

Subject: Netherlands' reaction to the Initial stage of the Code Review Process (a shared submission from four stakeholders)

Capelle aan den IJssel, 3 March 2012

Dear Mr. Howman,

Thank you very much for the invitation to provide suggestions and amendments in this initial stage of the Code Review Process. We are pleased to inform you that this letter provides the joint comments of the four Dutch stakeholders, being:

- 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.

On behalf of these organisations I would like to ask you to treat this letter as a fourfold contribution to the Code Review process.

### **Introduction**

In this first consultation phase of the Code Review Process we have decided to focus on general issues rather than addressing specific sections of the Code. The scope of this joint reaction is to point out in general in which areas improvements can be made, in order to make the Code an even more powerful and effective tool than it already is. In some cases, we take the liberty to mention issues that are outside the (current) scope of the Code, but which should be addressed nevertheless during the Review Process.

### **In general**

The Code is instrumental to a successful fight against doping. During the Code Review Process it is crucial to evaluate and determine (i) what we exactly want with the Code in the future and (ii) what is -in our opinion- necessary to gain and keep a broad support for the Code and the anti-doping efforts.

### **Preamble**

It would be good to introduce a new preamble to the Code, that better clarifies what the general rationale is behind the Code and which explains the focus of the Code. The

present preamble is too general and goes far beyond the anti-doping scope. Indeed, all undesirable behaviour within sports fits into the present preamble, which is too general. After working with the Code for 8 years, we should strive to answer questions like "where are we standing?", and "what do we wish to achieve in the upcoming years?"

### **Flexibility and Proportionality**

Since the adoption of the first version of the Code in 2003, the Code has proven to be an indispensable worldwide instrument that strives to achieve a doping-free sporting community. Standardizing procedures and sanctions has been a key factor to the Code's success. Sometimes however, this standardization has led to a certain rigidity and strictness of the rules. This may lead to decisions in doping cases that do not reflect the specific circumstances of the case or the position of the athlete.

Without doubt, this was necessary in the early years of the Code. However, this should be reconsidered now the Code is an accepted, implemented and functioning tool in the fight against doping in sports.

For the Revised code we would like to see changes that can be defined with the keywords "Flexibility and Proportionality". We think a change in this direction is necessary, because the application of the present Code does not always allow ADOs and disciplinary committees to treat individual cases in such a way that the outcome sufficiently reflects the particulars of the case and of the athlete involved. In other words, the present Code does not always lead to an outcome that can be considered to be fair and balanced. For example, improvement could be achieved by extending the concept of "other acceptable justification" of article 2.6.1. of the current version to other parts of the Code, for instance article 2.4. Another fruitful approach could be the introduction of 'mitigating circumstances' in addition to the aggravating circumstances that are already included (article 10.6).

### **The Code and the general public**

WADA Stakeholders do not only have to deal with the sporting community, but they also have to deal with the world outside the sporting community, like the general public and the media (which informs the general public). The support for our work and the funding of our organizations is largely dependant on the public's understanding of what we do and why we do it. It becomes more difficult to gain the public's support when the proportionality of sanctions and the consequences of certain rules become more difficult to explain to the "outside world".

### **A truly universal Code**

In this light we would also like to see the Code become less detailed and more flexible, thereby avoiding issues with differences between sports and legal structures that exist between countries and sports.

For example, there are countries which have centralized all relevant aspects of anti-doping work on the national level, where other countries (as the Netherlands) have different systems because of the autonomy of national sports federations. The Code is more based on the former principle, than on the latter.

More generally speaking, countries differ considerably where it comes to the involvement of varied organizations in the fight against doping in sport, and in the way they distribute tasks and responsibilities to those organizations.

Another example concerns the differences between the legal systems. The current version of the Code is very much based on the Anglo-Saxon legal system, e.g. the plea bargain possibility under article 10.5.3 of the current Code. This is not helpful to the global implementation and application of the Code. The revised Code should reflect more those important differences between countries and sports.

### **Explanatory Memorandum**

The Code as it is currently published in a form of a document is very specific. It is primarily a legal document, rather than a practical guide. The Code's transparency and comprehensibility could be improved by making it shorter and more accessible. It should only regulate the core principles and obligations. A possible solution is moving all comments to an Explanatory Memorandum (in an appendix), which would be a part of the revised Code. Such an appendix could explain the application of the Code in specific situations and allows the inclusion of more (detailed) examples and comments.

Many examples can be given about issues that could be explained in such a Memorandum, for instance the exact status of an athlete during a period of ineligibility (which is dealt with in quite different ways by ADOs), or the way ADOs could better gear the composition of National and International Testing Pools to one another.

Such an appendix would also make it possible to refer to important Court decisions, like those from CAS or from civil courts in various countries. This can also contribute to more general support for the Code, both by the media and the general public.

### **Prohibited List**

With regard to the Prohibited List we would like to see an increased emphasis on performance enhancement, and less on the "Spirit Of Sport". Such a shift in focus would lead to a more practical list, probably without most social drugs and with less risks for athletes to test positive because of the use of contaminated food supplements. Given the large amount of positive cases in these groups, and the usual lack of any proof that performance enhancement was intended, it is difficult to justify the rather heavy sanctions for athletes.

We also recommend that the list explains which (categories of) substances are included on the list on the basis of which arguments. Currently, one can only guess for which reasons the different (categories of) substances have been added to the list. This leads to serious doubts and ongoing discussions about the relevance of a number of these categories in the fight against doping in sports. The Prohibited List is one of the most important corner stones of the World Anti-Doping Program and the criteria that are used for assembling the list should be accessible to the public. This could also be helpful in obtaining more public support. This approach is – of course – primarily a 'List issue' but the principle is so important that it should have its basis in the revised Code.

### **National legislation**

As stated earlier, some of the provisions in the Code are difficult to bring in line with national legislation. In the Netherlands we deal with complications concerning one important provision: Privacy/data protection (with consequences for e.g. the transfer of data and for public disclosure. In the Netherlands, these complications affect the efficacy of our efforts considerably, and it is likely that these issues will develop into serious complications in most if not all European countries in the near future as well. More emphasis on proportionality can alleviate these problems. As an example we suggest to incorporate the requirement of a risk-analysis in building Registered Testing Pools and in developing a testing program; using such a risk-analysis can strongly constitute more proportionality by taking into account more the circumstances in specific countries and/or in specific sports.

### **Minors**

The current Code contains only a few references to minors. However, the position of minors in anti-doping is a particular one and should be specifically discussed in the Code

review process. The legal status of minors has shown to be problematic in several areas (e.g. testing, sanctions, public disclosure).

### **Non-analytical Findings**

In a practical way, it is currently difficult to deal with possible anti-doping rule violations involving non-analytical findings, as – for instance – evading sample collection and tampering. It is at the moment rather unclear how to deal with such non-analytical findings because proving these ADRVs to the satisfaction of disciplinary panels is – at least in a significant number of cases – nearly impossible. This is probably the main reason that analytical findings are still by far the most important proof on which doping cases are based. Considering the relevancy of discovering and prosecuting non-analytical cases, it would be helpful to pay more attention to non-analytical findings in the revised Code. In addition, in order to find practical ways to deal with this kind of cases, a "Best Practice" document should be introduced.

### **Sanctions**

All anti-doping sanctions should be included in the Code. At present, some ADOs and Major Event Organizers impose sanctions that are not included in the Code (the "Osaka-rule" was the primary example of this). Imposing such a sanction is therefore a breach of the Code. However, such sanctions may be very valuable tools in the future as well, and we recommend to add the possibility of imposing additional sanctions such as bans on participation in future events to the revised Code, while the question whether or not such sanctions should be imposed in certain cases, should explicitly be left to the disciplinary committees.

### **Education & Science**

Important articles related to education and science are included in the Code. However, these sections contain little information on how the obligations in the Code must be fulfilled. In this regard it would be beneficial to develop guidelines (comparable with the "Medical Information to Support the Decisions of Therapeutic Use Exemption Committees (TUECs)").

### **Legal costs**

For athletes, an appeal should be easily accessible, without excessive costs. At least financial restrictions should not be a reason not to appeal, and this basic principle should be included in the revised Code.

We trust that you will take our remarks into account in this first phase of the Code-review process and we are looking forward receiving the first draft in due course.

Also on behalf of the Ministry of Health, Welfare, and Sports, the Netherlands Olympic Committee\*  
Netherlands Sports Confederation (NOC\*NSF), and the NOC\*NSF Athletes' Commission,

Anti-Doping Authority Netherlands

Herman Ram  
CEO