

**World Anti-Doping Agency Code 2015**  
**SEMS Medico-Legal and Anti-Doping Issues – A Pandora’s Box**  
**9 December 2016**


*“The World Anti-Doping Agency – the past and present challenges of tackling drugs in sport”*

So why is it so difficult? You’re a professional athlete. Your livelihood and reputation depend on you being able to compete in your chosen sporting environment. You have enviable talent and opportunity. All you have to do is to know about the World Anti-Doping Agency (“WADA”) and make sure you don’t take anything you shouldn’t. Where’s the difficult bit?

And yet it seems that doping in sport receives more commentary on the sports pages and even the front pages than ever before. Doping has taken a journey from the death of Tom Simpson on Mont Ventoux in 1967, through state sponsored drug use in the Iron Curtain era of the 1970s, to the high profile exposure of Ben Johnson at the 1988 Olympics, and onto the “EPO years” of professional cycling through the 1990s/2000s. These stories stand out as infamous sports stories of their decades. However, more recently, we seem to be unearthing more examples of drug use in sport or, at the very least, significant suspicion and inference around sport stars. Are we opening our eyes to abuse that has always existed or has there been an increase in the use of drugs in sport?

In truth the answer is probably yes to both questions but the World Anti-Doping Agency will certainly point to their work since they were set up in 1999 and their achievements in co-ordinating an effective anti-doping programme. This article will therefore look at how WADA came to be set up, what the WADA code actually says and the challenges for all those involved in elite sport in trying to abide by and implement the WADA code.

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## **The Establishment of WADA**


Historically the policing of drug use in sport was handled by individual sporting bodies and federations. The International Olympic Committee (“IOC”) was the most prominent as the IOC had responsibility for the biggest sporting event and thus had responsibility for the highest number of athletes. However, by 1998, the disparate nature of this approach to anti-doping, and the ever increasing commercial nature of sport, exposed significant structural flaws in the governing and the policing of drugs in elite sport.

Matters were brought to a head by the Festina drugs scandal at the 1998 Tour de France. Willy Voet was a soigneur for the Festina team who were competing in the 1998 Tour de France. On 8 July, 3 days before the start of the Tour, Willy Voet was stopped on the Belgium/French border as he drove to the start of the Tour. 234 doses of EPO were found in his boot. The French police investigation that followed shaped the future direction of anti-doping policy in sport. The Festina team were arrested and brought to trial. During the course of the criminal proceedings the confessions of professional cyclists and the Festina management team uncovered systemic doping throughout Festina and the peloton as a whole.

After the events that shook the world of cycling in the summer of 1998, the IOC decided to convene a World Conference on Doping, bringing together all parties involved in the fight against doping. The first world Conference on Doping in Sport was held in Lausanne, Switzerland, in February 1999 and produced the Lausanne Declaration on Doping in Sport.

The Lausanne Declaration provided for the creation of an independent international anti-doping agency and the World Anti-Doping Agency was established on 10 November 1999 to promote and coordinate the fight against doping in sport internationally.

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WADA was founded under the initiative of the IOC with the support of governments and public authorities. The intentional separation of powers established WADA with equal representatives and funding from the Olympic movement and public authorities. There was a clear wish to separate the IOC interests from WADA and this was encouraged with a geographical departure away from Lausanne (the home of the IOC and the Court of Arbitration for Sport “CAS”). WADA’s headquarters were established in Montreal, Canada, initially for a period of 10 years but thereafter extended until 31 December 2021.

### **WADA’s Mission**

WADA’s purpose is to protect the rights of athletes to participate in clean sport and ensure harmonised anti-doping controls across national and international sports. Take a moment to look at the scale of that task – Establishing the rules themselves as well as seeking implementation and enforcement taking account of different jurisdictions, cultures, Governmental structures and languages is no mean feat.

Whilst the Lausanne Declaration led to the creation of the WADA code, many governments cannot be legally bound by a non-governmental document and therefore an international treaty was created - the UNESCO International Convention against doping in Sport – which has been signed by 174 countries. By ratifying the convention Governments have committed themselves to aligning domestic policy with the WADA code. However, enforcing sanctions against countries who do not adhere to the code is more difficult than those countries agreeing to sign up in the first place.

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## **The Code Itself**

The first WADA code was implemented by international federations prior to the Athens Olympics in 2004. A revised code came into being on 1 January 2009 and further amendments came into effect on 1 January 2015.

The stated purpose of the code is to:

- Protect the *Athletes'* fundamental right to participate in doping free sport
- Ensure harmonised, co-ordinated and effective anti-doping programs

*The fundamental rationale for the code is:*


*“to seek to preserve what is intrinsically valuable about sport, often referred to as “the spirit of sport”. It is how we play true. The spirit of sport is reflected in the values we find in and through sport. Doping is fundamentally contrary to the spirit of sport.”*

The essence of the rationale of the code is clearly set out. However, the nebulous nature which attaches to all the elements of the rationale demonstrate the challenge in trying to achieve these aims.

### Article 2.1: Anti-Doping Rule Violations

“It is each athlete's personal duty to ensure that no prohibited substance enters his or her body....Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated.”

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Strict liability exists where a prohibited substance is detected. There is no burden of establishing any conscious element on the part of the anti-doping authority although the athlete may wish to argue that there was no intention to cheat to reduce the sanction imposed.

### Article 3: Proof of Doping – Burden and Standard of Proof

*“The anti-doping authority shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be that the violation is established to **the comfortable satisfaction** of the hearing panel. That is to say greater than a mere balance of probability but less than proof beyond a reasonable doubt”*


This is a curious middle ground by way of a standard of proof between the balance of probabilities and beyond reasonable doubt. It is linked to the standard required by the Court of Arbitration for sport which is based in the Swiss jurisdiction but it does present a somewhat difficult target area to hit with the subjectivity which seems to go with this standard.

### Article 4: The Prohibited List

The prohibited list is a cornerstone of the WADA code and a key component of harmonisation (<http://list.wada-ama.org/> )

*“WADA shall, as often as necessary and no less often than annually, publish the Prohibited List”*

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#### Article 4.4: Therapeutic Use Exemptions

*“The presence of a prohibited substance shall not be considered an anti-doping violation if it is consistent with the provisions of a TUE”*

The Fancy Bears leaks have created significant inference and insinuation around the use of TUEs and the potential for them to be abused. TUEs are an essential part of the code. If an athlete needs treatment and the only way of treating him or her is with an otherwise prohibited substance then the athlete must receive that treatment. However, once this rule exists, it is open to be used and possibly abused to hide other substances.

An extract from Tyler Hamilton’s “The Secret Race”:


*“Another way to hide was through the use of TUEs, which were mostly for cortisone...the team doctors would invent some phantom problems - a bad knee, a saddle sore – and write a note allowing you to use cortisone. The only trick was remembering what made up ailment the doctor had given you – was it your right knee or your left?...”*

And David Millar’s “The fall and rise of David Millar”:

*“Even now cortisone is abused by some, its use being hidden behind TUEs...”*

It is therefore clear that the issuing of TUEs needs to be approached in such a robust way as to leave no opportunity for suspicion or insinuation.

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## Article 8: Right to a fair hearing

*“For any person who is asserted to have committed a doping violation, they are entitled to a fair hearing within a reasonable time by a fair and impartial hearing panel”*

“The reasoned hearing decision shall be provided to the athlete with a right to appeal under Article 13.2.3 (i.e. to Court of Arbitration for Sport)

## Article 10: Sanctions


- Disqualification of results
- Ineligibility
  - 4 years if a specified substance is detected
  - 2 years if the athlete can establish there was no intent to cheat


## Article 17: Statute of Limitations

“No proceedings may be commenced against an athlete unless notification of the violation has been reasonably attempted within 10 years of the date of the violation”.

## **Enforcement of the Rules**

Knowing the rules is the starting point but the implementation, interpretation and enforcement of those rules throws up challenges for all those involved in elite sport.

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WADA's jurisdiction and credibility is dependent on enforcement by others. However, as highlighted in the lead up to the Rio Olympics, this creates a precarious position for the organisation with the brief to police doping in world sport.


The McLaren report found that:


1. The Moscow laboratory operated, for the protection of doped Russian athletes, in a State-dictated failsafe system.
2. The Sochi laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games.
3. The Minister of Sport directed, controlled and oversaw the manipulation of athletes' analytical results and sample swapping.

Arising from the McLaren report, WADA recommended to the IOC that all entries from the Russian Olympic Committee be declined.

The IOC's response was that Russian athletes in any of the 28 Olympic summer sports have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions, and the "presumption of innocence" cannot be applied to them. However, the rules of natural justice had to be applied. Meaning that each affected athlete was given the opportunity to rebut the applicability of collective responsibility in his or her individual case. At this point the IOC passed responsibility for determining this onto the International Federations who had responsibility for their sports.

Arising from this most recent example demonstrates the circle that WADA attempts to square. Through establishing the rules and undertaking investigations, WADA can bring doping to the door of Court but it is then dependent on others to rule on enforcement and

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punishments. Whilst this may be justified to avoid a conflict of interests on WADA's part, it re-introduces the problem that the 1999 Lausanne Declaration sought to overcome. Namely, the IOC or the Independent Federations are the ones ultimately responsible for sanctioning their own athletes.


### **Abiding by the rules**

Away from the political difficulties and the issues of governance, why is it so difficult for athletes to stay clean. The WADA code is "the rule book" and, as with any rule book, written rules are open to interpretation. Human nature is such that interpretation can translate to many different things and it is certainly the playing field for lawyers. Where one lawyer finds a violation another finds an exemption. So having an understanding of the WADA code is essential but the WADA code simply establishes the rules of the game, the implementation, interpretation and enforcement is the game itself. Therefore, athletes reach for the rule book on a variety of occasions:

- 1) when they find themselves in trouble
- 2) to learn how to stay on the right side of the line
- 3) to learn what they can get away with

Whilst doping may appear to be black and white it is, more often than not, shades of grey. Ben Johnson may have been pumped full of anabolic steroids at the 1988 Seoul Olympics but what of Alain Baxter who lost his bronze medal at the 2002 Salt Lake City Winter Olympics having used a nasal spray in the US – the UK version was permitted but the US version was not. Maria Sharapova tested positive for Meldonium on 26 January 2016. Meldonium is a heart medication that is said to increase the blood flow but also assists an athlete's recovery. Ms Sharapova had been taking Meldonium since 2006. It was added to the prohibited list on 1 January 2016 and so for the 10 years previously she was permitted

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to take the drug without fear of sanction. However, once 2016 came around, she became a drugs cheat. Hypothetically, what if Ms Sharapova didn't have a heart condition and therefore took Meldonium for 10 years to enhance her performance. It wasn't on the prohibited list but should she really have been taking it?


Whatever stories are picked, a spectrum of offences unfold from deliberate cheating to playing the rules to masking agents to ill-advised/ignorant decisions. Therefore, the athletes must tread carefully whilst the anti-doping authorities charged with prosecuting the offences must ensure just sanctions are commensurate with the offences committed.

### **Conclusion – future challenges**

We hear that marginal gains produce the steps to success and in the uber competitive and financially lucrative environment of elite sport the WADA codes produces an ethical and moral minefield for athletes, sports medics and management teams. For the athletes, plotting the right path and observing the spirit of sport will continue to be the perennial challenge going forward.

And, in the opposing corner, what of the implementation and enforcement of the code. The finance that the sports industry attracts shows no sign of abating. Preserving the sports brands and the value that that confers onto sponsors is non-negotiable. Therefore, whether motivated through the need to preserve the integrity of sport for the benefit of the athletes or to preserve the commercial brand value, sports federations must ensure that the WADA code is respected and enforced. The challenge for sporting federations and the IOC in particular is establishing the appropriate forum to ensure that the recommendations arising from WADA's work are implemented to preserve the spirit of sport with the knowledge that the athletes involved are playing true.

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It is fair to say that we can expect much more commentary on the issue of drugs in sport in the years to come.

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