2021 Code Review - First Consultation: Questions to Discuss and Consider

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Article 2 - Fraudulent Conduct

DFSNZ agrees that the problem of Athletes or Support Personnel lying or submitting fraudulent documents during an investigation or the results management process needs to be addressed. Dealing with this issue in the definition of Tampering may be one way of doing so. DFSNZ notes that a CAS panel has decided that the provision can apply outside of a narrow view of 'doping control', but also notes that differing views about the scope of when the article can apply have been reached by other ADOs.

In any event, the definition of Tampering would benefit from clarification. Although the reach of Article 2.5 appears clear, DFSNZ has encountered apparent resistance to a broad reading of the clause on the basis that "real" Tampering relates to the manipulation of physical samples or objects, a reading more in line with the traditional connotations of "tampering". This is at odds with the purpose of the provision, and it ought to be clarified to remove any doubt as to its breadth.

Article 7 - Authority to Conduct Results Management

DFSNZ agrees that Article 7 would benefit from clarification. It has encountered situations where it has been unclear who has the right to conduct results management in certain circumstances.

Article 10 - Contaminated Products

How the Code addresses the possibility to reduce the applicable sanction when an Adverse Analytical Finding has resulted from a contaminated product is something that ought to be examined more closely. However, given the already frequent occurrence of this contention by Athletes in ADRV proceedings, care must be taken not to create a situation that encourages alleged contamination to be raised as a partial defence or exculpatory factor in situations where it is not appropriate.

Article 10 - No Significant Fault

DFSNZ agrees that the principle of No Significant Fault requires clarification. The variety of approaches to the question from different CAS panels and in different jurisdictions creates operational issues and undermines the suasion of the Code.

Article 10 - Timely Admission and Prompt Admissions

DFSNZ agrees that this issue needs to be addressed, including clarifying the intentions of these two provisions and when one or the other should apply. This includes clarity on whether a sanction can, or should, be backdated to include a period in which the Athlete was competing.

Furthermore, DFSNZ has encountered multiple situations where an athlete has admitted a violation but has taken a position on sanction such that full hearings have been necessary. The hoped-for advantage of lessening expense and expenditure of resources by ADOs as a result of an athlete making an admission have often been unfulfilled.

Article 10 - Multiple Violations

DFSNZ agrees that Article 10.7 would benefit from clarification. DFSNZ has encountered an issue whereby an

Athlete has committed a breach of New Zealand's Sports Anti-Doping Rules while serving a period of ineligibility imposed by another country's non-signatory anti-doping organisation. In that case, the Athlete submitted that the original breach (imposed by the non-signatory) was not a valid ADRV, and therefore the multiple violation provisions were not triggered in respect of sanction. This is plainly at odds with the intent of the Code. Any perceived lacuna in the Code in this respect should be addressed.

Article 13 - WADA Notification

DFSNZ agrees that the notification provisions would benefit from clarification.

Article 14 - Inconsistency

DFSNZ agrees that the inconsistency identified between Articles 14.3.1 and 14.3.5 needs to be addressed.

Article 14 - Data Protection

Article 15 - Mutual Recognition

It is agreed that the treatment of mutual recognition of sanctions requires clarification. DFSNZ has encountered an issue whereby an Athlete asserted that DFSNZ's recognition of another signatory's period of ineligibility, in turn recognition of a non-signatory's sanction, did not constitute recognition of the original underlying ADRV. This becomes important in the context of multiple violations, and it ought to be made clearer that mutual recognition of sanctions includes recognition of the underlying ADRV.

Article 20 - Responsibility of Officials

DFSNZ agrees that Article 20 should require that all officials agree to be bound by the Code.

Whistleblower Protection

DFSNZ considers that there should be some recognition of whistleblowers under the Code, particularly where the whistleblower is a Minor. However, careful consideration needs to be given to the situation where a whistleblower is also in breach of the Code. For example, an Athlete who impugns the conduct of another Athlete ought not to be completely immune from proceedings by virtue of his or her whistleblowing. The right balance must be found and the Code should differentiate between identifying or labelling an athlete or other person as a whistleblower (with the associated protections) and an athlete or other person providing substantial assistance.

Other Suggestions

DFSNZ has three further significant items it wishes to raise for consideration as part of the 2021 Code review:

- Administration of the Code

A universal theme in the feedback received by DFSNZ is that Athletes seek comfort that everyone bound by the Code is subject to the same level of rigor in its administration. In order to ensure this is the case, DFSNZ proposes that a greater level of transparency be instituted around key processes undertaken by Anti-Doping Organisations (**ADOs**) and WADA itself. By making certain information freely available, such as which Athletes are tested,

frequency of testing, which cases progress to ADRV hearings, and those that do not, as well as reasoning for key decisions made, ADOs would be in a position to hold each other to account. Sharing this information would increase WADA's efficacy by introducing an aspect of self-regulation between key stakeholders.

- Sanction regime

It is axiomatic that the Code is intended to ensure clean sport at all levels. This needs to be supported by ongoing education, whereabouts procedures, TUE support, testing, and a robust sanction regime. With regards to the imposition of sanctions, the Code must be calibrated to strike the right balance. While the current sanction regime is appropriate for high-performance athletes at the international and national level, DFSNZ has concerns about its implications for athletes at the other end of the spectrum.

With the evolution of anti-doping practices expanding further into investigations and employment of intelligence, there is increased potential for greater numbers of low-level athletes, at the lower end of offending, to be exposed. Imposing the full force of the code in such situations may lead to sub-optimal outcomes. While DFSNZ strongly believes that all athletes ought to be held to the same standard of integrity, it considers that it would be beneficial for WADA to re-examine the current sanction regime to consider whether it appropriately accounts for Athletes competing at a social or casual level whose breaches are comparatively minor.

We recognise that it may be difficult to differentiate between athletes who compete on a social or casual basis and athletes who aspire to higher honours (and seek an unfair advantage to get there). Further research may be required in this area to understand the reasons for taking prohibited substances in such circumstances.

If an alternative sanction regime was adopted for lower level athletes, this might include an option for an ADO to issue a formal and public written warning. Alternatively, a sanction reduction mechanism might be considered for athletes who participate in a set number of educational activities during a period of ineligibility.

It could be a powerful and persuasive educational tool to have people who have fallen foul of the rules participating, particularly at school level.

Nonetheless, the Code currently operates in a broadly 'all or nothing' manner. Athletes below national level can be included or excluded at the discretion of the ADO, but where the Code is applied, they face the same penalties as high performing athletes, notwithstanding the generally lower levels of knowledge.

Some better ability for the Code to respond to the situations of such athletes would greatly enhance the effectiveness and suasion of the Code.

- Court of Arbitration for Sport time frames

As the Court of Arbitration for Sport is the designated appeal body under the Code, the current review presents a timely opportunity to raise DFSNZ's concerns about the time taken for CAS decisions to be issued. These concerns do not relate to the speed at which the arbitrators reach their conclusions, nor the Oceania registry, but rather to what seems to be an administrative backlog within the Lausanne registry. In DFSNZ's experience, significant delays of up to six months in the issuing of awards is commonplace. This is regrettable as it can be unfair for the Athlete involved and have flow-on effects, for example delaying the delivery of decisions at the Sports Tribunal of New Zealand level. DFSNZ proposes that WADA investigate the cause of these delays and implement remedial procedures accordingly.

- Other Suggestions

DFSNZ continues to receive feedback from some national sport organisations that reduced sanctions should apply in relation to recreational drugs, where there was no intent to enhance performance, in particular, reducing the four-year sanction for in-competition use. This could involve changing the status of certain recreational drugs on the Prohibited List from non-specified to specified stimulants which would allow the starting sanction to be reduced to two years.

Where an athlete can demonstrate some form of mental impairment, such that he/she is not in a position to

properly consider risk at the time of committing an anti-doping rule violation, this could be a factor in considering a reduction in the period of ineligibility