles 10.3.3, 10.4 and 10.5.1. This comment has been deleted in draft version 1.0, and has been replaced by the reference to minors in the definition of fault. However, this reference is only applicable to athletes under 14 and therefore has a limited scope.

Recommendation:
(1) We recommend that WADA clarifies:

a. *why an ADRV (for example: administering prohibited substances) involving a 14-year old shall not be considered a particularly serious violation (article 10.3.2);*
b. *why the requirement in article 10.4.1, 10.5.1 and 10.5.2 that the athlete has to establish how the prohibited substance entered his body is still applicable to a 14-year old athlete (article 10.4.1.1, 10.5.1, 10.5.2);*
c. *why the mandatory public reporting required in 14.3.2 shall still be required where the athlete who has been found to have committed an ADRV is a 14-year old (article 14.3.6);*
d. *why, under article 14.3.6, the public reporting in a case involving 14-year old athlete does not have to be proportionate to the facts and circumstances of the case;*
e. *why a 14-year old athlete may not be accompanied by a representative to observe the sample collection session. (article C.4.5 IST).*

(2) We recommend:
To retain the definition of 'minor' that is used included in the 2009 Code (Minor: A natural Person who has not reached the age of majority as established by the applicable laws of his or her country of residence).

---

18. Public disclosure (article 14.3)

We note that article 14.3.6 states that public reporting "in a case involving a Minor or where article 10.4.3[5] is applicable" shall be proportionate to the facts and circumstances of the case. We welcome this reference to proportionality, but agree that it should apply to all cases.

Recommendation:
We recommend that the Code mentions that public disclosure in all cases be must proportionate, and especially when it relates to minors.

[5] Article 10.4.3: Substances of abuse.