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On the Efficacy of WADAs Whereabouts Policy: Between Filing Failures and Missed Tests

Wirksamkeit der WADA – „Whereabout Policy“ – Dokumentationsprobleme und „Missed Tests“

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SUMMARY

This study explores a controversial aspect of the new World Anti Doping Agency Code, which requires athletes in registered testing pools to submit accurate data concerning their whereabouts for one hour every day, three months in advance, to allow effective year round testing. In particular, the policy is designed to heighten the effectiveness of out-of-competition testing and close the loophole on athletes who have sought to use remote locations to avoid doping control officers. If an athlete misses three tests or records three filing failures they are deemed to have committed a doping offence, leading to a ban of up to two years. We present data from 20 National Anti Doping Organizations and 1 International Federation (cycling) regarding similar data. They reveal substantial variations in filing failures across organizations. We argue that the fairness of the system, however, is potentially vulnerable to variable interpretations of compliance, and to inaccurate and non-transparent administration regarding filing failures and missed tests. We conclude that there is a need for greater communication between anti-doping organizations and harmonization of interpretation and compliance of the rules.

Key Words: Anti-Doping, whereabouts, out of competition testing, fairness in sports.

ZUSAMMENFASSUNG

Diese Studie untersucht einen umstrittenen Aspekt des neuen World Anti-Doping Agency Codes, der von Sportlern in eingetragenen Testpools jeweils erfordert, genaue Daten ihres Aufenthaltsortes, drei Monate im Voraus, für eine Stunde pro Tag bereitzustellen. Ziel ist es, ganzjährig wirksame Tests durchzuführen. Insbesondere ist der Grundsatz dafür entworfen, die Wirksamkeit von nicht wett-kampfmäßigen Tests zu erhöhen und die Lücke bei Athleten zu schließen, die versucht haben, entfernte Standorte zu nutzen um Dopingkontrolleure zu umgehen. Wenn ein Sportler drei Tests verpasst oder drei "missed tests" verzeichnet werden, wird dies als ein Dopingvergehen angesehen, welches zu einem Verbot von bis zu zwei Jahren führt. In der Untersuchung werden Daten aus 20 nationalen Anti-Doping-Organisationen auf und einem internationalen Verband bezüglich ähnlicher Daten angeführt. Die Daten zeigen beträchtliche Unterschiede bei den Ausfallmeldungen in den Organisationen. Es wird angenommen, dass die Gerechtigkeit des Systems, potenziell anfällig für unterschiedliche Interpretationen der Einhaltung und zu ungenauer und undurchsichtiger Handhabung in Bezug auf Ausfallmeldungen und verpassten Test führt. Darau lässt sich folgern, dass eine bessere Kommunikation zwischen den Anti-Doping-Organisationen und der Koordination der Auslegung und Einhaltung der Regeln notwendig ist.

Schlüsselwörter: Anti-Doping, Aufenthaltsort, Dopingtest außerhalb des Wettkampfs, Fairness im Sport.

INTRODUCTION

During the May 2010 WADA Foundation Board meeting an interesting problem was raised by the Belgium Minister of Sport regarding the punishment of two Belgium tennis players who recorded three failures to file correct whereabouts information, which is obligatory under WADAs new 2009 Code (WADC). He said that no other athletes are punished because of filing failures. Based upon this supposition the athletes went to Civil Court to protest against an alleged violation of their rights to privacy. The response of the general public was a strong one: in one day alone more than 500 e-mails and letters were sent to the Belgian Minister of sport.

What is the background to this apparent controversy? The revised International Standards for Testing (IST) came into effect on January 1, 2009 along with the revised WADC (1). Two major changes

in relation to Whereabouts information and missed tests were introduced: (i) the requirement for top-level athletes included in the Registered Testing Pool (RTP) of either their International Federation (IF) or National Anti Doping Organisation (NADO) to specify 1 hour each day (between 6 a.m. - 11 p.m.) during which they must be available at a specified location for testing; and (ii) the harmonization of anti-doping rule violations in relation to Whereabouts and missed tests, and subsequent sanctions. Any combination of 3 missed tests (either NADO or IF) and/or failures to provide accurate Whereabouts information within an 18-month period could now bring about disciplinary proceedings by the Anti Doping organization (ADO) with jurisdiction over the athlete. Sanctions now range between 1 and 2 years depending on the particular circumstances of the case. Previously sanctions were at the discretion of ADOs, who worked within a suggested range of between 3 months and 2 years.

Critics of the new rules immediately came from several high profile professional athletes and players, as well as FIFA medical committee chairman Dr. Michel D'Hooghe, who complained that the system was both impractical and/or an invasion of an athletes' right privacy. D'Hooghe who called the new rules an "inquisition", while UEFA President Michel Platini railed against the players being available 365 days a year for testing (2). In Belgium, 65 athletes have started court proceedings against the system, citing Article 8 of the European Convention on Human Rights (ECHR). In response, the World Anti Doping Agency (WADA) was prompted to observe that it had taken enough legal advice to make sure the rules fell within the provisions of the ECHR (3).

At November 2009 the International Tennis Federation announced that two Belgian players, Yanina Wickmayer and Xavier Malisse, had committed an Anti-Doping Rule Violation. The Vlaams Doping Tribunal (VDT) ruled that they violated Article 2.4 of the 2009 WADC (Athlete Availability for Out-of-Competition Testing having three times failed to submit accurate information in an 18-month period. As a member of the Flanders (Belgium) Registered Testing Pool (RTP), they were required to provide accurate Whereabouts in accordance with the mandatory requirements of WADC. A suspension of 1 year was recommended, commencing on 5.11.2009. National Anti-Doping Organisation Flanders, on whose behalf VDT heard the case, is a signatory to the WADA Code, and in accordance with Article Q.1 of the Tennis Anti-Doping Programme, the ITF recognized the decision of VDT, and took steps to enforce it (4,5).

Nevertheless, only a month later the ITF lifted the bans saying: Following the appeal by Belgian tennis players Xavier Malisse and Yanina Wickmayer against the suspensions imposed on them by the Doping Tribunal of the Flemish National Anti-Doping Organization (NADO Flanders) for the commission of three Whereabouts failures in an eighteen-month period, a Belgian civil court has ordered NADO Flanders that the suspensions be lifted pending further appeal. As a signatory to the WADA Code, the ITF is required (under article 15.4 of the Code) to give wider recognition to decisions within the authority of other signatories. NADO Flanders is also a signatory to the Code, and accordingly the ITF has removed both Mr. Malisse and Ms. Wickmayer from the list of suspended players, and both are eligible to participate with immediate effect (6).

Given that their actions are contrary to WADC the question is raised as to why such an intervention (via a national civil court) should be sought and what political implications arise thereby. Given that so many elite athletes and their medical and scientific entourage are now bound by WADC, this about turn raises a range of ethical and legal issues concerning compliance, fairness, governance, and transparency. The present study is limited to an attempt

Table 1: Filing failure and missed test survey among ANADO members.

Legend: RTP = registered testing pool; 1ff = 1 filing failure; 2ff = 2 filing failures; 3ff = 3 filing failures; mt = missed test; mt + ff = combination of missed tests and filing failures; ~ = no data, ** NADO who gave all data *** = only total number of ffs returned and mt (missed test).

| no | ADO | RTP | 3 ff | 2 ff | 1 ff | mt | mt + ff |
|-----------|-------------|--------|------|------|----------|------|---------|
| 1 | Armenia | 22 | 0 | 0 | 0 | 0 | 0 |
| 2 | Austria | 250 | 0 | 0 | 42 | 9 | 0 |
| 3 | Canada | ~ | 2 | ~ | ~ | ~ | ~ |
| 4 | Croatia | 164 | 0 | 0 | 17 | 0 | 0 |
| 5 | Cyprus | 80 | 0 | 0 | 18 | 0 | 0 |
| 6 | Czech | 290 | 0 | 3 | 30 | 14 | 1 |
| 7 | Estonia | 130 | 0 | 0 | 0 | 2 | 0 |
| 8 | Germany | 631 | 0 | 22 | 266 | 28 | 4 |
| 9 | Ireland | ~ | 0 | 6 | 19 | 16 | 0 |
| 10 | Italy | ~ | 0 | 0 | 0 | 0 | 0 |
| 11 | Japan | 370 | 0 | 0 | 14 | 0 | 0 |
| 12 | Korea | 214 | 0 | 1 | 3 | 0 | 0 |
| 13 | Latvia | 32 | 0 | 0 | 0 | 0 | 0 |
| 14 | New Zealand | 160 | 0 | 1 | 16 | 13 | 0 |
| 15 | Poland | 0 | 0 | 0 | 0 | 0 | 0 |
| 16 | Romania | 300 | 0 | 0 | 1 | 0 | 0 |
| 17 | Serbia | 109 | 0 | 5 | 29 | 5 | 1 |
| 18 | Slovakia | 306 | 0 | 1 | 29 | 0 | 1 |
| 19 | Switzerland | 160 | 0 | 6 | 59 | 0 | 1 |
| 20 | UCI | 1040 | 0 | 1 | 66 | 23 | 2 |
| 21 | UK | ~ | ~ | ~ | 98*** | ~ | ~ |
| TOTAL** | | 3218 | 2 | 45 | 543 | 87 | 8 |
| AVERAGE** | | 201,13 | | 2,50 | 30,16667 | 4,83 | 0,44 |
| MEDIAN** | | 162 | | 0 | 16,5 | 0 | 0 |
| MODE** | | 160 | | 0 | 29 | 0 | 0 |

to explore the state of play regarding the whereabouts policy, with particular reference to filing failures and missed tests.

METHODS

To establish whether this challenge to WADAs Whereabouts policy is based on idiosyncracies or structural problems we surveyed a range of NADOs to see whether there were other bans arising from filing failures. At the time of sending out questionnaires there were 54 NADOs. A simple questionnaire was distributed to heads of international communication of 54 NADOs and 17 International Federations (IFs) under the Association of National Anti Doping Organizations data sharing arrangement, with five questions requesting data on the amount of filing failures, missed tests, as well as number of the athletes in RTP.

RESULTS

20 NADOs and 1IF responded. Of the 20, 17 NADOs completed all questions. Data from 4 NADOs were incomplete (marked with asterisk*). All data returned, including incomplete returns, are included in the table 1 below.

Some words of explanation are required before the data are discussed. Despite the presence of a data sharing agreement between ADOs, the process of collecting data from different ADOs was not straightforward. Nevertheless, the majority of the sample replied in few days. It also proved difficult to secure responses to all the questions raised. This point is discussed in detail below. It is notable that the Armenian, Austrian, Croatian, Cypriot, Estonian, Japanese, Latvian, Polish, and Romanian ADOs reported that no athlete had 3 or 2 filing failures given that they had a combined RTP of 1003 athletes. Among these it is noted that the Polish return was a 0 for all categories. The German ADO, with the highest national RTP in the table (631) registered a total of 22 such failures. Moreover, the German return for athletes with one filing failure (266) was approximately equal to the sum of all other (19) countries of the sample who returned data for the same (277). This may lead the naïve to think that administrative tardiness was a national elite athletic trait.

Other notable data points are that among the second largest recorded testing pool ($n=370$) the Japanese ADO record a very low one failure datum ($n=3.78\%$) while the Germans were the largest (42.16%). That the absence of missed tests among is distributed among smaller nations (Armenia, Croatia, Cyprus, Korea, Latvia, Poland, and Romania) is also noteworthy. Two exceptions to this norm are Japan (RTP=370) and Italy (no RTP data supplied) who also register no missed tests.

DISCUSSION

First, it even this small survey reveals wide variations among the size of the RTP of different countries. Secondly, complex statistics are not necessary to see that smaller countries with smaller RTPs have a tendency to report little or no filing failures or missed tests. This may prompt questions as to the volume of data captured by the smaller NADOs and the volume of testing controls. Thirdly, it is clear that UK NADO reported only total filing failure data and responded that UK Data Protection laws prevented the sharing of individual data. How this fact corresponds with the data sharing agreement across anti-doping organizations that exists across global anti doping is not clear.

Data is obtainable, however, from other sources. Thus, from Canadian Centre for Ethics in Sport we received information that there were two athletes with 3 filing failures. Likewise, from an Australian Sport Anti Doping Authority (ASADA) media release we ascertained knowledge of the punishment of 1 baseball player due to 3 filing failures.

Italy, like the UK, responded with only total data for filing failures. The UK response noted above is, however, contrary to the Code and the International Standard for Testing (IST). Since Article 11.2.2 of the IST requires the publication of (i) the amount of athletes in the RTP, and (ii) the name(s) of the athlete(s) included in the RTP. The requirement of article 11.2.2 IST should be interpreted to mean that this information will be available to those who legitimately request it in order to ensure appropriate and efficient coordination of anti-doping activities. Specifically, any other ADO who may be entitled to test the athlete and/or include them in their own RTP may be entitled to such information. Moreover, IF/NADOs must publish the list of the athletes who meet the criteria and who are thus included in its RTP (Article 2.27.). Clearly some resolution of

general legal requirements on data holders and sports anti-doping governance requirements is necessary.

A serious complication arises from the fact that IFs/NADOs may not share data that might enhance the effectiveness of anti-doping policy. So, for example, there may be duplication of testing by both parties. Conversely, a person withdrawn from a testing pool may end up being tested when they should not be. It is necessary to ask, then, what level or form of data must be withheld for lawful reasons of privacy (and therefore what level or form of data may be shared across IFs/NADOs)? Our survey has showed that the problem of filing failures was clearly an issue for Anti-doping organizations, since 15 NADOs out of the sample (72%) have registered 1 filing failure, while 9 (45%) register two failures, with a similar number of missed tests (35%) and similar number of NADOs (6) reporting combined filing failure and missed tests (30%). At one level, then, it can be said that the system appears to be working since so many NADOs are reporting missed tests.

WADA data on RTP, filing failures and missed tests

Comparing our data with the numbers announced by WADA at its Foundation Board in May 2010 and revisited in personal communication with a WADA senior manager, some important discrepancies emerge. Moreover, the data presented by WADA in May reflect data collected from NADOs in 2009 whereas our data are from May 2010. It is important to note that our sample covered a period of 17 months whereas the WADA table below covers only the preceding 12 months. The differences in the sample sizes and duration make complex comparisons problematic. Nevertheless we draw out some important points of contrast below (Tab. 2):

Table 2: Comparison of WADA data with present study.

| | 31 NADO average by WADA survey | 20 NADO average by our survey |
|------------------------------|-----------------------------------|----------------------------------|
| registered testing pool size | 441 | 201 |
| # of filing failure in 2009 | 50 (11.33%) | 30 (14.92%) |
| # of missed tests in 2009 | 17 (3.85%) | 5 (2.49%) |

First, it is difficult to understand how the average testing pool size is 441 as WADA announced, since our analysis has showed that all NADOs except German (631) have a smaller number of athletes in their RTPs. The presence of 3087 USA athletes in the 2009 RTP does not alone explain the difference. Nor is it easy to explain how the data reporting of filing failures (50 or 11.33%) in WADAs survey is to be reconciled with ours (30 or 14.92%), where a smaller sample taken over a longer period produced a higher frequency. Can the German NADO figures have skewed our data to an extent that would have explained the difference? It is of course possible. But this would not explain, however, the discrepancy between WADA data and our survey regarding missed tests (17 or 3.85%) compared to (5 or 2.49%), where WADA data present notably higher values. How these data are related to absent mindedness or evasion is of course a further pressing issue for IFs and NADOs but there is no obvious way to determine this on a large scale. Nor is it obvious

how the variations between NADO RTPs are to be interpreted. While beyond the scope of this study it seems an obvious question to raise in light of the data discrepancies.

The issue of which data are more credible is difficult to determine. This difficulty is compounded by the fact that they come from similar sources. It is not clear how this is to be explained without further and more precise data being available. However, taken at face value, even an average number of 30 NADO athletes with 1 filing failure and 5 with 1 missed test (in our survey) suggests that the problem of compliance is not limited to Belgian athletes. Given that athletes, IFs and Sports Politicians have reacted strongly to the whereabouts system, questions as to the efficacy of its operation are vital to its credibility and justification. In a climate of suspicion and mistrust, questions are always likely to arise about the efficacy of whereabouts and integrity of ADOs. We believe that the data for RTPs, filing failures and missed tests should be made public on an annual basis, and analyzed and distributed among NADOs without omission. This is important for issues of equity, harmonization and transparency.

Finally, we consider the only data in our survey returned by an IF. UCI returned data with a very large RTP (1040). It is notable that only 6.35% of the RTP have registered one filing failure. The context to this datum is worth dwelling on. Historically, the first athlete who is punished because of 3 filing failures is Danish cyclist, Michael Rasmussen, in the latter stages of the Tour de France. The CAS panel of three lawyers said Rasmussen violated the sport's anti-doping rules by repeatedly trying to avoid testing teams from the Danish Anti-Doping Agency. Following his expulsion, Rasmussen argued successfully that his team knew he was actually in Italy and France (7). His assertion was later upheld in a Dutch court of law in Utrecht, where his Team Sponsors were required to pay substantial compensation for wrongful dismissal (8).

That was not, however, the first successful prosecution within professional cycling arising from the whereabouts policy. Spanish Cyclist, Carlos Roman Golbano, who challenged the legitimacy of the Whereabouts system since, he alleged, it was contrary to individual privacy rights guaranteed by the Spanish Constitution. The provincial court in Almería, Spain, rejected the appeal by Golbano (9). It is unclear whether this low incidence is a function of the strong anti-doping posture adopted by professional cycling's international body and key event organizers; a sea-change in cycling culture; or inconsistencies across NADOs. That the cases here arise in the geo-cultural context of north-western Europe is noteworthy in political terms since EU legislation has had broader impacts with respect to sports governance where it has often allowed professional sports, notably football, to be something of an exception (10).

Recent European challenges to Anti Doping governance and other international cases

Recently 65 Belgian athletes decided to challenge the legitimacy of the Whereabouts policy under the European Convention on Human Rights. Eleven months later the two Belgian professional tennis players: Malisse and Wickmayer have been punished for 3 filing failures in successive trimesters. It may be reasonable to surmise that this is not random. Whether this is the product of a more significant – though implicit – response to excessive surveillance or intrusion is unclear. Norwegian and UK studies suggest that some of their elite athletes see the surveillance regime as a necessary

evil (11,12). Notably these surveys come from countries whose NADOs are thought to be leading best practice. Moreover, data from Denmark and the UK with elite athletes suggest a form of sporting xenophobia where athletes from other countries are thought to escape compliance to whereabouts measures (13,14). According to Belgian political officials, it is the general public that have been concerned about the issue not simply sports politicians (15). If WADA cannot secure public legitimation for their Whereabouts policy in Europe (where the case is still pending) there will be serious consequences for WADAs global harmonization agenda.

Whether the Belgian case represents a more concerted effort (whether legal, social, or purely athlete-driven) is a moot point, and one worthy of further consideration by anti doping policy makers. Nevertheless, WADA and NADOs may see the challenge of the European athletes as a potential threat to their legitimacy. Indeed, at an international level it may be a symptom of problematic relations between EU (sports) politicians and WADA. Yet, if there is political motivation by EU (sports) politicians antithetical to WADAs global governance aspirations, this raises questions as to the stance of those nation states who have signed the Copenhagen Declaration, UNESCO convention and many other anti-doping policy developments.

CONCLUSION

It seems reasonable to suppose that acceptance of the new Whereabouts system will become a more widely accepted part of elite sporting life, after initial skepticism regarding its intrusiveness and problems regarding standardization and compliance. Nevertheless, two points are worth highlighting. First, nothing is likely to undermine support for the whereabouts system than the perception that some athletes are being subjected to more stringent interpretations or standards of compliance. Our survey data suggest that there are significant differences in reported data concerning filing failures and missed tests than is widely known and, perhaps, reasonably accepted. These discrepancies deserve wider and transparent reporting. The skepticism regarding the efficacy of the Whereabouts policy has generated intense communication between WADA, IFs, and sports politicians. In the Belgian case that we have highlighted, it may well be the case that the Whereabouts policy is serving as a foil for larger political and legal disputes. This matter does nothing if not highlight further the need for greater education of athletes, IF/NADO officials, and elected Ministers with responsibilities for sports. Moreover, the case highlights the need for WADA to work more closely with States parties to press further their harmonization goal. The UK's Data Protection Act and its apparent tension with WADA data sharing agreements is a specific case in point. This general point holds true despite the fact that more than 130 countries have signed up to the 2009 WADC (16). It also begs the question of what signing up to the Code actually binds States' parties to and whether variations in compliance and interpretation are leading to a somewhat uneven playing field for athletes and their medical and scientific support teams at an international level.

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