

Right to a fair hearing – some remarks on notification procedure under the World Anti-Doping Agency Code

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Introduction

Under the World Anti-Doping Agency Code (WADC or Code)¹ anti-doping rule violations (ADRV) of prohibition against participation during ineligibility² are rare, accounting for less than 5% per year of all anti-doping rule violations cases reported to WADA annually.³ It is a non-analytical type of anti-doping rule violation⁴

¹ World Anti-Doping Code 2021, https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf (accessed 8 October 2024).

² Article 10.14.3 WADC.

³ In 2019 and 2020 WADA reported 34 cases in relation to Articles 10.12.1 and 10.12.3 of the 2015 World Anti-Doping Code – Violation of the prohibition against participation during ineligibility. In the period 2021–2023 three cases have been registered by the POLADA Disciplinary Panel in Poland; World Anti-Doping Program 2019 Anti-Doping Rule Violations (ADRVs) Report, p. 31, https://www.wada-ama.org/sites/default/files/2022-01/2019_adrv_report_external_final_12_december_2021_0_0.pdf (accessed: 8 October 2024), World Anti-Doping Program 2020 Anti-Doping Rule Violations (ADRVs) Report, p. 26, https://www.wada-ama.org/sites/default/files/2023-05/2020_dynamic_report_0.xlsx (accessed: 8 October 2024).

⁴ Article 15.1.1 WADC.

not established by an adverse analytical finding of a laboratory⁵ and without the benefit of the presumption embodied in the strict liability principle.⁶ It relates to the violation by an athlete or other person of the prohibition to participate in any capacity in sports competitions⁷, including demonstrations, training camps and exercises, as well as to conduct any related activities, including administrative activities, even as a volunteer. The prohibition extends to all disciplines organised by signatories to WADC.⁸

The determination of whether an athlete or other person has violated the above prohibition and whether an adjustment is appropriate shall be made by the National Anti-Doping Organization (NADO) whose results management led to the imposition of the initial period of ineligibility.⁹ The decision of NADO may be appealed¹⁰ to the relevant second-instance disciplinary panel.¹¹

The article focuses exclusively on notifications of allegations under Article 7 WADC and the answer to the question: Is there a presumption of delivery (legal fiction of delivery) of NADO's notifications in the anti-doping system, particularly under Article 10.14.3 WADC and anti-doping rule violations of prohibition against participation during ineligibility? A positive or negative response is fundamental to athletes' right to defense and fair hearings under the Code,¹² as well as to the anti-doping rules adopted and implemented by national anti-doping agencies in countries that are WADA Code signatories.¹³

⁵ R. Mukesh, R. Soumya, *Athletes' right to a fair trial in 'non-analytical positive doping cases': An analysis*, International Journal of Sport Policy and Politics 2021, vol. 13, issue 3, p. 383.

⁶ R.H. McLaren, *An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*, Marquette Sports Law Review 2006, vol. 16, issue 2 (193), p. 194, <https://scholarship.law.marquette.edu/sportslaw/vol16/iss2/3> (accessed: 8 October 2024).

⁷ For example, the work as a coach or other athlete support staff member.

⁸ Article 15.1.1 WADC.

⁹ Under Article 35.2 Polish Anti-Doping in Sports Act (Journal of Laws of 2017, item 1051, as amended), there is a pending discussion where the exclusive power to adjudicate in the antidoping case is strictly reserved for the Disciplinary Panel.

¹⁰ Article 13 WADC.

¹¹ Article 10.14.3 WADC.

¹² Article 8.3 WADC. See P. David, *Articles 9 and 10 of the Code: Sanctions for Anti-doping Rule Violations*. In: *A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport*, Cambridge 2017, p. 455.

¹³ Under Article 1.0 International Standard for Code Compliance by Signatories (ISCCS) Signatories to the World Anti-Doping Code commit to comply with a number of legal, technical, and operational requirements that are set out in the Code and the accompanying International Standards. Such compliance is necessary to deliver harmonized, coordinated, and effective Anti-Doping Programs at the international and national level, so that Athletes and other stakeholders can experience doping-free competition on a level playing field wherever sport is played - https://www.wada-ama.org/sites/default/files/2024-05/final_draft_of_is-

2. Right to a fair hearing

Article 8 WADC reflects generally recognised in international law and both common law and civil legal systems principle of fair hearing which provides that any person asserted to have committed an anti-doping rule violation is provided, *minimum minimorum*, a fair hearing. In principle, the athlete or other person – under Article 8.8 the International Standard for Results Management¹⁴ and Article 10.8 of WADC – have the right:

- 1) to be informed in a fair and timely manner of the asserted anti-doping rule violation(s),
- 2) to be represented by counsel at the athlete's own expense,
- 3) of access to and to present relevant evidence,
- 4) to submit written and oral submissions,
- 5) to call and examine witnesses, and the right to an interpreter at the hearing at the athlete's or other person's own expense,
- 6) to request a public hearing.

Also, the athlete or other person must be given the opportunity to provide a written explanation before formal charges are brought against them and to provide substantial assistance, and have the opportunity to admit the ADRV and, if applicable, potentially benefit from a one-year reduction in the period of ineligibility¹⁵ or seek to enter into a case resolution agreement.¹⁶

These rights can be waived either directly or indirectly.¹⁷ Directly, by accepting the penalty proposed by the NADO. Indirectly, by failing to contest the allegation within the specified time limit mentioned in the notice sent by the NADO. Such a failure is deemed (presumed) as a tacit waiver of the right to a hearing (*ipso jure*), with simultaneous admission to the ADRV and acceptance of the proposed

ccs_-_approved_exco_16_nov_2023_-_annex_b4_approved_11_mar_2024_clean_version.pdf (accessed 8 October 2024).

¹⁴ The World Anti-Doping Code *International Standard for Results Management* (ISRM) is a mandatory International Standard developed as part of the World Anti-Doping Program. The current version is from 2023: https://www.wada-ama.org/sites/default/files/2022-12/international_standard_isrm_-_abp_update_2022_final_redline.pdf (accessed: 8 October 2024).

¹⁵ Article 10.8.1 WADC.

¹⁶ Article 10.8.2 WADC. See also: Point 5.3. Guidelines for the International Standard for Results Management, p. 55, https://www.wada-ama.org/sites/default/files/2023-01/2023.01.18_-_results_management_guidelines_-_amended_version.pdf (accessed 8 October 2024).

¹⁷ Article 8.3 WADC.

sanction. Consequently, a disciplinary panel is empowered to make a default determination, i.e., in the athlete's absence.

However, the anti-doping authorities are not excused from the obligation to safeguard the athletes' fundamental rights, particularly prescribed in Article 6.1 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁸ In *Suovaniemi and Others v. Finland* case, ECHR considered that 'voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 (...). Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. (...) an unequivocal waiver of Convention rights is valid only insofar as such waiver is "permissible"'.¹⁹ Under Article 6.1 ECHR, the waiver is limited by the provision that a person could reasonably have foreseen the consequences of his conduct ('knowing and intelligent waiver').²⁰ As said in *Sigmatullin v. Russia*, proper notification is one of the safeguards in waiving the right to be present at the hearing.²¹ Particularly, the waiver cannot solely be presumed because the person was charged and thus considered a fugitive.²²

Therefore, the waiver should never be interpreted as a comprehensive relinquishment of all rights under Article 6.1 ECHR. Acceptability hinges on whether the individual could reasonably have foreseen the consequences of their actions. Under the Code, the issuance of any award during the proceedings is contingent upon a successful notification,²³ regardless of the anti-doping rule violation under consideration.

In the case of a violation of Article 10.14.1 WADC, the matter is further complicated by the *mutatis mutandis* application *inter alia* of the International Standard for Results Management, which covers the so-called result management process aimed at resolving cases of anti-doping rule violations in a fair, expeditious and effective manner. It can be 'explicit', meaning directly as written, 'with amendments', indicating modifications to the standard procedures, or 'bypassing', which suggests that certain standard procedures may be skipped or altered under specific circumstances.

¹⁸ ETS No. 5.

¹⁹ Decision on admissibility of 23 February 1999, 31737/96.

²⁰ Judgment of 27 June 2017, *Šarkienė v. Lithuania*, 51760/10, para 38; Judgment of 18 July 2017, *Sklyar v. Russia*, 45498/11, para 26; Judgment of 24 September 2009, *Pishchalnikov v. Russia*, 7025/04, paras 76–77.

²¹ Judgment of 23 April 2009, *Sigmatullin v. Russia*, 32165/02, paras 46–49.

²² Judgment of 7 April 2015, *Sanader v. Croatia*, 66408/12, paras 72–74.

²³ Article 7 WADC.

3. Result Management notifications

Under the World Anti-Doping Code, ADRV notifications are provided considering results management responsibilities, with, *inter alia*, strong encouragement to send all notifications directly to athletes. If the athlete does not receive the notification properly, as the Court of Arbitration for Sport (CAS) explained in *Albert Subirats v. Fédération Internationale de Natation* award: ‘(...) he or she may not be declared to have committed any filing failure.’²⁴

The delivery is performed by regular post or e-mail, including ineligibility violations; however, it must be with necessary modifications (*mutatis mutanda*) to charge or notification letters.²⁵ NADOs are recommended to implement the following steps in their anti-doping regulations when using emails as a method of notification²⁶:

- 1) Collecting an actual email address for each person falling under its jurisdiction (e.g., license, competition’s entry form, doping control form);
- 2) Where there are multiple addresses for an athlete, using all of them, in particular, the most recent one that the athlete corresponded from and the one registered in s-called ADAMS database²⁷ or any other official database;
- 3) If you use the athlete’s e-mail, activate any read receipt or delivery receipt feature available in your e-mail account to avoid any misunderstanding on whether or not the athlete actually received the notice sent to him/her²⁸;
- 4) For data privacy purposes, all notifications should be sent via an encrypted system, such as ShareFile, ideally one that indicates whether the recipients have downloaded the information.

²⁴ Judgment of 24 August 2011, *Albert Subirats v. Fédération Internationale de Natation (FINA)*, CAS 2011/A/2499, para 14, <https://jurisprudence.tas-cas.org/Shared%20Documents/2499.pdf> (accessed 8 October 2024).

²⁵ See comment on Article 11.1 ISMR: ‘In particular, the athlete/other person will receive the notification provided for in Article 5.3.2 (*mutatis mutandis*) and the notification of the charge under Article 7 (*mutatis mutandis*), and will be entitled to a hearing in accordance with Article 8.’

²⁶ Point 1.4 Guidelines for the International Standard for Results Management, p. 29, https://www.wada-ama.org/sites/default/files/2023-01/2023.01.18_-_results_management_guidelines_-_amended_version.pdf (accessed 8 October 2024).

²⁷ WADA’s ADAMS is electronic database designed to be a secure and cost-free web-based system that centralizes doping control-related information such as athlete whereabouts.

²⁸ Point 3 Annex A: Checklist for Adverse Analytical Findings Report, Guidelines for the International Standard for Results Management, p. 117, https://www.wada-ama.org/sites/default/files/resources/files/wada_isrm_guidelines_2021.pdf (accessed 8 October 2024).

Further changes are provided for athletes in the Registered Group Testing Pool (RGTP)²⁹, who are subjected to the highest number of anti-doping tests.³⁰ Such athletes are required to provide information of their whereabouts in such a way that they can be traced and tested:

- 1) the address at which the athlete is staying overnight,
- 2) schedule of competitions/sports events, and
- 3) regular training.³¹

Residence data is recorded and managed in the electronic ADAMS system and used exclusively for³²:

- 1) the planning, coordination and conduct of anti-doping controls,
- 2) the transmission of information relating to an athlete's biological passport or other test results,
- 3) the investigation of alleged anti-doping rule violations or as material in proceedings concerning such allegations.³³

NADO informs athletes about this obligation before their registration in the group and the consequences of failing to comply with the rules set out in Articles 5.5.10 and 5.5.11 WADC, i.e., the possibility of violation of Article 2.4 WADC: 'Any three instances of failure to appear for examination and/or failure to indicate whereabouts in accordance with the in accordance with the International Standard for Performance Management within a period of twelve months by an athlete qualified for a registered athlete group'. Registered athletes are obligated to keep their residency information up to date and accurate at all times.³⁴

4. Notifications *versus* instructions

The notification process, as stipulated in Article 14.1.1 WADC, must be distinct from the instructions provided for testing.³⁵ These instructions are a crucial component of the overall procedure, encompassing, among other things, detailed

²⁹ Article 5.5 of WADC.

³⁰ Article 4.8.6.1 of International Standard for Tests and Investigations (Hereinafter: 'ISTI'): *The test is performed in accordance with the testing schedule adopted by an international federation or national anti-doping organisation.* https://www.wada-ama.org/sites/default/files/2022-12/isti_2023_w_annex_k_final_clean.pdf (accessed 8 October 2024).

³¹ Article 5.5.10 WADC.

³² Article 5.5.10 *in fine* WADC.

³³ Article 5.5.7 WADC.

³⁴ Article 5.5.4(b) WADC.

³⁵ Article 5.4.3 ISTI.

information on the athlete's rights and responsibilities,³⁶ as well as the potential consequences for failing to adhere to the sampling process.³⁷ Athletes are informed before the sample is taken via the Doping Control Form (DCF), which the athlete signs, with the proviso that refusal is sanctioned for such omission.³⁸

Athletes receive information about the doping control process through the Doping Control Form (DCF), which they are required to sign before sample collection. This form serves as confirmation that the athlete has been informed. It includes a clause stating that refusal to sign or failure to comply with the procedure will result in sanctions for such non-compliance. Under Section 2 - Athlete Information, the athlete provides address data, including e-mail, which, according to the Doping Control Privacy Notice, is processed for results management. Any deviation from an ISTI or any other international standard or other anti-doping rule or policy set out in the Code or the rules of an anti-doping organisation is not a defence to an allegation of an anti-doping rule violation.³⁹ However, if an athlete or other person proves that one of the following deviations from an international standard may have resulted in an anti-doping rule violation as a result of an adverse analytical result or as a result of a violation of the designation requirements, then the Anti-Doping Organization shall have the burden of proving that such deviation did not result in an adverse analytical result or a violation of the designation requirements.

5. Law in action – Jakub Krzewina case

In May 2023, Jakub Krzewina, a Polish athlete, was deemed to have violated Article 10.14.13 Polish Anti-Doping Agency Antidoping Rules (PAAR)⁴⁰ by the Disciplinary Panel at POLADA. This violation pertained to his engagement in prohibited activities (specifically, coaching) in a sports discipline governed by a WADA Code signatory, namely football, during his ineligibility imposed by CAS in 2022.⁴¹ The new date for the running of sanctions thereof was made pursuant to Article 8.3.2 of the PAAR, i.e., in absentia due to the athletes' failure to respond in time to the charges.

³⁶ Article 5.4.1 d) ISTI.

³⁷ Article 5.4.1.e) iii ISTI.

³⁸ Article 5.4.3 ISTI.

³⁹ Article 3.2.3 WADC.

⁴⁰ The equivalent of the above article in the WADA Code is article 10.14 WADC. <https://anty-doping.pl/wp-content/uploads/2021/06/Przepisy-Antydopingowe-POLADA-2021-wersja-1.3..pdf> (accessed 8 October 2024)

⁴¹ Judgment of 17 October 2022, 2021/A/8459 (not published), see P. Łebek, *Did Jakub Krzewina run into the black forest?*, <https://wprawie.com/2022/12/12/did-jakub-krzewina-run-into-the-black-forest/> (accessed 8 October 2024).

The athlete filed an appeal against the aforementioned ruling, which the Disciplinary Panel found to be well-founded in relation to the finding of an *ex officio* violation of the results management procedure⁴² and the failure to notify the defendant of the alleged anti-doping rule violation effectively.⁴³ All notices in the case were sent to the athlete's postal and email address as disclosed in the ADAMS register, from which the athlete had already been removed before the proceedings were initiated.

The appellate authority was faced with the issue of whether the athlete had been effectively notified of the charge and, therefore, whether there could have been a waiver of the right to a hearing under the Code. The case was answered negatively, pointing to several issues. It is one thing to have residence data and another to have a residential or permanent address. During performance management, NADO used the athletes' residence data, including correspondence and email addresses, as disclosed in ADAMS.

For the purposes of the PAAR and the WADC, residence data is one thing, and residence or permanent residence, understood as the athlete's centre of life, is another. If the athlete is not a member of the RTP, the residence data cannot automatically (by implication) be regarded as a correspondence address (including email) even if historically, in the ADAMS system, the registered athlete has indicated such addresses. The presumption referred to in Article 3.2.3 iv PAAR⁴⁴ does not cover such data from the Adams system. They may be processed for, *inter alia*, investigations relating to alleged anti-doping rule violations but are not themselves covered by the presumption of veracity.

The athlete has the burden of proof to substantiate that a particular deviation from the PAAR⁴⁵ and International Standards had the effect of an anti-doping rule violation. However, the above burden of proof does not extend to the rules of notification (service) to the extent that the PAAR does not clearly specify this. In particular, where the athlete is not informed of the consequences of indicating a particular email and mailing address.

This is not altered by the fact that 'The athlete, however, is fully responsible for complying with the residency notification requirement, whether or not the anti-doping organisation has provided him with the assistance described above'⁴⁶.

⁴² Article 7.6 PAAR. The equivalent of the above article in the WADA Code is Article 7.6 WADC.

⁴³ Article 7.3 PAAR. The equivalent of the above article in the WADA Code is Article 7.3 WADC.

⁴⁴ The equivalent of the above article in the WADA Code is Article 3.2.3 iv WADC.

⁴⁵ Relevant provisions of the WADA Code.

⁴⁶ Article 4.8.7 ISTI.

The obligation to stay and update this data must be interpreted with the athlete's right of defence, and this excludes any unexpressed presumption in favour of anti-doping organisations, particularly the athlete's notifications.

Adopting an unexpressed presumption of the effectiveness of service outside the RGA would violate the right to a hearing⁴⁷ and, ultimately, the fundamental right to a defence. Also, being a member of the RGA does not mean that the aforementioned presumption exists unless the NADO effectively informs the athlete of the consequences of breaching the residency obligation of Article 5.5.4 of the PAAR⁴⁸, in particular that Article 5.5.9 PAAR⁴⁹ imposes on the NADO the obligation to inform of the consequences of breaching Article 5.5.10 PAAR⁵⁰ and 5.5.11 PAAR and not Article 5.5.4 PAAR⁵¹. Meanwhile, as indicated in Article 4.8.7.1 of the ISMR 'Athletes qualified for the registered athlete group will be informed and trained so that they understand what indication requirements they must meet, how the system works, the consequences of not indicating their whereabouts'.

Finally, the indication of the address by the athlete does not mean that effective service has taken place, given that the PAAR does not introduce a presumption of effective service and Article 3.2 PAAR can only have a limited application, i.e. as to the fact that a notice has been sent by means of communication in accordance with Article 7.6 PAAR⁵², but without a presumed effect of service.

'The athlete is, however, fully responsible for complying with the residency reporting requirement, whether or not the anti-doping organisation has provided the above-described assistance to the athlete'. However, the residency obligation must be interpreted with the athlete's right of defence⁵³ in mind, and this excludes any unexpressed presumption in favour of anti-doping organisations, in particular as to the athlete's notifications, which have the effect by law of forfeiting the rights of defence.

⁴⁷ The equivalents of the above article in the WADA Code are Articles 8 and 14.2.1 WADC.

⁴⁸ The equivalent of the above article in the WADA Code is Article 5.5.4 WADC.

⁴⁹ The equivalent of the above article in the WADA Code is Article 5.5.9 WADC.

⁵⁰ The equivalent of the above article in the WADA Code is Article 5.5.10 WADC.

⁵¹ The equivalent of the above article in the WADA Code is Article 5.5.4 WADC.

⁵² The equivalent of the above article in the WADA Code is Article 7.6 WADC.

⁵³ See also the Judgment of 18.1.2018, *Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France*, 48151/11 and 77769/13, paras 152–159 (requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests is consistent with the Article 8 of the European Convention on Human Rights); J. Gleaves, A. V. Christiansen, *Athletes' perspectives on WADA and the code: a review and analysis*, International Journal of Sport Policy and Politics 2019, vol. 11, issue 2, p. 346.

6. Summary

The ADRV for participation in competition during an ineligibility sanction is one of the key elements of the anti-doping system, as sanction is only as effective as its enforcement. This principle is supported by *inter alia* legal presumptions in anti-doping law and the specific distribution of the burden of proof. Nonetheless, this does not prevent the WADC's signatories and their executors from safeguarding the right of defence of athletes, particularly in a situation where the Code has a so-called lacuna (gap). Hearing bodies have no law-making powers and are appointed exclusively to apply the anti-doping law. In this context, the problem of notifications, including anti-doping charges, appears as a subject requiring special attention and care because the failure to effectively serve notices in the anti-doping rules may result in a situation in which the athlete is deprived of his or her right of defence. Any presumption that interferes with the aforementioned right should be interpreted restrictively and, failing that, not presumed. Ultimately, NADO and hearing bodies should be guided by the principal *nihil de nobis sine nobis*, bearing in mind that the right to be heard is part of the athlete's fundamental human right.

Abstract

The article examines the notification procedures and the right to a fair hearing under the World Anti-Doping Agency (WADA) Code. It addresses the rare occurrence of anti-doping rule violations (ADRV) related to participation during ineligibility, emphasizing the importance of proper notification for ensuring athletes' rights to defense and fair hearings (Article 8.3 WADC). The discussion focuses on the legal presumption of delivery of notifications and the necessity for anti-doping organizations (NADOs) to safeguard athletes' fundamental rights, including the right to be informed, represented, and heard. The critique highlights issues with reliance on email notifications and the importance of effective service to avoid infringing on athletes' rights to a defense. The case of Jakub Krzewina is used to illustrate problems with notification procedures and their implications for athletes' rights. The article concludes that any presumption affecting the right to be heard should be restrictive and that NADOs must ensure proper notification to uphold the fundamental human rights of athletes.

Kew words: WADA Code, antidoping, fair hearing, right to defense, notification, charges

Prawo do sprawiedliwego przesłuchania – kilka uwag na temat procedury powiadamiania zgodnie z Kodeksem Światowej Agencji Antydopingowej

Streszczenie

Sprawy antydopingowe o naruszenie zakazu uczestnictwa w zawodach w trakcie trwania kary dyskwalifikacji nie są częste w Polsce. Budzą one wiele wątpliwości, w szczególności na gruncie prawa zawodników do obrony i tego, czy m.in. w przepisach antydopingowych istnieje domniemanie doręczenia (fikcja doręczeń) powiadomień organizacji antydopingowych. Zarówno pozytywna, jak i negatywna odpowiedź na to pytanie ma fundamentalne znaczenie dla prawa do obrony zawodników i ich dalszego prawa do rozprawy, o którym mowa w art. 8.3 WADC. Przekonuje o tym sprawa lekkoatlety, Jakuba Krzewiny, w której zadano pytanie kluczowe dla dalszej odpowiedzialności zawodnika uprzednio ukaranego dyskwalifikacją za naruszenie obowiązków pobytowych.

Słowa kluczowe: Kodeks WADA, antydoping, prawo do obrony, prawo do wysłuchania, notyfikacje, zarzuty

