



ANTI-DOPING (II)

THE 2021 WADA CODE REVIEW

BACKGROUND TO THE 2021 WADA CODE REVIEW

- I. The **World Players Association** (World Players) offers the following comments and policy positions on the ongoing review of the World Anti-Doping Code (WADA Code) with amendments to take effect in 2021 (2021 WADA Code Review).
- II. World Players has established an Anti-Doping Working Group¹ to oversee and drive key policy matters pertaining to anti-doping.
- III. World Players challenged the 2021 WADA Code Review, noting its limited scope:²
 - a) precluded fundamental matters from being taken into account, such as revision to the prohibited list criteria;
 - b) contrasted with critical developments in world sport connected to safeguarding player and athlete rights in accordance with the *United Nations Guiding Principles on Business and Human Rights* (UNGPs);
 - c) would not address the frequent cases of injustice connected with the enforcement of the WADA Code on matters pertaining to disproportionate sanctions, the demonstrable impact that the global anti-doping regime is having on players, and the punitive approach to players who have tested positive for substances of abuse; and
 - d) continued the exclusion of player associations from the processes through which the WADA Code is developed, promulgated and implemented in circumstances where their members are expected to be compulsorily bound.
- IV. World Players additionally offered the following constructive solutions that would have elevated the 2021 WADA Code Review in meeting its objectives. These were:

- a) WADA publish revised terms of reference that make it clear that the scope of the review is not limited;
 - b) WADA prepare a report to inform submissions to be made to the review which evaluates the effectiveness of the global anti-system. That report should address the capacity of athletes to access justice, and the impact of the system on athlete careers, health and wellbeing. It should be prepared through extensive consultation with those affected by the system including World Players; and
 - c) the composition of WADA Code Drafting Team be expanded to include two nominees of World Players, with expertise on issues such as human rights and scientific matters.
- V. The response from WADA, including minuted remarks from its Executive Committee, made it clear that they refused meaningful engagement with World Players.³
- VI. The only limited engagement World Players has been afforded was a meeting with the WADA Code Drafting Team in October 2018.
- VII. Such an approach from WADA does not constitute meaningful stakeholder engagement in circumstances where World Players represents in the order of 80,000 players who are compulsorily bound by the WADA Code as a mandatory condition of their employment, yet are excluded from its development, and implementation.
- VIII. This is occurring in circumstances where WADA is experiencing a crisis of confidence.⁴ This is particularly relating to its governance model which World Players has addressed in its “Four Pillars” governance proposal tabled with WADA in July 2017.
- IX. It is in the context of these concerns, that World Players articulates the following principles for WADA Code reform. These fundamental proposals would address the overwhelming number of negative and unnecessary impacts on player careers, livelihoods and well-being.

I. RESPECT FOR THE PRINCIPLE OF INDIVIDUAL CASE MANAGEMENT

1. The WADA Code must be amended to provide that an anti-doping rule violation is not committed where the athlete can show, on the balance of probabilities, that he or she did not intend to, or did not, enhance his or her sporting performance.

II. UNDERTAKE AN IMPACT ASSESSMENT ON PROPORTIONALITY

1. Jurisprudence of the Court of Arbitration for Sport (CAS) demonstrates the WADA Code is “clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for the WADC.”⁵ This persists in circumstances where a player’s federation even advocates for a reduction.

2. Proportionate sanctions are a fundamentally recognised right and any limitations on their enjoyment must be in pursuit of a legitimate objective and go no further than what is necessary to achieve this.⁶
3. As WADA does not research, monitor or assess the impact of the global anti-doping regime on players, WADA does not know whether sanctioning under the WADA Code is proportionate. For example, WADA has not undertaken due diligence on how this may affect a player's physical and mental health or social wellbeing. Moreover, the purported maintenance of an apparent "consensus" underpinning WADA's approach to sanctioning cannot be considered a legitimate objective or provide any justification for overriding fundamental rights.
4. WADA must therefore undertake research into the impact of the global anti-doping regime on players. This impact assessment will enable WADA to develop the requisite understanding of how its activities and relationships are actually affecting players. It must also include evaluation of less restrictive ways to achieve the WADA Code's purported deterrent objectives and be reconciled with the WADA Code's health-based priorities.

III. ADOPT A HEALTH AND REHABILITATION BASED APPROACH TO SUBSTANCES OF ABUSE

1. The WADA Code must adopt a health and rehabilitative approach to substances of abuse. This has been contemplated in past WADA Code reviews, and has been successfully implemented in various policies developed between player associations and their governing bodies.⁷
2. Such an approach has the player's health as its foundation in the administration of educational and preventative methods, and the adoption of a rehabilitative approach to sanctioning.

IV. ADHERE TO THE FRAMEWORK OF THE UNGPs

1. WADA is an agency of governments and sports governing bodies which respectively have a duty to protect and respect fundamental rights. WADA therefore has a responsibility to ensure that the fundamental rights of athletes are protected, respected and upheld in accordance with the UNGPs.
2. This requires WADA to develop an athlete rights policy through genuine collaboration, conduct an ongoing due diligence process to assess the risk of WADA's activities negatively impacting on the internationally recognised human rights of players, and provide access to an effective remedy where these rights are violated. WADA must also report and engage with key stakeholders including players and their legitimate representatives.

V. ORGANISED PLAYERS ARE NOT PART OF WADA'S APPARENT CONSENSUS

1. If the WADA Code is not amended in accordance with the policy position of World Players, then it is clear that the 80,000 players represented by affiliated player associations are not a party to the apparent consensus on which WADA relies to justify almost all legally controversial aspects of the WADA Code.
2. Accordingly, the following amendment as underlined must be inserted in the introduction to the WADA Code:

"When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the WADA Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport. This consensus, however, does not include players in professional team sports."⁸

VI. ENABLE PLAYERS IN PROFESSIONAL LEAGUES TO COLLECTIVELY BARGAIN ANTI-DOPING

1. Anti-doping policy should be the product of negotiation between the legitimate representatives of players and the corresponding league or governing body that oversees their participation in competition.
2. There are numerous examples of where negotiated outcomes through collective bargaining agreements have secured outcomes that have been effective in preventing doping, whilst ensuring protection for the rights of players and the integrity of competition.⁹
3. This is all the more essential given the ongoing exclusion of professional players from the WADA Code's process of development as noted in "the Background" to this policy.

Adopted:

World Players Association

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Executive Director

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Lausanne, Switzerland

Notes:

¹ The Working Group comprises members of the professional staff of World Players' affiliates. They are representative of all the world's major team sports, and have significant expertise in collectively bargaining anti-doping matters.

² World Anti-Doping Agency, *2021 WADA Code Review*, accessed 12 November 2018 at <https://www.wada-ama.org/en/what-we-do/the-WADA Code/2021-WADA Code-review>

³ World Anti-Doping Agency, Minutes of the WADA Executive Committee, 16 May 2018, accessed at: https://www.wada-ama.org/sites/default/files/resources/files/minutes_executive_committee_meeting_16_may_2018.pdf

⁴ M Hyde, 'Let us simplify this for Sir Craig Reedie: Wada is not doing its job', *The Guardian*, 31 October 2018, accessed at: <https://www.theguardian.com/sport/2018/oct/31/sir-craig-reedie-wada-president-russia-reinstated>

⁵ WADA v FIFA and Guerrero, 2018/A/5571

⁶ European Commission, *CASE AT.40208 -International Skating Union's Eligibility rules (2017)*

⁷ See inter alia *NFL Policy and Program on Substances of Abuse*; NHL – NHLPA Substance Abuse and Behavioural Program, NBA-NBPA 2017 – 2024 Collective Bargaining Agreement, article XXXIII, Major League Baseball's Joint Drug Prevention and Treatment Program, (2016) article 4A-B

⁸ *World Anti-Doping Code (2015)*, 'Introduction, p.17

⁹ See variously *NFL Policy and Program on Substances of Abuse*; NHL – NHLPA Substance Abuse and Behavioural Program; NBA-NBPA 2017 – 2024 Collective Bargaining Agreement, article XXXIII; Major League Baseball's Joint Drug Prevention and Treatment Program, (2016); NHL – NHLPA 2013 – 2022, article 47