Blog Symposium: The impact of the revised World Anti-Doping Code on the work of National Anti-Doping Agencies. By Herman Ram

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Editor's note

Herman Ram is the Chief Executive Officer of the Anti-Doping Authority the Netherlands, which is the National Anti-Doping Organization of the country. He has held this position since 2006. After working twelve years as a librarian, Herman Ram started his career in sport management in 1992, when he became Secretary general of the Royal Netherlands Chess Federation. In 1994, he moved on to the same position at the Netherlands Badminton Federation. He was founder and first secretary of the Foundation for the Promotion of Elite Badminton that was instrumental in the advancement of Dutch badminton. In 2000 he was appointed Secretary general of the Netherlands Ski Federation, where he focused, among other things, on the organization of large snowsports events in the Netherlands. Since his appointment as CEO of the Anti-Doping Authority, he has developed a special interest in legal, ethical and managerial aspects of anti-doping policies, on which he has delivered numerous presentations and lectures. On top of that, he acts as Spokesperson for the Doping Authority. Herman Ram holds two Master's degrees, in Law and in Sport Management.

Introduction

The 2015 World Anti-Doping Code is not a new Code, but a revision of the 2009 Code. In total, 2,269 changes have been made (see here for the redlined version). Quite a number of these changes are minor corrections, additions and reformulations with little or no impact on the work of NADOs. But the number of truly influential changes is still impressive, which makes it hard to choose.

Luckily, WADA has identified the – in their view – more significant changes in a separate document and I have used this document to bring some order in a number of comments that I want to make on the impact of those revisions on our daily work.

Part of what follows is based on our experiences with the implementation of the revised Code so far, but quite a bit of what follows cannot be based on any actual experience, because the revised Code has only been in place for seven months, and only a rather small number of disciplinary procedures in relatively simple cases have come to a final decision under the revised rules. As a result, and because I am not in the business of predicting the future, on this occasion I have decided to share some of my expectations with you. Only the future can tell whether I am right on those issues.

Theme 1: sanctions

Probably the most discussed aspect of the revision is the longer period of ineligibility that can be imposed on – as WADA formulates it – 'real cheats'. In other cases, especially cases of unintentional violations, the revision should lead to more flexibility to impose lower sanctions. Due to the amendments in most cases it will be crucial to establish 'intent' – or the lack of it – in order to be able to determine the appropriate sanction. And because of the Strict liability principle that applies to the burden of proof in cases with Adverse Analytical Findings, NADOs have not focused very much on the establishment of 'intent', simply because under the previous Codes it was not relevant for the outcome of most cases.

In the case of non-specified substances, it is now up to the athlete to prove that the violation was not intentional, and in the case of specified substances it is up to the (N)ADO to prove intent. This is new, and our current practice shows that this kind of evidence is very hard to deliver for both parties. As a consequence, four year sanctions have been imposed rather matter-of-factly until now in cases where non-specified substances are involved. And such severe sanctions will remain common if non-specified

substances are detected, but they will be quite rare in other cases. No doubt, jurisprudence will be developed that will help to assess specific situations, but for most cases the four year sanction will more or less automatically result from the simple fact that a non-specified substance is involved.

Some exploratory analysis of the sanctions imposed under the 2009 Code for specified substances has shown that panels have already established a practice with a lot of flexibility in those kind of cases under the 2003 and 2009 Codes, and I do not expect major changes there.

Quite interesting from our (NADO's) point of view is Article 10.6.3, which introduces a role for both the (N)ADO with result management responsibility and WADA in cases where athletes or other persons promptly admit an anti-doping rule violation. If both the (N)ADO and WADA agree, a sanction reduction from four years to a minimum of two years is possible. We do not yet know what WADA's position will be in this kind of cases, but I do know that many NADOs will be inclined to grant a reduction of the period of ineligibility, because we want to stimulate admissions as much as possible. Information given by athletes and other persons is most valuable, and (less important, but still…) we can spare ourselves a lot of costly work in the process.

Somewhat related to prompt admissions (not new, but amended and expanded in the revised Code) is the possibility to reduce sanctions based on substantial assistance (Article 10.6.1). Because of the growing importance of Investigations and Intelligence (see Theme 3 below) and the increased emphasis on Athlete Support Personnel (Theme 4) I think that we will see that this Article will become more important in the work of NADOs. It seems to me that the revisions will help us considerably in all cases where athletes or other persons need reassurance that an agreed-upon reduction of sanctions will be respected 'no matter what'. At the same time, more information will become available that may help us in uncovering and prosecuting other anti-doping rule violations.

Theme 2: proportionality and human rights

I can be quite short here: I have not identified a single consequence of this Theme for the NADO that I work for, and I can hardly imagine that other developed NADOs will see this differently. This is not because this Theme is not important (quite the contrary) but because NADOs do not need extra encouragement in order to ensure that proportionality and human rights are taken into consideration on an everyday basis. And because – at least in Europe – data protection issues and the related issues of public disclosure and the protection of minors are primarily governed by legislation, not by the Code.

Theme 3: Investigations and intelligence

Indeed, the development of 'Intelligence & Investigations' is one of the major issues that quite a few NADOs are dealing with now. In less than two years' time, more than a dozen NADOs have attracted new staff for this purpose, and cooperation between NADOs (and some IFs) in this field is gradually developing, at a pace that is primarily determined by taking care of the legal side of things. The Code revision has not initiated this development, but it certainly confirms and strengthens it. And we are well aware that Intelligence has played a major role in practically all cases (old and recent) where large-scale, organized, doping practices have been uncovered. Which does not mean that we are all prepared for this kind of thing…

First of all, it is necessary to develop and sign bilateral cooperation agreements in which the preconditions for sharing information between (N)ADOs are defined. I have signed several, and there are more to come. But it is also necessary to start and develop a cooperation with customs and law enforcement agencies, and this kind of cooperation needs even more legal preparation in order to be successful (or just possible). Indeed, information sharing with government agencies is just as logical as it is complicated in practice.

I do not know one NADO that does not feel the need for cooperation with law enforcement agencies. And that fact, supported by the revised Code, means that NADOs are slowly but surely getting better acquainted

with government agencies. It is my opinion that several legislation proposals in various countries in Europe illustrate this development nicely. Countries which have done without specific anti-doping legislations for years – including my own country – are now working on legal measures that aim to facilitate a close(r) cooperation between governments and (N)ADOs (in line with the expansion of Article 22.2 in the 2015 Code).

The investigative powers of Intelligence Officers of NADOs on the one hand, and law enforcement agents on the other hand, are wide apart. In most countries, an Intelligence Officer has no other rights than any citizen, while there are elaborate laws that define and regulate what law enforcement officers may and may not do. The gap between the two has to be narrowed, in order to facilitate and stimulate further cooperation. Which means that Intelligence Officers will need to have specific authorizations that enable them to do their job within sport, but without becoming law enforcement officers themselves. The solutions will be different per country, but the common factor will be that NADOs will have more tools to fulfil their tasks.

Apart from these legislative and regulatory developments, which open doors that have been firmly closed until now in many countries, there are not many 'quick wins' to be expected because of 'Intelligence & Investigations'. In the long run, however, 'Intelligence & Investigations' will probably have a significant impact on the effectiveness of doping control programs, which will not really become 'smarter' (more brain power has been invested in the testing programs under the 2003 and 2009 Codes than most people can imagine), but certainly more 'targeted' and tailor-made. This may be an equally important effect of 'Intelligence & Investigations' as collecting evidence.

The extension of the statute of limitations (Article 17) to ten years will not make a big difference in numbers, but the cases where this extension pays off, will for a large part be the kind of cases that we find especially important to bring to justice. There is a downside to this as well, of course, and one of the aspects that I have not seen mentioned often is the fact that relevant samples will have to be stored for another two years, which will lead to additional costs. Few people realize how expensive the storing of samples – under the right conditions – is.

Theme 4: Athlete Support Personnel (ASP)

This Theme is closely connected to Theme 3, because anti-doping rule violations by Athlete Support Personnel cannot be proven by the traditional means of proof of ADOs, i.e. the analysis of urine and blood samples. There can be no doubt that catching those coaches and doctors that supply and administer doping to the athletes must be a high priority for NADOs. We are well aware that athletes do not function in a vacuum. As a consequence, NADOs will dedicate a considerable part of their 'Intelligence & Investigations' capacity to ASP. A rise in the number of cases where ASP is involved can be predicted, although – unfortunately – a huge effect is unlikely. Not only because these cases will always be hard to prove (no matter what) but also because large groups of ASP are not (properly) bound by anti-doping regulations. The seriousness of this problem varies per country and per sport (discipline), and the problem may – at least partly – be solved through legislation. But in my own country, I do not see how the Code revision will help the NADO in prosecuting ASP, unless and until we manage to find ways to sufficiently bind all relevant ASP to our rules.

The new anti-doping rule violation 'Prohibited Association' brings us some serious new challenges, I think. One of them being the burden of proof, which often will not be easy to discharge. Here again, 'Intelligence & Investigations' will play a crucial role. But even if it can be proven that an athlete is working with an ineligible coach, trainer or doctor, there may be several legal challenges if the ineligible person has a private practice outside organized sport, and working with athletes is the livelihood of that person.

Theme 5: Smart testing and analyzing

As I mentioned above (see Theme 3) 'Intelligence & Investigations' will probably have a significant positive impact on the effectiveness of doping control programs. However, it remains to be seen whether

this effectiveness will show in terms of the detection of more anti-doping rule violations, or in a better deterrence. Whichever it will be, a consequence of the development towards more targeted and tailor-made testing and analyzing, is that the price of testing will go up. Tailor-made testing means more individual testing, on odd hours, in (sometimes) strange places. This is – no surprise – considerably more expensive than testing a number of players at random after a training session of a team.

On top of that, the Technical Document for Sport Specific Analysis (TDSSA, https://wada-main-prod.s3.amazonaws.com/resources/files/wada-tdssa-v2.2-en.pdf) that has been developed after the implementation of the revised Code (based on Article 6.4 of that Code), prescribes a minimum percentage of additional analyses per sport discipline, with even more cost increase as a consequence. Some NADOs have managed to get additional funding in relation to these new requirements, but most of us have not (and not many of us foresee a budget increase in the near future). So the global number of tests performed by NADOs will in all likelihood decrease.

Whether this decrease in numbers will be acceptable, depends on the value added by the additional analyses that are now performed. If less tests bring more proof, then it is a good development. However, for the time being, there is no way to tell. And it is predictable that decreasing numbers of tests (the number of tests performed being the most commonly used measuring stick to assess the performance of a NADO) will generate critical questions about how serious we take the fight against doping in sport.

While I am writing this contribution, we are in the middle of the 'IAAF controversy', following the leakage of confidential information to the media, and the subsequent publication of sensitive data. I am not in the position to comment on what exactly is right and wrong in this case (I simply do not know) but I do know that the IAAF anti-doping program is 'smarter' than most, and that it can show results that few IFs can. Nonetheless, the public discussion is focusing on what has not been accomplished with all these data. So the large amounts of data that become available through 'smart' testing and elaborate biological passport programs, may become a burden instead of a blessing if the burden of proof is not reached in too many cases. Which – I fear – may be the case.

Theme 6: International Federations and NADOs

Another development that is not initiated by the Code revision – but certainly is supported and accelerated by it – is the improvement of NADO-IF cooperation. The revised Code clarifies and solves several of the problems that we have experienced with the 2009 Code. Examples are the control of therapeutic use exemptions (Article 4.4), the testing authority during international events (Articles 5.3, 5.2.6 and 7.1.1), and the coordination of whereabouts failures (Article 7.1.2). All these changes are improvements.

However, cooperation is more in the soul than it is in the rules, and we must acknowledge and accept that there are relevant differences between NADOs on the one hand and IFs on the other hand, in terms of culture, position and tradition. WADA has created Ad Hoc Working Groups of NADOs and IFs separately, and these groups have made inventories of existing problems that are subsequently brought to the table in joint meetings. The Articles in the Revised Code that underline the need for better cooperation will have no meaning if we stay separated in two worlds. But the impact will be huge, if and when we benefit from each other's knowledge and experience. And although I am not an optimist by nature, I am pretty sure that this will work out fine.

Theme 7: A clearer and shorter Code

I think it is obvious that this Theme is quite ambitious, and I can only regretfully conclude that the revised Code is neither clearer, nor shorter than the 2009 version. The Code is the most important legal tool in the anti-doping world, and both lawyers and administrators may (and do) delight in the fact that the Code has proven to be an indispensable tool in our toolkit. It is, however, not a tool for athletes (except for those who are also lawyer or administrator) and it will never be. Clarity about the rules is delivered by the Education departments of NADOs, in the form of numerous publications, leaflets, manuals and (more and more)

digital tools. And it is my personal opinion that there is not much wrong with accepting that the Code is not meant to educate athletes, but to protect them.

Miscellaneous

It is difficult to choose what other aspects of the revised Code are worth mentioning here. Let me name only a few.

The new possibility for an athlete to return to training during the last part of the period of ineligibility imposed on him (Art. 10.12.2), is – in my opinion – a balanced compromise between the need to fully execute sanctions, and the interests of team members that have not been sanctioned themselves. However, this refinement of the sanction regime further complicates the task that has been a burden for many NADOs for years already: how to monitor that sanctions are observed correctly and fully. This monitoring task usually cannot be fulfilled without the help of sport federations and clubs, and – to a certain extent – fellow athletes. Publicly known elite athletes will hardly have an opportunity to violate their sanction without being 'caught', but for lesser gods the situation is different, which fact collides with the Level playing field that we want to achieve.

Article 6.5 of the revised Code addresses the storing of samples for further analysis. It is good that these rules are now clarified, because it is to be expected that the percentage of samples that are stored for future analysis will rise over the years. The revised rules are meant to do justice to both the athlete and the (N)ADO and I think they actually do that, although I am sure that both NADOs and athletes will disagree in any particular case they are involved in.

The importance of the explicit wording of the Articles 20.4.3 and 22.6 that address the need for NADOs to be free from interference in our operational decisions, cannot be overestimated. Anti-doping issues can get a lot of attention in the media, and that may or may not lead to unleashing certain political powers. In my country, parliamentary questions have been asked about specific doping cases on several occasions. Thankfully, in no case this has led to actual interference in our work, but it is very good that the Revised Code is there to ward off such interference in countries where this may be necessary.

Tags : Doping, NADA, WADA, WADC