

Ministry of Health, Welfare and Sport

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Subject Compliance with the World Anti-Doping Code

*All correspondence addressed
to the postal address quoting
date and reference of this
letter.*

Dear Mr. Niggli,

Your next Executive Committee meeting will be on 14 September. I understand from the Compliance Unit's letter dated 18 August 2021 that a specific issue relating to non-compliance in the Dutch situation is one of the agenda items to be discussed during that meeting. I would like to avail myself of this opportunity to provide you with additional information prior to your meeting about the steps taken by the Dutch government and Doping Authority Netherlands to amend the Dutch anti-doping regulations in this respect.

I understand from your letter dated 28 July that the Executive Committee has been asked to consider a non-compliance statement relating to Doping Authority Netherlands. Your letter dated 18 August 2021 explains that this request relates to WADA's vision with respect to the position of the National Doping Regulations Appeals Committee (hereinafter: the BND).

Appeals concerning anti-doping rule violations are heard in the Netherlands by the Institute for Sports Law and by appeals committees organised by the sports federations and organisations. Both the ISR and the other appeals committees are completely independent of Doping Authority Netherlands in institutional and operational terms. In addition, Doping Authority Netherlands has its own committee in the form of the BND, which is exclusively competent to hear objections and appeals which - in summary - are lodged against the decisions referred to in Article 13.2 of the WAD Code and against decisions by the Therapeutic Use Exemption committee with respect to applications for therapeutic use exemptions.

The BND therefore considers only cases not heard by the other committees and it has consequently heard only two cases since it was established more than two and a half years ago. I understand that WADA's objections relate solely to the position of the BND.

In the letter of 3 August 2021 (reference 069/HR/AvdG), Doping Authority Netherlands explained once again how the Dutch legal system operates in this respect and how, in that context, the BND arrives at its decisions independently. Please find that letter enclosed for your information. On 5 August 2021, there

were consultations between WADA, Doping Authority Netherlands, the Council of Europe and the Ministry of Health, Welfare and Sport. In WADA's opinion, the BND does not meet the requirement of being 'institutionally independent' of the Doping Authority.

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It is obviously the intention of the Netherlands, and Doping Authority Netherlands in particular, to pursue an anti-doping policy that complies not only with the Dutch legal system but also with the WAD Code. The intention is therefore to table a bill as soon as possible to establish a position for the BND which is, in legal terms also, entirely independent of Doping Authority Netherlands, making the BND the appeals body for the decisions referred to in Article 13.2 of the WAD Code. Pending the passing of the bill into law, the Netherlands would like to comply with the WAD Code as far as possible. Doping Authority Netherlands will, in the very short term (as of 1 October 2012), amend the Rules for the National Doping Regulations Appeals Committee. That will establish a position for the BND with respect to Doping Authority Netherlands that will be as independent as possible in the current statutory context.

I would like to provide you with a brief explanation of these two solutions below.

Legislation

The Dutch Anti-Doping Policy Implementation Act (Wuab) sets out the position and competences of Doping Authority Netherlands. General legislation, such as the General Administrative Law Act, the Government Information (Public Access) Act and the NSA Framework Act, also applies to Doping Authority Netherlands and its operations, as is the case for all independent administrative bodies. I intend to draft a bill to amend the above act which, in derogation from the General Administrative Law Act, would make the BND the sole appellant body for the appeals referred to in Article 13.2 of the WAD Code. This will be done to ensure that the BND has a fully independent legal position and to safeguard compliance with Article 13.2 of the WAD Code. More specifically, this effectively means the following.

- A new separate *independent administrative body* will be established by law - in addition to the independent administrative body Doping Authority Netherlands - through the amendment of the Anti-Doping Policy Implementation Act. This independent administrative body will be the sole body for appeals against the decisions referred to in article 13.2 of the WAD Code, as well as against decisions relating to therapeutic use exemptions.¹ This independent administrative body will therefore have its own competences and a separate position in the budget of the Ministry of Health, Welfare and Sport. The administrative body will therefore be institutionally independent of Doping Authority Netherlands, the sports associations and the Ministry.
- The Framework Act for independent administrative bodies will apply to this new administrative body. That act focuses mainly on the structure and operations of an independent administrative body.

¹ This will be an amendment to the act which requires the consent of both the First and Second Houses of the Dutch Parliament. In this case, approval is granted by a simple majority.

- By contrast with the usual appeals procedure now in place, an athlete will have the option of lodging an appeal with the new administrative body against decisions made by Doping Authority Netherlands. An appeal against a decision by Doping Authority Netherlands concerning, among other things, applications for therapeutic use exemptions and compliance with sanctions will therefore be heard by *another* administrative body, namely the new administrative body. The new administrative body may make decisions in appeal procedures in accordance with its own judgement and will not be accountable for its decisions to either Doping Authority Netherlands or the Ministry of Health, Welfare and Sport. Naturally, decisions made by this new administrative body will be accompanied by procedural safeguards such as the obligation to state adequate grounds for the appeal decision at all times and the right of interested parties to be heard and to call on experts.
- The new administrative body will also hear appeals under association law. If an athlete instigates either administrative or disciplinary proceedings against the same decision, these appeals will be heard together by the BND. It should be pointed out that the new administrative body will also be competent to draft additional internal regulations about its own operations or to clarify procedures.
- Members of the BND will be appointed, suspended or dismissed by the Minister of Medical Care and Sport. The Minister of Medical Care and Sport will appoint the chambers of the BND (the legal chamber and the chamber for applications for therapeutic use exemptions) and will also appoint the president of each of these chambers.
- Employees of Doping Authority Netherlands will not be eligible for appointment to the BND. Nor will persons working at the Ministry of Health, Welfare and Sport, insofar as they are engaged in anti-doping activities, be eligible for appointment to the BND.
- Appointees will be required to be competent in the field, i.e. in the field of administrative and association law or, in the case of decisions relating to therapeutic use exemptions, the field of medicine. The Minister of Medical Care and Sport will monitor the independence of the members, inter alia by checking, prior to any appointment, whether one or more secondary positions could result in a conflict of interest or the impression of such a conflict. Members will immediately report any secondary position to which they are appointed during their membership of the BND to the Minister of Medical Care and Sport.
- The chambers of the BND will be assisted by a secretary. This secretary will be placed at the disposal of the BND by the Minister of Medical Care and Sports. Persons employed by Doping Authority Netherlands will be excluded from the position of secretary. The secretary will be accountable solely to the chamber he or she assists and - like the members, of course - not to Doping Authority Netherlands or the Minister.
- In terms of funding, both the members of the BND and the secretary or secretaries will be paid exclusively by the Ministry of Health, Welfare and Sport.

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Naturally, an amendment to the legislation - for which I will take the initiative - will have to pass through the usual legislative procedure in the Netherlands, which means that, after the discussion in the Council of Ministers, the constitutional procedure has to be followed. In broad terms, this will consist of the procedure for advice from the Council of State and debate by the First and Second Houses of Parliament. In addition, the present government is acting in a caretaker capacity, and this may affect how quickly the process can be completed. Nevertheless, I shall do my utmost to ensure that this legislative process is set in motion expeditiously and I hope it will be completed within a year.

Given that the urgency of the change is clear to me, I will ensure, once Parliament has passed the bill, that the amended act will enter into force and be implemented as soon as possible. Naturally, I will also ensure that WADA is kept informed of the progress of the bill.

Amendment of the Rules for the National Doping Regulations Appeals Committee

Because a legislative amendment takes time and in order to ensure that the BND can operate autonomously from the rest of Doping Authority Netherlands as soon as possible and is not accountable to Doping Authority Netherlands, a number of matters in the National Doping Regulations will be amended in parallel with the legislative amendment described above.² Those amendments will relate to the abovementioned provisions about the appointment, suspension, dismissal and profile of members of the BND, as well as the position of the secretariat and the arrangements for financing the BND, which will be effected through the budget of the Ministry of Health, Welfare and Sport.

The regulations will also include a provision that decisions by Doping Authority Netherlands may never be contrary to the WAD Code and cannot, in substantive terms, deviate from the BND's advice.

These amendments will be effective on 1 October 2021. I will of course keep you informed about progress and send you the amended regulations in translation.

I am confident that the solution described in the short term, in combination with the proposed statutory solution, will establish a situation for the BND that is in line with both the WAD Code and with Dutch law. I await any decisions made by the Executive Committee with great interest and I will be happy to supply you with any additional information you require.

Yours sincerely,

State Secretary for Health, Welfare and Sports

² Other regulations, such as the Regulations for Compliance with Doping Sanctions, will then be brought into line with the amended Rules for the National Doping Regulations Appeals Committee.