

**NOTE TO WADA'S STAKEHOLDERS ABOUT DRAFT VERSION 2.0 OF THE INTERNATIONAL STANDARD FOR CODE COMPLIANCE BY SIGNATORIES (PUBLISHED ON 1 SEPTEMBER 2017)**

WADA is grateful for the comments received from stakeholders on draft version 1.0 of the International Standard for Code Compliance by Signatories (ISCCS), which WADA issued for consultation on 1 June 2017. Stakeholders overwhelmingly welcomed the amendments to certain Articles of the World Anti-Doping Code (the 'Code') on this topic, supported by a new International Standard, and also broadly welcomed the approach taken in the revised Code Articles and new International Standard. However, some stakeholders proposed amendments to certain specific provisions.

WADA has carefully considered all of the comments received, and has made amendments to address many of the changes proposed. It is now issuing revised drafts (version 2.0) of the Code Articles and International Standard, for further consideration by stakeholders. A redline is also being published that highlights all changes between draft version 2.0 of the ISCCS and the original draft (version 1.0, issued on 1 June 2017).

Please see section 1 below for a brief commentary on the changes we consider to be most material in draft version 2.0. We have also flagged various comments that WADA considers more appropriate to include as part of the broader Code review envisaged for 2018-2019 (see section 2). Finally, we have flagged two other relevant matters (see section 3).

**1. Major changes from draft version 1.0**

The major changes in draft version 2.0 of the International Standard for Code Compliance by Signatories, compared to draft version 1.0, are as follows:

- **Distinguishing Signatories acting in good faith from Signatories acting in bad faith:**
  - In response to many comments from stakeholders, draft version 2.0 of the ISCCS seeks to draw a clear distinction between (a) Signatories who are trying in good faith to comply with the requirements applicable to them; and (b) Signatories whose non-compliance is serious and deliberate or who are otherwise acting in bad faith.
  - In particular, the draft version 2.0 includes specific provisions (including a special fast track process) to enable WADA to take urgent and effective action to address instances of deliberate/bad faith non-compliance with Critical Code requirements. These are the cases that will be given the highest priority. (See, e.g., ISCCS Article 4.3 (definition of 'Aggravating Factors'); Article 8.2.3; Article 9.4).
- **Distinguishing between different types of non-compliance:**
  - The different requirements of the Code and International Standards are now classified as Critical, High Priority, or Other (see ISCCS Article 4.3). Further examples of the first two have been provided and further guidance has been added to Annex A. The presentation of the different categories has been reversed in Annex A, so that they now appear in decreasing order of gravity, for sake of clarity.

- **Prioritizing WADA's monitoring and enforcement efforts on the most important types of non-compliance:**

- In addition, again in response to stakeholder concerns, and also given WADA's limited resources, draft version 2.0 gives WADA express power to prioritize its monitoring and enforcement efforts by focusing on certain priority Signatories (determined by reference to objective factors) and also on Critical and High Priority requirements. (See ISCCS Article 8.2.3).

- Further to that power, WADA Management has developed a prioritization policy that it intends to submit for discussion and approval to the Compliance Review Committee (CRC) in September 2017 and subsequently to WADA's Executive Committee for endorsement in November 2017. In brief, that policy would:

- categorize Signatories into three tiers, based on the factors identified in ISCCS Article 8.2.2;

- prioritize the Signatories within each of those tiers based on their current level of Code compliance, evaluated in light of their responses to the recent Code Compliance Questionnaire and other relevant information and data available to WADA; and

- give all Signatories in these three tiers a Corrective Action Report identifying, classifying and explaining how to correct the non-conformities uncovered by their respective responses to the Code Compliance Questionnaire, but for the first two years following entry into force of the ISCCS, as a general rule based on ISCCS Article 8.2.4, WADA would only take further action in respect of Non-Conformities not corrected by the timeframe specified in the Corrective Action Report as follows:

- against Tier 1 Signatories, only if Critical requirements were not met within 3 months or High Priority requirements were not met within 6 months;
- against Tier 2 Signatories, only if Critical requirements were not met within 3 months;
- against Tier 3 Signatories, only by exception if Critical requirements were not met within 3 months.

- In addition, various timeframes for complying with WADA requests/correcting non-conformities/responding to WADA notices have been extended (see, e.g., ISCCS Article 8.7.4; Article 10.3.1), and it has been clarified that references to days are calendar days not business days unless otherwise specified (ISCCS Article 4.4.4).

- Where the Signatory is a Major Event Organization, a special fast track procedure has been introduced for the correction of non-conformities, to reflect the fact that the important period (for which corrections are required) is mainly limited to the event and the months leading up to the event. (See ISCCS Article 9.9.2 and 9.4).

- **Roles of the CRC and the WADA Executive Committee (ExCo):**

- Many stakeholders expressed a clear preference for the WADA Executive Committee, rather than the WADA Foundation Board, to consider recommendations by the CRC that

WADA take formal action against a Signatory for non-compliance. Given the greater specialization of the Executive Committee, its higher number of meetings per year, as well as ongoing discussions within the Working Group that is currently reviewing WADA's governance in relation to the addition of independent members to the Executive Committee, draft version 2.0 includes this preference by transferring this responsibility from the Foundation Board to the Executive Committee. (See Code Article 23.5.4 and ISCCS Article 10.2).

- To ensure transparency, ISCCS Article 10.2.1 provides that the CRC recommendation and WADA ExCo's decision in respect of that recommendation will be made public (e.g., by publication of the minutes of the relevant part of the ExCo meeting) no more than 14 days after the decision is made.
- In addition, any formal notice issued by WADA asserting non-compliance by a Signatory will be published by WADA (Code Article 23.5.4), as will the final decision on non-compliance and consequences, whether that decision is accepted by the Signatory (Code Article 23.5.5) or made by the Court of Arbitration for Sport (CAS) (Code Article 23.5.8).
- **CAS to determine any dispute as to non-compliance, consequences and reinstatement conditions:**
  - No change has been made to the core principle that WADA will not determine non-compliance and consequences itself, but instead (in case of dispute) will refer the matter to an independent tribunal for determination. (See Code Article 23.5 and ISCCS Articles 10.2 to 10.4).
  - However, many stakeholders suggested that disputes should be referred straight to CAS to determine (rather than first to another independent tribunal, with an appeal to CAS).
  - This has been actioned in draft version 2.0. Rather than disputes going to an independent tribunal and then any appeal going to CAS, draft version 2.0 provides that any dispute will go straight to CAS, where WADA will bear the burden of proving its assertion of non-compliance and the proportionality of the consequences and reinstatement conditions it has proposed. Any decision by CAS would then be final, and subject only to challenge before the Swiss Federal Tribunal on the normal grounds set out in section 190(2) of the Swiss Private International Law Act, i.e., improper constitution of the CAS Panel, lack of jurisdiction, ruling *ultra petita*, violation of right to equal treatment/right to be heard, incompatibility with Swiss public policy. (See Code Articles 23.5.6 to 23.5.10; and ISCCS Article 10.4).
  - In response to several comments, draft version 2.0 gives not only the International Olympic Committee (IOC) and International Paralympic Committee (IPC) but also affected International Federations (IFs), National Olympic Committees (NOCs) and National Paralympic Committees (NPCs) a right to intervene in the dispute, if they see fit. It also gives any other persons and organizations who consider they have a legal interest in the dispute the right to apply to intervene, with such intervention permitted if the parties agree or if CAS so orders. (See Code Article 23.5.7; ISCCS Article 10.4.1).
  - The alternative to this 'one-stop' proceeding would be to have CAS determine the case (as now) but also to give WADA and the Signatory (and those third parties listed above) a right to appeal against the first CAS decision to a second CAS Panel, with the second CAS Panel hearing the matter again *de novo* (i.e., from the beginning, without being

bound in any way by the first CAS Panel's decision). This is not the preferred option at this stage, given (1) the lack of any legal need or good reason to provide a right of *de novo* appeal to a CAS Panel against a decision that has been made by another (also fully independent) CAS Panel; and (2) the significant extra time and expense that this further round of legal proceedings would inevitably involve. However, parties that would be entitled to intervene (or to apply to intervene) in the 'one stop' CAS proceeding contemplated in version 2.0 of the draft ISCCS might prefer this alternative, because it would allow them to sit out the first stage of the proceedings (and so avoid any expense for themselves), wait to see if the outcome affects their interests materially, and only step in at that stage if it does, by seeking *de novo* review of the matter by the second CAS Panel. WADA will await stakeholders' comments on this point and will consider it again once those comments have been received and reviewed.

- **Consequences of non-compliance:**

- The principle of non-discrimination in treatment of different categories of Signatory has been expressly emphasised. (See ISCCS Article 11.2.3).
- In response to many adverse stakeholder comments, fines have been removed as a potential sanction except in the most extreme cases involving breach of Critical requirements and aggravating factors (i.e., deliberate breach, concealment, bad faith, etc). (See ISCCS Article 11.1.1.6; Article 11.2.2; Article 11.2.10).
- In addition, if a Signatory is required to pay any costs or expenses as a condition of reinstatement, provision has been made for an instalment plan so that it can be reinstated even if it still has some monies still to repay. (See ISCCS Article 11.2.3.1).
- Following written and verbal comments from International Federations, the current obligation to do everything possible not to award event hosting rights to a non-compliant country has been replaced with the clearer and more certain obligation not to accept bids for event hosting rights from a non-compliant country. (See Code Articles 20.3.11 and 20.6.6; ISCCS Article 10.1.1.5).
- Amendments have been made to clarify when and how a non-compliant Signatory's functions may be supervised or taken over by a third party, to try to minimize the risks of creating a gap in the global anti-doping coverage when a National Anti-Doping Organization or an International Federation is not authorized to conduct all or parts of its anti-doping activities as a result of non-compliance. (See amendments to definitions of Supervision and new defined terms Approved Third Party and Takeover; and ISCCS Article 11.1.1.4).
- It has also been clarified that WADA may specify post-reinstatement conditions to facilitate monitoring and to demonstrate the reinstated Signatory's continuing compliance. (See ISCCS Article 12.3.7).

## **2. Matters deferred for consideration as part of the broader Code review**

WADA considers that the following matters raised by stakeholders are better considered as part of the broader Code review envisaged for 2018-2019:

- How should WADA's own Code compliance be monitored and enforced? In fact, WADA is not a Code signatory and its structure, jurisdiction and mandate are not compatible with those of

a Code signatory. This matter – and in particular revision of Code Article 23.1.1 – will need to be discussed for clarification as part of the next Code review. WADA's activities are monitored by its Executive Committee and its Foundation Board. In addition, discussions are ongoing within the Working Group that is currently reviewing WADA's governance in relation to the potential creation of an Ethics or Supervisory Committee.

- Details of what precisely is expected of Signatories who are required to monitor and enforce Code compliance by their members/recognized bodies (in particular, clarification of the respective roles of International Federations and NOCs/NPCs in monitoring and enforcing Code compliance by National Federations).
- Whether or not the consequences for Signatory non-compliance currently set out in the ISCCS should be incorporated into the Code itself (e.g., as part of Code Article 12).
- Whether the role of the CRC should be mentioned in the Code itself.
- Whether individuals who are responsible for/centrally complicit in non-compliance by a Signatory should be subject to sanction under the Code (and/or whether Code Article 2.10 should be extended to prohibit association by Athletes/Athlete Support Personnel with such individuals).

### **3. Other matters**

The Foreword to draft version 2.0 of the ISCCS states that if there is sufficient consensus to proceed without a third round of formal consultation after 14 October 2017, the draft ISCCS will be presented for approval at the 15 November 2017 meeting of WADA's Executive Committee; while amendments to the Code will be presented for approval at the 16 November 2017 meeting of the Foundation Board. Generally, International Standards and Code amendments take effect three months after their approval. However, given that this date would be in the middle of the PyeongChang Winter Olympic Games (9-25 February 2018) and just before the Paralympic Games (9-18 March 2018), it is proposed that the ISCCS and Code amendments take effect on 1 April 2018.

Finally, following a number of suggestions, WADA has asked Judge Jean-Paul Costa, a former President of the European Court of Human Rights, to prepare an expert legal opinion on the proportionality of the proposed consequences on Signatories in the ISCCS (as he did in relation to the 2015 Code sanctions for individuals) and on certain other aspects of the ISCCS. The objective is to receive the legal opinion in time to incorporate any required modifications into the draft ISCCS prepared at the end of this second round of formal consultation, on 14 October 2017.