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978-1-107-00346-0 - A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport: Second Edition

Paul David

Excerpt

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INTRODUCTION

The last two decades of the twentieth century saw many doping scandals concerning the major sporting events and leading athletes. Events such as the 1988 Olympic 100m final where a steroid-assisted Ben Johnson won the gold medal in startling fashion are etched in the sporting memories of many sports fans as tarnished magic moments.¹ However, it was the doping affair concerning the Festina cycling team, which occurred during the 1998 Tour de France, which highlighted the need for more coordinated global action against doping. The foundation of the World Anti-Doping Authority (WADA), which was established as a private foundation under the laws of Switzerland on 10 November 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms, was the most significant response to this need.

While doping investigations and scandals continue in the sporting world,² WADA has been a highly visible player in efforts to combat doping

1 This run and the outcry in Canada produced the Dubin Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance, which led to significant changes in the organisation of testing for prohibited substances in Canada and other countries. Ultimately, Mr Johnson was banned for life under the IAAF Rules when he committed a further doping violation. For the decision in the Ontario Court (General Division) rejecting the challenge to this life ban, see *Johnson v. Athletics Canada and IAAF* [1997] No. 3201, Chapter 10, page 135 below.

2 Athletics and cycling continue, perhaps, to provide the most prominent controversies in the media. In cycling, the Tour de France in 2007 saw several positive tests and the withdrawal of the holder of the yellow jersey by his team. The decision by the American Arbitration Association that Floyd Landis had committed an anti-doping rule violation after Stage 17 of the 2006 Tour, which was confirmed on appeal to CAS, meant that the winner of the 2006 Tour was not Mr Landis but Oscar Pereire. For a summary of the decisions, see Chapter 5, pages 152–5 below. The Operación Puerta inquiry which began in Spain in about 2004 ultimately led, after a protracted investigation and legal process, to a two-year period of ineligibility for the Spanish cyclist Alejandro Valverde (see Chapter 2, pages 70–4 below, for a summary of the lengthy process in this case) and most recently to the same penalty for Jan Ullrich as a result of the evidence against him uncovered in Operación Puerta CAS 2010/A/2083 *UCI v. Ullrich and Swiss Olympic*. As this text goes to print the UCI has just recognised and accepted the decision by USADA to impose a lifetime ban for

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in sport. The World Anti-Doping Program introduced by WADA, which has the World Anti-Doping Code ('Code') at its centre, has been at the heart of these efforts. This book seeks to provide a guide to the Code and the International Standards which operate together with the Code, for those who work with the Code whether as administrators, advisers or participants in sport.

Origins of WADA and the Code

The International Olympic Committee (IOC) convened the World Conference on Doping in Sport which took place in Lausanne in February 1999. As a result of a proposal from the Conference, WADA was established as an independent body which would establish and maintain unified standards for anti-doping testing and the imposition of sanctions for doping violations, and seek to coordinate the efforts of sports' organisations, anti-doping organisations and governments to combat doping in sport.

Until WADA was founded, the IOC had taken the lead role in implementing measures to prevent doping in sport.³ Olympic sports, and sports outside the Olympic movement, had adopted the Olympic Movement Anti-Doping Code (OMADC), which was produced and refined by the IOC. WADA took over this role and sought to build a wider acceptance throughout the global sporting community for a standard approach to the detection and punishment of doping. WADA assumed the role of producing the list of Prohibited Substances and Methods from the IOC and developed the Code,⁴ in pursuit of its main objective of developing harmonised rules, disciplinary procedures and sanctions.

The Code aims to produce international harmony by agreement between the organisations which are Signatories to it. It contains key Articles relating, primarily, to doping violations, the proof of violations and sanctions, which Signatories have to implement without significant

anti-doping violations under the Code on Lance Armstrong and remove his seven Tour de France titles. There have been several investigations in various jurisdictions into the use of EPO and other performance-enhancing substances and methods. The detailed report by Senator Mitchell into the use of prohibited substances in the sport of baseball in the US (which is not a Signatory to the WADA Code) has highlighted the apparently widespread use of steroids and other prohibited substances by players in the major leagues.

3 The IOC initially established its Medical Code under the Olympic Charter. This Code sought to provide for prohibited substances, sanctions and such matters and to harmonise the approach to doping across international federations and national Olympic committees.

4 For the full text of the 2009 Code (and the earlier 2003 Code which it replaced), see the WADA website, www.wada-ama.org.

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amendment in order to accept the Code, and other Articles, which provide for standards relating to the handling of anti-doping matters, which Signatories have to meet, but are able to attain in different ways.

Adoption of the Code

The Code was the product of an extensive consultation and drafting process, and was unanimously adopted by the World Conference on Doping held at Copenhagen in March 2003. Since its adoption the Code has been accepted by Signatories around the world. The organisations which can accept the Code as Signatories (in addition to WADA itself) include the International Olympic Committee, national Olympic committees, the International Paralympic Committee, national paralympic committees, international federations, national anti-doping organisations and major event organisations. The number of Signatories in these categories is currently approaching 100 per cent.⁵ By Signatories agreeing to the application of the Code, an interlocking structure of agreements containing the Code's key Articles, and other provisions which fulfil the standards set by the Code, has been created throughout the world of sport at both international and national level.

Neither governments nor national sporting organisations can be Signatories to the Code. National sporting organisations and their members become bound to the Code through the agreements made by Signatories which adopt the Code, such as international federations and national anti-doping organisations. National sporting organisations are either bound by their membership of other organisations, which are Signatories, or enter into specific agreements with Signatories. The individual participants in sport become bound as members of a sporting organisation which has implemented the Code, or when they agree to the terms on which an event is held at national or international level. Although they cannot agree to the Code, governments have an important part to play in supporting the Code by implementing the UNESCO Anti-Doping Convention.

5 For the current position on the acceptance of the Code, see www.wada-ama.org. International federations outside the Olympic movement were slower to adopt the Code: see e.g. the lengthy process by which FIFA adopted the Code but, again, acceptance is now widespread. The process of acceptance by FIFA included obtaining an advisory opinion from CAS on the compatibility of provisions of the Code with fundamental principles of Swiss law (see CAS 2005/C/976 & 986, *FIFA v WADA*, Chapter 9, page 352 below).

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The Code and the International Standards

In the last decade, the Code has become the central rallying point for the fight against doping in sport, and its existence has received widespread media coverage. Together with the International Standards concerning the Prohibited List, Testing, Laboratories, Therapeutic Use Exemptions and, most recently, the Protection of Personal Information and privacy and the model guidelines produced by WADA,⁶ the Code makes up the World Anti-Doping Program which is intended to bind participants in sport in the same way as the rules of the sports themselves. This Program encompasses both the key substantive elements of the anti-doping regime, such as the violations and sanctions, and the technical operational procedures (provided primarily by the International Standards) by which anti-doping rule violations, in particular the presence of prohibited substances or methods in bodily samples given by athletes, will be detected, such as sampling and testing.

Some idea of the scope of the WADA Program is provided by the fact that some 277,928 samples were collected and analysed in 2010.⁷ In addition, anti-doping organisations are now devoting more resources to the gathering of accurate whereabouts information from elite athletes, and to the investigation of doping violations, such as trafficking, which are not established by positive tests, but by obtaining and presenting other evidence.⁸ A significant development in the last two years has been the publication by WADA of the Athlete Biological Passport Operating Guidelines which allow sporting organisations to adopt biological passport regimes under which doping can be detected by the analysis and expert evaluation of blood or urine values for an athlete over time.

The practical result of the acceptance of the Code is that both national- and international-level athletes who are bound by the Code can be subject to both testing for the presence of prohibited substances and prohibited methods in their bodily samples in- and out-of-competition (and the various obligations which are connected with a testing programme, such as the provision of information concerning their whereabouts) and to investigation in respect of various violations,⁹ which do not require

6 For more on the International Standards, which are a mandatory aspect of the Code, and the Guidelines published by WADA, see Chapter 2 below.

7 See WADA Laboratory Statistics Report 2010.

8 For some examples and the proof of such violations, see Chapter 5, pages 130–9 below.

9 The Code uses the phrase ‘anti-doping rule violations’. In the text this or the abbreviation ‘violation’ is used.

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adverse analytical findings or the analysis of bodily samples. In addition, the conduct of other persons bound by the Code, such as athlete support personnel, who may commit anti-doping rule violations, such as trafficking or administering prohibited substances, may be investigated by the anti-doping organisations responsible for administering the Code, at national and international level. Investigations will be carried out by the anti-doping organisation which has jurisdiction under the Code over the athlete or other person. An investigation may lead to the bringing of allegations by the organisation responsible for managing the results of an investigation, and, where a violation is established, to the imposition of sanctions by the tribunal which hears the allegation.¹⁰ The tribunal hearing an allegation will be either a national or an international-level sporting tribunal or the Court of Arbitration for Sport (CAS) depending on the rules and policies of the particular anti-doping organisation which manages the results.¹¹

The aim of the Code is to provide for the process of investigating and hearing doping violations to be carried out in a consistent and coordinated way throughout the sporting world. The central place of CAS – an arbitral institution established by the Olympic movement in the mid-1980s to hear sports-related disputes – in interpreting and applying the Code is an important part of this effort to bring about a consistent approach to the application of the Code.

Governments, while they cannot be Signatories to the Code, have declared their support for the Code. The International Convention against Doping in Sport was developed and adopted by the General Conference of UNESCO at its 33rd Session on 19 October 2005. This Convention has come into effect and has been widely ratified in a short period of time.¹² The Convention provides a means by which State parties commit themselves to take steps to support the Code.¹³ It is important, however, again to note that the Code's legal enforceability is not derived from this State-level commitment or from legislative acts by individual States, but,

10 See Chapter 7 below for responsibility for investigation and results management.

11 Tribunals will have jurisdiction by agreement over the hearing of alleged violations under the Code and should, if it is submitted, be regarded as functioning as arbitral bodies in considering the allegations brought: see Chapter 10, page 339 below.

12 On 17 November 2010, Fiji became the 150th country to ratify the Convention. Since the Convention came into force on 1 February 2007, the Convention has been ratified by more than 75 per cent of countries, covering more than 92 per cent of the world's population. It has been one of UNESCO's most rapidly implemented treaties.

13 See Chapter 3 below for an outline of the main provisions of the Convention.

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as with the anti-doping regimes which the Code replaced (and, indeed, other disciplinary regimes in sport), from the agreement by sporting organisations and their members and participants in sport, to the application of the Code.

Other methods of regulation

The Introduction to the Code specifically provides, consistent with the principle that it is enforceable by agreement, that the Code is not intended to be subject to the principles of criminal (or employment) law. Doping in sport can be made subject to the provisions of criminal or civil law by national governments, and some States have enacted specific anti-doping legislation criminalising doping in sport. In many jurisdictions, however, there is no criminal or other legislation which is specifically concerned with the problem of doping in sport. Criminal allegations in the context of doping in sport have been relatively rare, although increased political awareness of the problem of drugs in sport has seen more countries enact specific anti-doping laws. Where criminal allegations are brought, they are usually made under legislation which is concerned with the regulation of the supply of prescription medicines, or with customs control, or under general misuse of drugs provisions, where the use of substances which are prohibited in sport falls within the terms of the legislation.

The Code functions at a transnational level, independently of the national laws of States and, in some instances, while an outcome reached under national law will be applied within a particular State, the agreement of an athlete to the application of the Code (and, as a consequence, decisions made under it by the tribunals with responsibility for hearings), can mean that, internationally, in the world of sport, the outcome in disciplinary proceedings may differ from the outcome of proceedings in State courts.¹⁴

Liaison with State authorities

The Code functions as an international agreement across national boundaries and seeks to bring about a coordinated approach among Signatories. The investigation of anti-doping rule violations under the Code may also

14 See further for different outcomes at national level and under the Code, Chapter 2, pages 67–9 below. There are many examples of CAS awards reaching decisions under anti-doping regimes which are binding internationally which differ from decisions by national sporting bodies or, indeed, national courts.

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involve liaison between anti-doping organisations operating under the Code and the State authorities responsible for enforcing the criminal law or customs legislation (or, perhaps, other bodies responsible for professional disciplinary matters). The extent to which this kind of liaison and reporting occurs will depend on the rules and policies of the organisation responsible for investigation and result management, and the relevant national legislative provisions which are potentially applicable.¹⁵ The territorial nature of criminal law has meant that there has, to date, been relatively little international coordination by authorities responsible for the application of the criminal law concerning such matters as trafficking in prohibited substances. However, WADA is now seeking to promote greater cross-border cooperation between States in the light of growing concern at the large scale of the criminal activity involved in the trafficking of performance-enhancing drugs and methods. This area of the possible regulation of doping in sport lies outside the Code (and the scope of this book until specific rules or guidelines for Signatories to the Code are developed), but has to be kept in mind by those involved in investigations and others operating under the Code, both from the point of view of sharing information with State authorities and, in relation to the conduct of investigations concerning possible violations under the Code, where athletes or other persons may also be subject to criminal proceedings in relation to the matters under investigation.

The challenges for the Code

The need for consistency

As with any instrument which seeks to produce a standard, harmonised approach in an area of wide-ranging international activity, the Code

15 The investigation and criminal prosecutions and anti-doping violation proceedings relating to the Bay Area Laboratory Cooperative run by Mr Conte (the 'BALCO affair') provide a good example of the interaction between the criminal law of the State in question and the disciplinary system agreed to by athletes under the Code. Mr Conte and others involved in a wide-ranging doping conspiracy were subject to criminal punishment for charges involving trafficking in drugs under the US misuse of drugs legislation, while a number of high-profile athletes received periods of ineligibility of up to eight years under the rules of the USATF/IAAF after hearings before the American Arbitration Association and CAS to which they were bound. Several recent doping cases have started with searches carried out by police in criminal investigations (see e.g. Operación Puerta, in Spain in which a search of a medical facility by police revealed bags of blood for use in blood transfusions). The case against the cyclist Alejandro Valverde provides an interesting example of the issues which can arise where the application of national laws and sporting rules across territorial frontiers is involved. See Chapter 2, page 70 below.

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faces considerable challenges. Perhaps, the main areas where constant effort is required, if the Code is to achieve its goals, lie in the challenges presented by the need for the consistent application and interpretation of the Code's provisions by tribunals hearing anti-doping violations around the sporting world, and by the need for those who are bound by the Code to be aware of the principles concerning liability for, and the punishment of, anti-doping rule violations under the Code. While WADA, governments, the various Signatories to the Code (in particular, the national anti-doping organisations and international federations) and national sporting organisations, devote considerable energy to the education of sporting participants (and the Code is often referred to in the sporting media), the cases which come before CAS and before national tribunals still continue to show that there remains a good deal of ignorance among many sporting participants, their coaches and advisers, at both national and international level, concerning the nature of the anti-doping regime under the Code (in particular the high level of obligation imposed on athletes by the strict liability regime under the Code) and the consequences of violations.

Access to decisions under the Code

In the area of decision-making under the Code, CAS occupies a central position in interpreting and applying the Code. CAS Panels have emphasised the need for consistency in their awards. The goal of harmonisation is relatively difficult to achieve where many tribunals (particularly at the national level) may well not be aware of the decisions made, and principles applied, in interpreting and applying Articles of the Code by other sporting tribunals or CAS. In the last three years, access to decisions has improved significantly with CAS providing an on-line database of decisions going back to 1986 of CAS awards and regularly publishing the most recent decisions.¹⁶ However, the production of a range of decisions worldwide by various sporting tribunals and CAS makes the task of consistent decision-making harder. This book seeks to assist by providing a guide to the fundamental principles of the Code for those involved in sport, whether as participants in sporting competitions, sports administrators,

16 The CAS website (www.tas-cas.org) reproduces the most recent decisions (generally six decisions are posted at a time with different decisions on the French and English parts of the site), and there is an on-line library of decisions. Digests of CAS awards dating back to 1986 have also been produced by CAS: see Digest of CAS decisions I (1986–8), II (1998–2000) and III (2001–3). References to CAS awards in the period 1986–2003 in the text refer to the references in the Digests.

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advisers or decision-makers. In key areas, the operation of the provisions of the Code is illustrated by reference to short summaries of decisions by CAS and other sporting tribunals.

Outline of the text

After a short outline of the development of anti-doping measures in the area of sporting activity, the book outlines the legal principles relating to liability for doping which were developed before the advent of the Code and which are, to a significant extent, carried forward into the Code. The text then outlines, by reference to decisions of CAS Panels and national courts, the lack of harmony which existed in the approach to doping (in particular, as regards the imposition of sanctions) which the Code was produced to address. An overview of the Code and the World Anti-Doping Program then follows, before a commentary is given on the interpretation and application of the key Articles of the Code by reference to decisions made by tribunals and, in particular, CAS.¹⁷

The structure of the book follows the structure of Part One of the 2009 Code and provides an explanation of, and commentary on, the Articles with summaries of relevant CAS awards and sporting tribunal decisions at the end of each chapter. The Code has been the subject of one review process in accordance with its terms and this produced the 2009 Code which considerably amended the 2003 Code, in particular as regards the regime of sanctions for anti-doping rule violations. References to the Code in the text are to the 2009 Code unless otherwise stated. The full text of the 2003 and 2009 Code is available on the WADA website.

Chapter 1 provides a brief summary of the history of doping and the development of anti-doping regimes, then outlines the key principles

¹⁷ The liberty left to sporting organisations in relation to managing results by the Code means that there are many different sporting tribunals which have to interpret and apply the Code. Additionally, at the national level, in some jurisdictions, tribunals which are independent of national sporting organisations have been established to hear sports-related disputes by agreement with national sporting organisations. An example is the New Zealand Sports Tribunal (www.sporttribunal.org.nz). In other jurisdictions, established arbitration bodies provide the first-instance decision-making tribunal for anti-doping rule violations (see e.g. the American Arbitration Association in the US anti-doping regime). The United Kingdom has established an independent tribunal to hear doping allegations – the United Kingdom Anti-Doping Tribunal. Where possible, the text refers to CAS awards and decisions in the courts, but reference is also made to the decisions of sporting tribunals at national and international level, where the decisions assist in understanding the operation of the provisions of the Code.

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developed in relation to doping liability before the Code. The central role of CAS in developing the principles which are applied in anti-doping matters and in interpreting and applying the Code is explained. The CAS procedural rules applicable in anti-doping matters are outlined.

Chapter 2 gives a general overview of the provisions of the Code and the International Standards and explains how they operate together to form the World Anti-Doping Program. The chapter also contains a summary of the main provisions of the International Convention against Doping in Sport 2005, by which State parties agree to take action to support the Code.

Chapter 3 outlines the central role of the Prohibited List and the system of testing for anti-doping violations in more detail, and explains how substances are included in the Prohibited List by WADA. The contents of the International Standards are explained.

Chapter 4 discusses the general principles and provisions relevant to the interpretation and application of the Code.

Chapter 5 comments on Articles 1 and 2 of the Code which contain the key provisions outlining the anti-doping rule violations.

Chapter 6 discusses the burden and standard of proof applicable to the proof of anti-doping rule violations under Article 3 of the Code and the burden and standard which lie on the athlete in relation to various matters under the Code.

Chapter 7 reviews the provisions of the Code relating to results management, reporting and hearings by Signatories. Certain national systems for results management and hearings are described in outline. The provisions of the Code concerned with the responsibility for testing and investigation, provisional suspension, confidentiality and reporting and the mutual recognition of the decisions of other Signatories are outlined.

Chapter 8 continues with commentary on the Articles of the Code, including Articles 9 and 10, the key Articles relating to the imposition of sanctions, with reference to decisions of CAS and of various national and international tribunals. The operation of the more complicated regime for assessing sanctions under the 2009 Code is explained.

Chapter 9 comments on Article 13 of the Code which provides for appeal rights to national appeal tribunals and CAS, before discussing the possible grounds for further appeals from CAS awards to the courts.

Chapter 10 discusses the possibility of challenges to the enforceability of the Code before national and supranational courts. Potential civil claims against anti-doping organisations which undertake testing, investigation and results management are considered. Decisions by the Swiss Federal