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CCES Submission to 2021 Code Review
Second Consultation Phase

In response to WADA's request for comments as part of Phase 2 of the 2021 World Anti-Doping Code consultation process, the CCES submitted the following comments.

Fundamental Rationale for the World Anti-Doping Code

As a general comment for the final version of the Code, CCES recommends providing hyperlinks to references within the Code and to other International Standards within the Code.

As a general comment to this Standard, CCES recommends using "their" in place of "his/her" to comply with gender inclusivity norms.

Introduction

We note that the Introduction to the redline version of the Code emphasises that ADOs remain responsible for all aspects of Doping Control, and therefore for the conduct of Sample Collection Authorities. We understand that WADA envisages that ADOs should seek to ensure Code compliance by such Authorities via contract. We are against this approach and we consider that the most appropriate and effective way of seeking to ensure Code compliance by Sample Collection Authorities is by making them directly subject to the Code, and so WADA's oversight.

Article 2.10.3

In the new paragraph it should refer to both the Athlete Support Personnel's disqualifying status and Ineligibility to capture both situations described in subsections 1 and 2 immediately preceding. Disqualifying status as a term is just found with reference to clause 2.10.2. CCES believes both the disqualifying status and Ineligibility (if the person is subject to the Code) must be included.

Article 3.2.1

The proposed wording seems odd. If WADA has approved the presumption it certainly exists and has been established. It is appropriate to have an athlete challenge the validity of an assumption that WADA has already approved.

Article 5.6

CCES suggests adding the words "more limited" between "collect" and "whereabouts" in the last sentence. It clarifies that some information can be collected but not the full scope required for an RTP athlete.

Article 8.1
Include the word "Independent" into Article 8.1 so that a hearing body is required to be both independent and impartial.

Article 10.2
In Article 10.2.3, with respect to how to prove a lack of intent, the issue, of course, is whether proof of source is required in every case to enable an accurate evaluation of the athlete's mental state. We believe it should be made express in 10.2.3 that in a Presence violation it should be required when evaluating intent for an Athlete to prove how the substance entered his/her body. Without an accurate understanding of what has occurred it is most difficult (if not impossible) to evaluate the Athlete's subjective knowledge regarding the athlete's intent. This assessment of the Athlete's subjective knowledge is needed to evaluate intent – just as it is absolutely needed to evaluate an Athlete's fault. Without knowing what has happened and how the substance entered the body it is effectively impossible to accurately evaluate the Athlete's intention (or the athlete's fault).

CCES is mindful of the CAS jurisprudence whereby a "theoretical possibility exists" that an athlete can prove a lack of intent while not proving the source of the substance. The Comment in the first draft seems to address this scenario as being "unlikely in the extreme". CCES prefers to make proof of source a clear requirement – applicable to all.

Article 10.6.3
CCES suspects there will be fewer admissions with this system as an admission will demand both accepting the Anti-Doping Rule Violation and the proposed sanction so there will be no hearing (like a prompt admission in the current Code). CCES prefers the existing method whereby the Anti-Doping Rule Violation can be admitted (but not the sanction) and the hearing is merely to determine a sanction. It makes hearings shorter and cleaner.

Article 10.13.1
In Article 10.13.1, add a reference to voluntary Provisional Suspension. As drafted, it is excluded by omission.

Article 14.3
In Article 14.3.6 add "or Recreational Athlete" in the final sentence: "Any optional Public Reporting in a case involving a Minor or Recreational Athlete shall be proportionate to the facts and circumstances of the case"

Definition – Minor
CCES prefers using one age (age 18) for all purposes.

Definition – Recreational Athlete
CCES prefers a three (3) year waiting period and a top 20 ranking.

The definition of a "Recreational Athlete" is not clear enough. "Ranked in the top 50" is not precise enough for many sports. Smaller sports in smaller countries may have less than 50 top level athletes. Further, the definition is aimed at Olympic sports but does not provide a workable definition for many team based sports where there are well in excess of 50 National level athletes.

Uncertainty is also created in relation to athletes that "have not represented any country in an International Event". Guidelines for every sport may assist.

Suggestion to raise reporting thresholds for substances which are known contaminants, or obviously used Out-of-Competition and could not possibly have an In-Competition effect
CCES strongly supports raising the reporting thresholds in these situations.

Other suggestions

Additional comments from the CCES are presented below, in no particular order.

Article 2.1 'gap':
CCES' concern is based on the wording in the Presence violation. There is a clear disconnect between the Athlete's duty to not have a drug in the body and yet the violation is automatic when the drug is in the sample. These are not synonymous scenarios. Included below are parts of a letter sent to Richard Young that tries to explain the CCES' concern in this regard.

"You will recall that the issue pertains to the wording of the Presence violation (Code Article 2.1) which requires the presence of the banned substance in the athlete's sample to establish an ADRV but the athlete's personal duty is to ensure that the banned substance never enters the body (Code 2.1.1).
… In the result, the CAS panel found as a fact that the cocaine was **never in the athlete's body** at a time when it was prohibited (in-competition). The cocaine entered the sample collection container at an in-competition test via the previously used catheter. These finding of these facts by the CAS panel led them to conclude the athlete was at "no fault" (so the sanction could be avoided – after the vast majority of time was served) but **an ADRV was nonetheless registered against the athlete**. This was done because the cocaine was in the sample and the CAS Panel wanted to respect the strict liability principle – despite the "unfairness." This outcome has been disputed for years and is now being litigated in Canadian Courts.
A similar outcome might occur again with any disabled athlete using a catheter (as personal sample collection equipment can still be used). It could occur if a collected sample was spiked or manipulated in some way by a third party after the sample was provided by an athlete. It has occurred in the past with

various “active-urine” cases when Nandrolone developed in the sample container after the urine was passed. These are rare occurrences to be sure – but certainly possible to imagine.
At the heart of this matter is the principle of strict liability and the potential ‘gap’ between what can be detected in the sample and what was, in fact, in the athlete’s body. The wording in Code 2.1 creates this discrepancy. I think I can describe the issue this way:

1. For the strict liability principle to be legally justified I believe the banned substance must be both in the collected sample and in the athlete’s body at the time it was prohibited. In such a case, even with “no fault” for the violation (so there is no sanction imposed against the athlete), the registration of an ADRV against the athlete is proper. This will occur in 99.9% of all cases.
2. In contrast, where (i) there is “no fault” and (ii) the athlete can prove that despite the urine sample containing the banned substance the banned substance was never in the body when it was prohibited, an ADRV should not be registered. Doing so registers a violation against an athlete **when the athlete’s personal duty was never breached**. In effect, it becomes an absolute liability offence to provide a sample in which a banned substance is detected. This is problematic in Canadian law and greatly expands the ‘strict liability’ concept in the Code.
3. This issue (when, if an athlete is found to be at “no fault,” should an ADRV be registered) is not treated the same way by arbitral panels in various fact situations. I believe the worldwide anti-doping effort needs consistent outcomes when similar facts present themselves. This demands, in my opinion, a small revision to Article 2.1.
4. We do not envision that an IF or a NADO must demonstrate that the banned substance was in **both** the sample and in the body to be successful proving a Presence violation. Presence in the sample is enough (and all that is needed) to prove a Code 2.1. violation. However, if an athlete can demonstrate that despite the presence in the sample **it was never in the body when it was prohibited** and that the athlete was at “no fault” then I believe there should be no ADRV registered. This outcome does not offend the strict liability principle.

Our comment to WADA was as follows (to add a new exception):

- 2.1.3.1 As an exception to the general rule in 2.1.3, there shall be no anti-doping rule violation if the *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in the *Athlete’s Sample* was not present in the *Athlete’s* body.

Perhaps it can be better expressed as follows:

- 2.1.3.1 As an exception to the general rule in 2.1.3, there shall be no anti-doping rule violation if the Athlete can demonstrate the *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in the *Athlete’s Sample* was not present in the *Athlete’s* body when it was prohibited.

Article 4.4.3.1

In Article 4.4.3.1, CCES suggests a clarification regarding the validity of TUEs for international testing. When TUEs are being reviewed by WADA, athletes are uncertain whether their nationally granted TUE is (i) valid in Canada and (ii) valid on the international level. Adding a clarifying statement about international testing would reduce this confusion. Suggested rewording is as follows: "If the matter is referred to WADA for review, the TUE granted by the National Anti-Doping Organization remains valid for national-level in-competition and out-of-competition testing as well as for tests conducted out-of-competition by an International Federation."

Article 4.4.4.1:

In Article 4.4.4.1 CCES recommends modifying the sentence "The MEO must ensure a process is available for an athlete to apply for a TUE…" Most athletes competing at MEOs have difficulty finding the Games anti-doping rules and more specifically the process to follow in order to ensure that their already-existing TUE is valid for the Games. Suggested rewording is as follows: "The MEO must ensure a process is available and readily accessible for an athlete and supporting staff to apply for a TUE…"

Interpretation of "Participate" and "Compete":

More care is required in the Code between the use of the word "participate" and the word "compete" to clarify how each is being used, how each should be interpreted (in each context) and whether additional meaning can or should be 'read in' to each word. For example, as used in the title of Article 10.12.1 and throughout the CCES is convinced that the term "participate" must be interpreted broadly to achieve the desired aims – a very broad prohibition from sport involvement. In contrast, in the defined term "in-competition" the word "participate" has now been interpreted by a doping Tribunal rather narrowly to include the implied notion that such participation must include, in addition to merely taking part, some element of meaningful competing. It is not enough to participate in a race if the intent when doing so was to merely conduct training. Furthering the confusion, in the comments in Article 10.12.1 an athlete may not "participate" in a training camp, exhibition, etc. but is directed to not "compete" in a non-Signatory professional league. Why the difference? Is it intended that they mean the same thing? If so, selecting one term and using it consistently would be recommended.

The CCES suggests the following revisions:

- The definition of *Competition* should state at the end of the first sentence "… regardless of the motivation for participating."

- Any new definition of *Participation* or *Participate* should be suitably broad and should include the notions of "involvement"; "to take part in"; "to engage with" – all without reference to the subjective motivations for so doing.

Proportionality recognition:

Although it is well recognized that the Code as a whole is drafted in a fashion that reflects proportionality principles, it is also well known that in some rare outlier cases the sanction that is imposed after strictly applying the Code provisions can be less than satisfactory. This inevitable "collateral damage" undercuts the global fight against doping in sport. These outlier results can occur when (i) there is innocent inadvertence and a very low degree of fault associated with a non-specified substance or (ii) an athlete is unable to prove a route of ingestion. Without in any way wanting to risk the highly desirable goal of sanction harmonization, the CCES supports the inclusion of the following text immediately after the first sentence in Article 8.1: "The sanction imposed must be proportionate to the violation committed and must not exceed that which is reasonably required to achieve a justifiable aim." CCES believes this accurately reflects the proportionality principle underpinning the Code and merely describes what Tribunals must now evaluate in every case. By including it in the actual text of the Code it may serve as a useful reminder of this overarching obligation.

Jurisdiction:

CCES suggests that a provision be added to the Code to state expressly that no Athlete may participate in International sport competition until that Athlete has been verifiably under the jurisdiction of a robust Code-compliant anti-doping program for a period of twelve (12) months immediately preceding the International sport competition. The goal is to ensure that an Athlete could not be outside the jurisdiction of the NADO or ADO (so as to allow doping) and then quickly join elite level competition. As with the retirement provision in 5.7.1, an exception could be incorporated.