



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 15 February 2013

6427/13

**SPORT 12
DOPAGE 3
SAN 47
JAI 103
DATAPROTECT 16**

"I/A" ITEM NOTE

from: General Secretariat of the Council
to: Permanent Representatives' Committee / Council

No. prev. doc.: 5979/13 SPORT 7 DOPAGE 2 SAN 36 JAI 71 DATAPROTECT 10

Subject: EU contribution to the revision of the World Anti-Doping Code and International Standards
- *Approval of the text*

1. The World Anti-Doping Code provides the basic framework for harmonised anti-doping policies, rules and regulations within sport organisations and among public authorities. The World Anti-Doping Agency (WADA) has launched a Code revision process with a view to adopting a revised Code at the fourth World Conference on Doping in Sport in Johannesburg, South Africa in November 2013.

2. The first two EU contributions, which were agreed by the Council¹ and submitted to WADA on 14 March and 5 October 2012 respectively by previous Presidencies, included comments and proposals organised under the following five headings:
 - emerging data privacy principles,
 - use of the Anti-Doping Administration & Management System (ADAMS),
 - Registered Testing Pools (RTPs) and whereabouts,
 - involvement of Governments,
 - public disclosure, and
 - International Standards.

3. Given that the latest draft of the revised World Anti-Doping Code and related International Standards continues to have an impact upon different aspects of EU legislation, notably data protection and free movement, the Working Party on Sport² has prepared, at the invitation of the Presidency, an EU Contribution to the third phase of the World Anti Doping Code review process. At its meeting on 14 February 2013, the Working Party on Sport reached a broad consensus on the text of the EU contribution set out in the Annex to this Note.

4. The Committee of Permanent Representatives could now invite the Council, as an "A" point at one of its forthcoming sessions, to
 - agree on the text of the EU contribution set out in the Annex to this Note

 - authorise the Presidency to submit the EU contribution to WADA.

¹ Doc. 6846/1/12 and doc. 14204/12.

² The Working Party used as a basis a text prepared by the Expert Group on Anti-Doping established by the Member States and the Commission in the framework of the EU Work Plan for Sport 2011-2014.

Draft

**EU contribution to the revision of the World Anti-Doping Code
and International Standards**

1. Introduction

As part of the revision of the World Anti-Doping Code (Code) and the related International Standards (IS), the EU submitted comments in March and October 2012. The first EU contribution was based upon the existing Code 2009, while the second EU contribution included comments on the draft Code 2015 (v. 1.0) which had been circulated online on 1 June 2012, as well as comments on the various existing IS. This third EU contribution includes comments on the draft Code 2015 (v. 2.0) which was circulated online on 1 December 2012, together with comments on certain IS (v. 1.0) which were circulated at the same time. The aim of this contribution is to recognise progress made in the revision process to date, highlight specific positive changes which have been made and reiterate certain positions which would require further changes to the draft code.

This third EU contribution does not include detailed comments on every point highlighted in the second EU contribution. In particular, to avoid an excessively long and technical text, suggestions for rephrasing in certain parts of the Code and IS have not been repeated in this submission.

However, the EU would like to highlight again some outstanding issues.

The EU will closely follow developments until the adoption of the Code 2015 and IS 2015. A fourth EU contribution may be submitted if the EU and its Member States deem this necessary.

2. Comments on the second version of the Draft Code 2015 (v. 2.0) (1 December 2012)

Having compared its comments and proposals put before WADA in the second contribution³ with the current draft Code 2015 (v. 2.0), the EU is generally satisfied with progress made by WADA in its reworking of the draft Code 2015 (as compared with v. 1.0). The EU submits the following comments and proposals to WADA.

WADA has not taken up the general request by the EU and its Member States to provide written explanations to the proposed changes to the Code. This would be helpful bearing in mind that, ultimately, the Code finally shall also be recognised by national governments according to their commitments under the UNESCO International Convention against Doping in Sport. If governments are to agree to a final version of the 2015 Code, they should be in a position to explain the proposed changes to their parliaments.

The EU and its Member States also ask WADA to provide explanations where EU requested changes to the Code have not been taken on board.

2.1. Registered Testing Pools (RTPs) and Whereabouts / respect of the principle of proportionality and human rights (Code Articles 5 with sub articles) (section 2.1.3. of the second EU contribution)

In the second contribution, the EU had expressed general satisfaction with the progress made on this important subject, but also warned that the progress made can only materialise in the form of improved athletes' rights if appropriate non-binding guidance is adopted and circulated by WADA. While the EU appreciates that such guidance is not part of the Code and IS revision exercise, on account of the status of non-binding guidance within the overall architecture of the World Anti-Doping Programme, the EU would nevertheless strongly welcome an assurance that such guidance will be prepared, adopted and circulated by WADA. Ideally this should happen in time for guidance to be implemented jointly with the Code 2015 and IS 2015, on 1 January 2015.

³ Council doc. 14204/12, see also: http://ec.europa.eu/sport/news/20121005-eu-council_en.htm

- The EU supports developing guidance for establishing proportionality in relation to RTPs and Whereabouts.

2.2. Involvement of Governments (Code Introduction; Code Article 22) (section 2.1.4. of the second EU contribution)

The EU has taken note of WADA's partial rephrasing of Code Article 22 and of WADA's determination to maintain Article 22.2. The EU regrets that Article 22 has not been rephrased more thoroughly so as to take account of the detailed EU comments submitted, in the second EU contribution, on this important part of the Code. Despite this, the EU views the present draft as an improvement compared with the previous one, in particular on account of the clarifications provided. The previous EU submission contained a two-pronged proposal which would have allowed the EU and WADA to find common ground by choosing between two graduated solutions. The EU regrets that this request has not been met and invites WADA to a deepened dialogue and to give due consideration on the comments and proposals made in the second EU contribution with regard to Article 22.

- The EU invites WADA to give due consideration to the comments and proposals put before WADA in the second EU contribution with regard to Article 22, as submitted in the present version.
- The EU invites WADA to make the following changes.
 - Article 22.1 shall be reworded as follows: "Each government will strive to take all actions and measures necessary to comply with the UNESCO Convention."
 - Articles 22.2, 22.3, 22.4 and 22.6 are repealed. Article 22.7 stands as it is.

- As stated in the second EU contribution, the EU's preference is for deletion Articles 22.2, 22.3, 22.4 and 22.6. We do not consider them necessary. If WADA wishes to maintain some of them in the Code, in the spirit of good co-operation the EU sees the need to rephrase them as follows:
 - Article 22.2 shall be reworded as follows: "Each government will strive to put in place a proper basis for cooperation and sharing of information with Anti-Doping Organizations and sharing of data among Anti-Doping Organizations as provided in the Code." (The word "legal" is deleted, this is to let the text better reflect article 5 of the UNESCO-convention which provides that State Parties can adopt appropriate measures to comply with the obligations set out in the Convention. Such measures may include legislation but also regulation, policies or administrative practices.)
 - Article 22.3 has been improved in the new draft text and might be acceptable if article 22.2 is deleted. It is a concern that these two points actually deal with the same issue, and might contradict each other.
 - Article 22.4 shall be reworded as follows: "Each government will seek to respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law."
 - Article 22.6 (new numbering, equivalent to former Article 22.5) is repealed as it would otherwise risk giving rise to unjustified expectations among athletes regarding the obligations of governments. It should be noted that the reference to Article 22.3 in the text should rightly be Article 22.2.

2.3. Public disclosure (Code Article 14.3) (section 2.1.5. of the second EU contribution)

In the second contribution, the EU had expressed general satisfaction with the progress made on this important subject. However, if automatic publication is considered a *sanction* (cf. Code Article 10.10), then it should be equally and uniformly applied. This is currently not the case, for a variety of reasons, but in particular because data protection provisions differ greatly internationally. Furthermore, the progress made can only materialise in the form of improved athletes' rights if appropriate non-binding guidance is adopted and circulated by WADA. Reference was made to the solution found, in 2010-11, in relation to the International Standard on the Protection of Privacy and Personal Information (ISPPPI) and the suggestion was made that a similar solution could be found in this case, by developing specific rules on public disclosure. The EU cannot see that this has been done and would like WADA to reconsider its position. The comments made above (section 2.1 of this submission) on Registered Testing Pools (RTPs) apply *mutatis mutandis*.

- The EU offers WADA its full support and cooperation in developing appropriate non-binding guidance to improve athletes' rights.

2.4. Therapeutic Use (obligations of International Federations) (Code Article 4.4.1) (section 2.2.2.2. of the second EU contribution)

In the second contribution, the EU had encouraged WADA, in the context of legal certainty, to annex a list of systems approved by WADA, including but not limited to ADAMS. The EU cannot see that this has been done and would like WADA to reconsider its position. The comments made above (section 2.1 of this submission) on Registered Testing Pools (RTPs) apply *mutatis mutandis*.

- The EU supports the development of such guidance.

2.5. Notification after review regarding adverse analytical findings (section New 2.2.2.2. of the second EU contribution)

In the second contribution, the EU had expressed its unconditional disapproval of the proposed amendment. The EU welcomes the fact that the amendment has not been maintained.

2.6. Consequences for team sports (Code Article 11.2) (section 2.2.2.4. of the 2nd EU contribution)

In the second contribution, the EU had expressed its unconditional disapproval of the proposed amendment. The EU is welcomes the fact that the amendment has not been maintained.

2.7 Payment of Court of Arbitration for Sport (CAS) cost awards (Code Article 10.12)

The EU understands WADA's desire to harmonise the legal status of the athletes across sports and develop means to collect any CAS cost award against the athlete. However, the EU is concerned about prolonging the period of an athletes' ineligibility until any CAS cost award against that athlete has been paid, as this may constitute an inappropriate connection between a financial issue (payment of costs/civil law) and the anti-doping/sport rules/sanctions as set by the Code. The EU therefore asks WADA to consider other measures for ensuring a harmonised legal status and for the collecting of a CAS cost award against an athlete.

3. Comments on the first version of the Draft IS 2015 (v. 1.0) (1 December 2012)

Having compared the comments and proposals put before WADA in the second contribution with the current draft IS 2015 (v. 1.0), the EU is generally satisfied with progress made by WADA in its reworking of the draft IS 2015 (as compared with the IS currently in force).

The EU submits the following comments and proposals to WADA. The comments on linguistic and technical remarks made in section 1 of this submission apply *mutatis mutandis*.

3.1. Current International Standard on the Protection of Privacy and Personal Information (ISPPPI 2009): Annex on Retention Times (section 3.3.1 of the second EU contribution)

The EU is generally satisfied with progress made on this issue in recent years, but wishes to be reassured that the Annex on Retention Times will be retained after 1 January 2015 and that it will have the same status as under the current Code and IS system. The EU has noted with surprise that the Annex on Retention Times is not annexed to the ISPPPI as part of the revision exercise. The EU is seriously concerned that failure to maintain the Annex would have negative impacts on athletes' rights.

- The EU urges WADA to give assurance that the Annex on Retention Times will be retained after 1 January 2015 as an Annex to the International Standard on the Protection of Privacy and Personal Information (ISPPPI 2015).
