Proportionality and the application of the World Anti-Doping Code

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1. INTRODUCTION

Even since before the first version of the World Anti-Doping Code (the Code) came into force in January 2004, there has been an intense debate about the principle of proportionality in the Code. Much of the debate focussed on the possibility of 'individual case management', in a Code which was designed to establish world wide harmonisation and standardisation. The question (or perhaps "fear" is a more accurate term) was whether this wish for harmonisation would take over the need for rules which would allow an athlete to receive a sanction which was in accordance with (i) the offence and (ii) the individual or exceptional circumstances under which the offence was committed. The debate continued during the first Code revision process, which led to the adoption of the revised Code in 2007.[2] Now that the second Code revision process has commenced, it may be expected that proportionality will again be a hot topic, revived in the months to come.[3]

The Code is the foundation of all the anti-doping rules and procedures world wide. A recurring aspect of the Code discussion is the tension between the necessity to harmonize anti-doping rules on the one hand, and the wish to treat individual doping cases individually on the other hand. The Code should allow sufficient flexibility for taking the individual aspects of each case into consideration, while at the same time ensuring global harmonization through the Code. The tension between these two goals is quite significant, especially because the Code aims at equal treatment *across sports*. This has inspired and will continue to inspire a lively debate about - for instance - whether or not imposing a two year sanction is *equal treatment* for athletes from different sports.[4]

The tension between individual assessment and global harmonization may be reduced over the years if more flexibility will be allowed for taking the individual aspects of each case into consideration, but global harmonization through the Code is the cornerstone of the World Anti-Doping Program, and the Code is a central and indispensable tool within that program.[5]

But still, the present Code offers relevant possibilities for individual assessment of doping cases. This is not always recognized by the general public and, more importantly, it is not always understood by legal counsel, which acts on behalf of the athlete in doping cases. In other words, there is limited but relevant room for flexibility and proportionality within the Code, but this room is not always used as it could and should be.

In this article, we will try to shed some light on the positions of athletes (paragraph 2) and Anti-Doping Organizations (paragraph 3), in relation to the proportionality issue we have introduced above. In the fourth paragraph, we will describe the approach of the Dutch Doping Authority, and the fifth and last paragraph provides some conclusions and input for further discussion.

2. THE ATHLETES' POSITION

The possibilities that the Code offers for individual assessment of doping cases should be fully used by panels *and* legal counsel, in order to reach decisions that are both Code-compliant *and* proportionate. The extent to which this is actually realized is largely dependent on the defence of the athletes who are involved in doping cases. Athletes are dependent on others to defend their case, *others* meaning people with a relevant legal and/or scientific background. Athletes themselves are very seldom able to defend their own case in a knowledgeable way, because athletes with both a Law degree and a PhD in Chemistry are rare indeed. So the question is: who helps the athlete?

2.1 LEGAL COUNSEL

When we try to answer that question, it is important to note that the majority of athletes that get involved in disciplinary proceedings because of an (alleged) Anti-Doping Rule Violation (ADRV) are *not* top level, professional athletes. On the contrary, most (alleged) doping offenders are amateurs who more often than not are unknown to the general public.

WADA's Laboratory Statistics 2010 mention 2790 Adverse Analytical Findings. The global number of Non-Analytical Findings (refusals, tampering, etc.) is unknown, but it is safe to say that each year more than 3.000 doping cases are brought before disciplinary panels around the world (or at least they *should* be brought before panels). It is unknown in how many of these cases legal counsel has been involved, but it is our estimate that not more than 20% of *Dutch* athletes have enough financial resources to hire legal counsel: out of 61 Dutch cases in 2009-2011, legal counsel was involved in only 11 cases.

The situation in other countries may be very different (both better and worse), but there can be no doubt that most athletes cannot afford to hire legal counsel, considering the costs of legal counsel and the average income of athletes.[6]

And even if an athlete can afford to hire legal counsel (because he is a well paid athlete, or he has a generous sponsor, rich parents, or an adequate legal aid insurance) it may be quite hard to find a lawyer who has adequate knowledge about the World Anti-Doping Code and the national anti-doping regulations, because the number of doping cases in a certain country is usually (far) too low to enable law firms to specialize in the field.

In short, adequate legal counsel is available in only a limited number of doping cases, and in the majority of cases, no counsel is available to help the athlete. And the outcome of procedures where legal counsel is absent, or fails to offer adequate legal support can be disastrous.[7]

2.2 CONFIDENTS AND ACTIVISTS

As a result of the inaccessibility (due to the high costs) or unavailability (due to the lack of relevant expertise/experience) of adequate legal counsel, many athletes put their trust in confidents who may be their parent, teammate or spouse, or someone who profiles himself as an anti-doping expert.

1 CEO Anti-Doping Authority Netherlands, the National Anti-Doping Organisation (NADO) for the Netherlands, and so recognised by the Government of the Netherlands in accordance with the World Anti-Doping Code.

2 See for some comments on the results of the first Revision: Steven Teitler and Herman Ram: 'Analyzing the new World Anti-Doping Code: a different perspective', ISLJ 2008,(1-2), p. 42-49

3 The present revision process started in November 2011 and will culminate in the adaption of the revised Code in November 2013

4 Two recurrent issues being the contract between professional and amateur athletes, and the contrast between athletes in sports with a short (for instance: gymnastics) and a long (for instance: shooting) athletes' career

5 To be sure: the principle that 'the punishment of an offender should fit the crime' is not the only proportionality issue at stake. This article focuses almost exclusively on the proportionality of a sanction in relation to the nature and severity of the offence, but other principles, 'that the measure must be suitable, be necessary and be reasonable to achieve the aim', are just as relevant. This last principle is for instance used as criterion for composing a Registered Testing Pool and imposing the whereabouts obligation onto athletes.

6 In CAS-procedures, athletes can apply to ICAS (the governing body of CAS) for free legal counsel. CAS Rule S6 reads: The ICAS exercises the following functions: […] 9. If it deems such action appropriate, it creates a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means. The operation of the legal aid fund including criteria to access the funds is set out in the CAS legal aid guidelines.

If an athlete solely relies on a trusted member of his team or family that may be of great psychological help to him, but it usually does not add much to the quality of his defense. We have witnessed several hearings in which the confident went to great lengths to convince the panel that the athlete involved is an honest, reliable and likeable human being, but this unfortunately does not bear much weight in assessing doping cases.

Some athletes do not rely on their social surroundings, but try to find support elsewhere. We are not at all sure about other countries, but at least in the Netherlands we have a number of activists who oppose the current anti-doping policies, and who try to get involved in doping cases in order to promote their views on the subject. They seek publicity, and more or less offer themselves as counsel. The result of the involvement of such activists in doping cases is ineffective at best and disastrous at worst. Several athletes have been severely disadvantaged by this kind of counsel. For instance, some athletes missed their right to appeal because they were misinformed about their position, the procedures, the deadlines, etc. On top of that, athletes may end up with costs and fines that they're not warned about.

In short, for an athlete to rely on confidents or activists for help is inadequate, and sometimes even dangerous.

2.3 DISCIPLINARY PANELS

Dutch disciplinary panels tend to compensate for the lack of adequate counsel in their proceedings and decisions. Panels may - for instance - refer to mitigating circumstances which have *not* been put forward by the athlete himself, or panels may apply Code provisions that have not been mentioned by the athlete. We have heard the same about disciplinary panels in some other (European) countries, although we're not sure about the exact situation in those countries, let alone the situation worldwide. The tendency to compensate for the lack of counsel is clearly recognizable in some CAS decisions as well, as for example is the case in the CAS decisions that we refer to in footnotes 10 and 13.

The effort that panels invest in helping the athlete may be very laudable, but it unfortunately does not always lead to decisions in conformity with the Code. On the contrary, in the period 2003/2008, in 66 out of 192 Dutch doping cases (34%), the disciplinary decisions were *not* compliant with the Doping Regulations, according to the Dutch *Audit Committee Doping*[8], and the non compliant sanctions were *always too lenient, never too harsh*. In 2007 and 2008 *half* of the decisions violated the rules.[9]

Panels are - apparently - willing to ignore the Code and the Doping Regulations in order to reach decisions that they consider to be proportionate, or they do so without even knowing it.

This situation may have brought joy to a number of athletes, but it is unacceptable that disciplinary panels - deliberately or even unknowingly - disregard the rules of the Code that both the Dutch government (by acceptance of the International Convention Against Doping In Sport of UNESCO) and the Dutch Olympic Committee NOC*NSF (by signing the Code) have embraced. This consistent and recurring disregard of the rules has forced the Dutch Doping Authority to appeal a number of exemplary and/or strategically relevant decisions, and to bring one specific case before CAS[10], in order to overcome the unwillingness of disciplinary panels to apply the rules correctly. In this particular case that we have brought before CAS, the Appeals Committee of the Dutch Institute for Sports Law[11] did not only reject *the application* of the Code / Doping Regulations, but it rejected that Code and those Regulations *per se*. The panel used phrases as *'WADA ideology'*, and *'draconic and implacable regulations'* to express their abhorrence of the Code.

We considered it to be a serious problem that this Appeals Committee (the most important one in the Netherlands) rejected the Code. But at the same time, we appreciated the fact that they had written it down so eloquently, and we confirmed that in an article that we wrote on the issue at that time: "The openness - not to say: defiance - with which the Appeals Committee distances itself from the Code, deserves praise and appreciation because herewith the road is open for an open debate and a principal assessment of the case."[12] After the CAS Award was issued, there have been no further decisions by the Institute for Sports Law that were as hostile to the Code as this one.[13]

But nevertheless and in short, diverging of the rules by disciplinary panels is a dead end street: helping individual athletes by 'bending the rules' will eventually turn out very bad for the athletes' community as a whole.[14]

3. THE NADO'S[15] POSITION

It is rather evident that the NADO's position is quite different from the athlete's position. Most NADOs have solid knowledge about doping proceedings, and access to more resources than the general athlete. When we see athletes and NADOs as opposing forces, this fact may lead to question about the 'equality of arms' which after all is a fundamental principle in legal proceedings. But it is doubtful whether NADOs should (only and always) be seen as opponents of the athletes. In order to shed light on the position of NADOs, we will first turn to the Code, and next we will make some remarks on the specific position of the Dutch NADO.

3.1 THE POSITION OF NADO'S IN THE CODE

The Code defines an Anti-Doping Organization (ADO) as: *'A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process'*.[16] This definition makes the Doping Control process the core business of an ADO.

A *National* Anti-Doping Organization is defined as: *'The entity[ies] designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of Samples, the management of test results, and the conduct of hearings, all at the national level'*.[17] As such, this definition enumerates four tasks, all directly linked to the Doping Control process, so it more or less specifies the main ingredients of the NADO's core business: the Doping Control process.

Both definitions fall severely short of describing the many other tasks that (N)ADOs have, like - for instance - offering education, issuing Therapeutic Use Exemptions (TUEs), managing a Registered Testing Pool, etc. Although not part of the definitions, these tasks are true (N)ADO-tasks, and many of these tasks are mentioned elsewhere in the Code or in the International Standards.

On top of all the tasks that stem from the Code, NADOs may do other things as well, including offering support to athletes who are involved in disciplinary procedures, and the Code does not limit the

7 In a recent (unpublished) case, we encountered the somewhat bizarre situation that the Doping Authority argued that the adverse analytical finding might have been the result of a contaminated nutritional supplement and that this could possibly be verified by analysis of the food supplement, while *counsel* did not choose to cooperate along these lines. Thus, a possible ground for reduction of the sanction was set aside *by counsel*, and the athlete was sanctioned with two years ineligibility.

8 Reports 8-15 (2003-2008) Audit Committee Doping *[Rapportages 8-15 (2003-2008)Auditcommissie doping]*. This committee has been installed by the General Assemblee of the Dutch Olympic Committee, and its task is to assess whether or not disciplinary decisions in Dutch doping cases are in conformity with the applicable Doping Regulations (and as a consequence, with the World Anti-Doping Code)

9 Steven Teitler & Herman Ram: 'Dutch disciplinary proceedings and the application of the World Anti-Doping Code *[Nederlandse tuchtrechtspraak en de toepassing van de World Anti-Doping Code]*', Tijdschrift voor Sport & Recht 2010 (2), p. 57-70

10 CAS 2009/1/2012 Anti-Doping Authority the Netherlands v. Nick Zuijkerbuijk.

11 In Dutch: *Instituut Sportrechtspraak*. Dutch sports federations can transfer their disciplinary proceedings to this institute on a voluntary basis, and about half of the federations had done so at the end of 2011.

12 Steven Teitler & Herman Ram: 'Dutch disciplinary proceedings and the application of the World Anti-Doping Code *[Nederlandse tuchtrechtspraak en de toepassing van de World Anti-Doping Code]*', Tijdschrift voor Sport & Recht 2010 (2), p. 61

13 There has, however, since then been a decision of the Appeals Committee of the Royal Dutch Skating Union that reasoned - although formulated less extreme - along the same lines. This decision was also corrected by CAS in its arbitral award of 22 August 2011: 2010/A/2310,2311 Anti-Doping Authority the Netherlands & Royal Dutch Skating Union v. Wesley Lommers

14 The situation in the Netherlands has changed considerably since 2009, and the percentage of decisions that are not in conformity with the Doping Regulations has dropped sharply.

15 National Anti-Doping Organisation.

16 Appendix 1 of the Code

17 Appendix 1 of the Code

activities of a NADO (at least as long as they do not interfere with Code-related tasks).

3.2 THE POSITION OF THE DUTCH NADO

The position of a NADO is not only defined by the Code. The 'scope' and 'room to maneuver' of a particular NADO may also be defined (and limited) by national regulations, by legislation, by the legal structure of the NADO's organization, and also by its resources and even by its traditions. For this reason it is not possible to give a general picture of what NADOs can do on top of their Code-obligations.

The Dutch Doping Authority is a foundation under private law, and is funded by both the Ministry of Health, Welfare & Sport *and* by the NOC (basically this is not NOC-funding but Lottery-money). There is no Doping Law in the Netherlands that defines the position and tasks of the Doping Authority, nor are there other formal limitations that the organization has to take into consideration when defining its own position. The Doping Regulations of Dutch sports federations are drafted by the Doping Authority and these regulations do not limit the scope of the organization either. In short: the Dutch NADO has numerous obligations under the Code, but is not restricted when considering tasks outside the Code. And one of the most prominent of those additional tasks is helping the athlete, which is the core subject of this article.

4. THE APPROACH OF THE DUTCH DOPING AUTHORITY

One of the tasks of the Dutch Doping Authority is the result management, including providing information for the disciplinary Panels that deal with doping cases. On top of that, we report to WADA about problems that we encounter in Dutch disciplinary decisions. Unfortunately, the picture that we have painted above in paragraph 2.3. about the quality of de decisions of disciplinary committees is rather grim, notwithstanding the fact that the quality of the decisions has - on average - risen since. And we are fully convinced that the lack of professional and knowledgeable support for the athlete contributes to this problem. It seems that most athletes who get entangled in a disciplinary procedure because of a doping charge, have little chance to find their way around all of the pit holes that they encounter. Many examples can be given. Athletes have to decide whether or not to spend money on the analysis of the B-sample, but it is almost impossible for them to oversee the possible consequences of waiving this right. Athletes may want to 'come clean' on their rule violation, but more often than not, they are not able to oversee the consequences in terms of the sanctioning and otherwise. Athletes may waive their right for a hearing without having properly considered the chances a hearing can offer for the defence, etcetera.

So, unfortunately, the situation often *is* quite bad for athletes. Even athletes with (some) legal training almost never have a scientific background, vice versa. And - as a rule - both legal and scientific aspects must be thoroughly assessed in order to assess a case in its entirety.

Anti-Doping Organizations usually do have officers with ample legal and scientific knowledge, or at least, ADOs have access to this knowledge. And athletes know that, or at the very least: *Dutch* athletes do.

This situation has consequences, not only for the athletes and their federations, but also for the Dutch Doping Authority. In the following four subparagraphs, we will describe the different tools that we use in order to help the athlete.

4.1 PRE-HEARING INFORMATION

Athletes can (and do) contact the Dutch Doping Authority before the hearing to obtain information and advice. At present, about 40% of the athletes contact the Doping Authority after receiving notice of the ADRV, in order to prepare for the disciplinary proceedings.[18] Upon his request, the athlete can meet with representatives of the Doping Authority, before the disciplinary proceedings have even started.

We have found that this approach can be extremely helpful, especially in cases where additional research is an option. An athlete may, for instance, ask for the analysis of nutritional supplements that he has used, in order to explain the analytical finding. Or it may be relevant to do an extensive search in the scientific literature in order to support or dismiss a theory that the athlete brings forward. The available time for this kind of research is always limited and if additional research is initiated at the first possible moment, this may prove beneficial. But even in clear-cut cases (that is: from an analytical point of view) it can be of great value for the athlete to be informed about his rights and about the ins and outs of the upcoming disciplinary proceedings.

We are well aware that this approach is not without risks. Athletes may - at a later point in time - try to gain an advantage by accusing the Doping Authority of providing incomplete or even wrong information, and he may even accuse the Doping Authority of 'taking advantage of an athlete in a vulnerable position'. Such behaviour may weaken a case (from our point of view), and thereby it may jeopardize the obligation that the Doping Authority has to 'vigorously pursue Anti-Doping Rule Violations'.[19] The Dutch Doping Authority is, after all, also the organisation that brings cases to the national federations in order to start disciplinary proceedings.[20] Formally, in Dutch doping cases, the national sports federation and *not* the Doping Authority actually starts disciplinary proceedings, and the board of the federation acts as prosecutor.[21] However, this kind of subtle legal distinctions are usually overlooked by athletes (and all other parties involved), and the Doping Authority is perceived to be prosecuting the case, no matter what. And on top of this, we are also responsible for ensuring that the Code is applied correctly in our country.[22]

In order to objectify the situation during pre-hearing contacts as much as possible, the Doping Authority has adopted five basic rules that it applies as part of the Results Management Process;

a. *Initiative:* The Doping Authority does *not* contact the athlete after he is notified in writing about the ADRV, but leaves the initiative to the athlete (or his entourage).
b. *Meeting:* Upon request, the Doping Authority agrees to arrange a meeting with the athlete, preferably with an official of the sports federation present as well, preferably at the office of the Doping Authority, and preferably with two officials of the Doping Authority present. Unfortunately, time pressures and other issues do not always allow for all this.
c. *Rights Caution:* At the start of the meeting, the athlete is explicitly informed about his rights, and about the roles and position of the Doping Authority, both before, during and after the disciplinary proceedings.
d. *Minutes:* Minutes are written and sent to the athlete and his federation, and the minutes are added to the case file. The Rights Caution is explicitly mentioned in the minutes.
e. *Intervision:* All contacts with athletes who are involved in disciplinary proceedings are reported and discussed in biweekly Case Management Meetings, which are attended by all members of the Management Team.

4.2 LEGAL OPINIONS

The Dutch Doping Authority submits written Legal Opinions to disciplinary panels. The Opinions are meant to inform and advise the panels about the (interpretation of the) applicable rules and about relevant case law, including CAS decisions. In some complicated cases, these Opinions tend to grow into manuals on 'how to treat the case', while in other cases, we can limit the Opinion to one or two pages with some

18 It is important to note that this percentage is specific for the Netherlands, and not a global figure at all. In some countries the percentage is higher, in other countries it is (near to) 0%.

19 Code art. 20.5.6

20 In the Dutch situation, the sports federations are responsible for starting disciplinary proceedings, but they do so on the basis of files that the Doping Authority presents to them. The federations cannot easily refuse to start the proceedings, because that can have quite negative consequences for their relationship with the Dutch Olympic Committee NOC*NSF (in terms of funding, etc.).

21 A position which is rather foreign to most boards, who more often than not would like the case to evaporate as soon as possible, and who sometimes might even contradict their formal position during hearings by pleading for acquittal of the athlete, notwithstanding the fact that they themselves brought he case before the panel.

22 In a recent case, legal counsel stated in his Statement of Defence that *'[…] the Doping Authority cannot combine the role of prosecutor, guardian of the Code and advisor of the athlete in one person'* [unpublished]. A true word indeed, which unfortunately does not bring us one step closer to a solution.

basic facts and references to the applicable articles in the Doping Regulations and elsewhere. The right to submit these Opinions is embedded in the latest version of the Dutch Doping Regulations, so the practice is now standard and enforceable. The Opinions have a noticeable influence on the decisions rendered, and in a (maybe) surprisingly high number of cases, these Opinions have been beneficial to the athlete, in terms of reduced sanctions or even elimination of the entire sanction. One of the reasons that these Opinions are so influential is the fact that the Doping Authority has knowledge about decisions in all Dutch and many foreign cases, while Dutch panels often do not see more than the decisions in their own sport on the national level.[23]

4.3 RIGHT TO APPEAL

The Dutch Doping Authority has the right to appeal decisions of disciplinary panels in doping cases (per article 13.2.3 of the Code). Again, it may be surprising to some, that our right to appeal can be beneficial to the athlete. Out of nine appeals by the Dutch Doping Authority in the period 2009-2011, at least three have been in the interest of the athlete (in terms of a reduced sanction, etc.)

4.4 IMPARTIAL ADVICE

The Dutch Doping Authority can advise (in writing or otherwise) in cases, provided that the Dutch Doping Authority is not a party and has no right to appeal in that particular case. The Dutch Doping Authority has been and still is involved in several cases between an athlete and an International Federation, on the initiative of the athlete. Our involvement can take different shapes, depending on the case. In one case between a Dutch athlete and his International Federation, we have done additional research into the absorption of cannabis through passive smoking and skin contact, and we have made the results of this research available to the athlete who presented it to the disciplinary panel.[24] In another case, we have been given Power of Attorney by the athlete, who had otherwise not been able to get access to legal counsel.[25] And in yet another case we voluntarily decided to be party to the case, partly because we considered this to be the most adequate way to give the athlete involved access to adequate support.[26]

5. CONCLUSIONS AND DISCUSSION

In the four subparagraphs above, we have tried to sketch the approach that the Dutch Doping Authority has chosen to help athletes that get involved in disciplinary proceedings concerning an ADRV. At present, athletes turn to the Dutch Doping Authority because no alternative is available or affordable. The Dutch Doping Authority does not choose to turn the athlete down, but provides its support and advice.

The Dutch Doping Authority, however, is limited in what it can do. Not so much by its formal and legal position, but certainly by its position as an ADO under the Code (which defines the roles and obligations of NADOs and International Federations, as we have demonstrated in paragraph 3).

Still, we dare say that *lacking better solutions,* the Dutch Doping Authority is at present often the best (and sometimes: the only) choice for an athlete to get help. The Doping Authority is not specifically equipped for this task, but it has at least four different tools that it can use to provide that help (and without charge).

Very little is known about the way that other ADOs deal with this issue. We know that at least a number of ADOs have pre-hearing contacts with athletes, but little is known about the intent and content of these contacts. Not much is known about the role of other ADOs in disciplinary proceedings either. It is not known (at least to us) if other ADOs file appeals against decisions in the interest of athletes, and if so: how often and on what grounds. And it is not known (to us) if other ADOs take a position that is comparable with ours in (international and national) disciplinary proceedings where they are not a party and have no right to appeal. Our policy may be quite particular, or it may be more common than we think.

What we do know for certain, is that athletes worldwide do not have access to adequate and knowledgeable support in their doping cases. So we can hardly imagine that other NADOs are *not* facing the same kind of predicaments that we encounter during our work. And we know for sure that ADOs go through great length in order to produce scientific or other information that may be beneficial to the athlete. Still a great example of this is the case of the Canadian triathlete Kelly Guest: the Canadian Center for Ethics in Sports (CCES) did everything within its power to enable the athlete to prove that he had unknowingly digested the prohibited substance, knowing that the chance for success was slim.[27] From our own recent practice, the case of the Dutch mountain biker Rudi van Houts is rather illustrative: the Dutch Doping Authority did everything within its means to bring to light the probability of Van Houts' claim that the Adverse Analytical Finding was a result of the consumption of contaminated meat during a stay in Mexico.[28]

In an ideal situation, an ADO only has to provide technical information and documentation, because
1. the athlete has access to good (legal) advice, and
2. an independent prosecutor presents the case.[29]

Offering affordable legal advice to all athletes, and introducing an independent prosecutor in all doping cases could improve our present problem substantively.

How to achieve this worldwide, is a question which should probably be answered in many different ways, depending on the legal situation and the organization of sports and anti-doping activities in different countries, among others.

23 In some cases where the Doping Authority did *not* yet have the right to submit Opinions, we have submitted an overview of decisions in comparable cases *to the athlete*.

24 Decision ADC Case no. 4/2011, Federation Internationale de l'Automobile (FIA) v. X, 20 december 2011

25 The CAS-case is still in progress under number CAS 2011/A/2675

26 This is a CAS-case - still in progress under number CAS 2012/2747 - in which WADA has filed a CAS-appeal against a decision of the Appeals Committee of a Dutch sports federation; the athlete, the federation and the Dutch Doping Authority are all respondents in the case, but WADA stated explicitly in the Statement of Appeal/Appeal Brief that *'[…] WADA would have no objection in the event that the NADO resolved not to participate in these proceedings.'* We decided to participate anyway, because we fundamentally disagree with WADA's position, but also because of the athlete's interests.

27 The Canadian Center for Ethics in Sports (CCES, the Canadian NADO) assisted the athlete in his efforts to prove that he had unknowingly digested the prohibited substance, years after the sanction had ended. The efforts unfortunately did not lead to the clarity the CCES and the athlete wished for. See for instance: http://slam.canoe.ca/Slam/Columnists/DallaCosta/2008/08/15/6463491-sun.html (read on 12 April 2012).

28 Decision 16 March 2011, Institute for Sports Law (ISR) T 2011001/2011-32-01, Royal Dutch Cycling Union (KNWU) v. Rudi van Houts. In this case, the information we were able to collect led to a decision in which Van Houts was found guilty, but no sanction was imposed. This decision was reflected in other decisions on clenbuterol cases, as for instance the Nielsen Case (Doping Board of the Sports Confederation of Denmark, Decision 21 March 2011 in case no. 2/2011, Sports Confederation of Denmark v. Philip Nielsen).

29 The Dutch Institute for Sports Law is presently considering to embed such an independent prosecutor in the existing structure of the Institute.