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to:	Permanent Representatives' Committee / Council
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Subject:	EU contribution to the revision of the World Anti-Doping Code

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 of adopting a revised Code at the fourth World Convention on Doping in Sport in Johannesburg, South Africa in November 2013.

2. Given that the World Anti-Doping Code has an impact upon different aspects of EU legislation, notably data protection and free movement, the Working Party on Sport[1] has prepared, at the invitation of the Presidency, an EU Contribution to the first phase of the World Anti Doping Code review process. At its meeting on 22 February, the Working Party on Sport reached a broad consensus on the text of the EU contribution set out in the Annex to this Note.

[1] 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.

3. 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.

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ANNEX

EU contribution to the revision of the World Anti-Doping Code

Introduction

The European Union (EU) welcomes the initiative to revise the World Anti-Doping Code.
The EU contribution to the World Anti-Doping Code (Code) Review addresses issues pertaining to the Code and proposes amendments to certain specific Code provisions.

It is recognised that many of the issues which are linked to EU legislation may be better addressed through amendments to the relevant International Standards (IS). A comprehensive EU contribution to the International Standards Review will be submitted in due course. Therefore, this contribution does not aim to propose any changes to International Standards, unless such changes are a consequence of Code amendments.

The EU contribution focuses on the following issues:

- emerging data privacy principles
- use of ADAMS
- RTPs and whereabouts
- involvement of Governments
- public disclosure

The detailed EU comments are set out below.

1. Emerging data privacy principles

WADA references

- Code Article 14.5 (Doping Control Information Clearinghouse)
- IST, sec. 4.3, 4.5, 15.2
- ISPPPI, sec. 4.2 (primacy of national law)

EU references

- EU Charter of Fundamental Rights (Charter) Article 8
- Directive 95/46/EC (data protection), in particular Article 25 (1)-(2)

EU concerns

Under Charter Article 8, *"data must be processed fairly for specified purposes." "Fair processing"* encompasses a requirement under Directive 95/46/EC, Article 25 (1), that personal data may only be transferred to a third party country if *"the third country in question ensures an adequate level of protection"*. This may pose a problem in relation to a data-sharing tool designed to facilitate data sharing at a global level, including data sharing with private organisations, if that sharing results in data being transferred to countries that do not have an adequate level of data protection. Note that the notion of *"adequate level"* goes beyond the mere existence of data protection laws, in accordance with Article 25 (2): *"The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectorial, in force in the third country in question and the professional rules and security measures which are complied with in that country."*

The Whereabouts system and the use of the Anti-Doping Administration and Management System (ADAMS) database are, as highlighted by certain ongoing political[2] and social-dialogue discussions,[3] as well as litigation and complaints in some countries, the most controversial parts of the entire WADA rules system. ADAMS use may pose legal concerns, in particular as regards data protection, given the technical possibilities afforded by ADAMS in terms of data sharing on a potentially global scale, in conjunction with WADA's mission as a global clearinghouse. Several EU Member States only allow limited or restricted use of ADAMS and some have either banned it or are effectively not using the database.[4] Accordingly, in its Second Opinion on WADA (2009),[5] the Article 29 Data Protection Working Party took the view that *"as the Privacy Standard contains numerous references to the WADA Code and to the ADAMS database […], it is necessary to examine it in the broader context of its application."* There is a general and cross-cutting EU interest in clarifying all potentially problematic parts of the Code and international standards in this respect. Much of section 2.2 of the Second Opinion on WADA is about ADAMS use, although the Article 29 Data Protection Working Party has not taken a clear position for or against ADAMS use. A mandatory ADAMS use cannot be supported by the EU at this moment.

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2 See EP questions to Commission asked by Bozkurt (E-6778/08) and Belet (H-0404/09). See also the on-going preparation of the LIBE report (rapporteur: Bozkurt) on the Commission's Communication on Sport (COM2011) 12), including an expert hearing organised on 30 June 2011.

3 See initiatives taken by athletes' trade unions (EEAA, PPA, FifPro), including litigation in Belgium and France.

4 T.M.C. Asser Instituut (2010): The implementation of the WADA Code in the European Union. Report commissioned by the Flemish Minister responsible for Sport in view of the Belgian Presidency of the European Union in the second half of 2010. The Hague: T.M.C. Asser Instituut. http://www.asser.nl/upload/documents/9202010_100013rapport%20Asserstudie%20(Engels).pdf

5 Second opinion 4/2009 on the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on related provisions of the WADA Code and on other privacy issues in the context of the fight against doping in sport by WADA and (national) anti-doping organizations. Adopted on 6 April 2009. 0746/09/EN. WP 162. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp162_en.pdf

WADA's role as a global "Doping Control Information Clearinghouse" is defined unambiguously in Article 14.5 of the 2009 WADA Code. The language of Article 14.5 appears to be problematic in that it requires data-sharing on a wide scale, worldwide, between public and private actors. If such language can be accepted at all, WADA must provide a very high level of legal certainty. The principle of legal certainty is recognised in the case law of the European Court of Justice, not only as regards EU Institutions' application of EU law (the scope of the Charter as a binding instrument), but also with implications for Member States' rules and practices in such areas as VAT, including a case involving a sport organisation,[6] telecommunications regulation,[7] etc. Crucially, Article 14.5 (WADC 2009, p. 89) states that *"to enable it to serve as a clearinghouse for Doping Control Testing data, WADA has developed a database management tool, ADAMS, that reflects emerging data privacy principles."* The reference to "emerging data privacy principles" does not afford even a minimum of legal certainty in an already highly contested field of the anti-doping system. Rather, it might lead to practices potentially violating athletes' rights as data subjects.

Also, Article 14.6 of the Code contains a potential problem – it obliges compliance with both national data protection law *and* the WADA Standard, without setting out which should prevail should there be any inconsistency. In addition, the references to information and consent requirements should be removed, because they create the risk that they might be construed as the only two data protection requirements.

Note that any personal data to be transmitted to third countries in application of the Code can only be transmitted under the conditions set out in Articles 25 and 26 of the Directive, which in principle require an adequate level of data protection in the country of destination.

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6 Amministrazione dell'Economia e delle Finanze, Agenzia delle Entrate v Fallimento Olimpiclub Srl", ECJ (Second Chamber), judgment of 3 September 2009, C-2/08. For a discussion, see: Orzan, M.F. (2010): Oops – the ECJ did it again! : The relationship between the principle of effectiveness of EU law and the principle of legal certainty in the ECJ case-by-case approach. In: European Law Reporter, no. 2, pp. 63-69

7 For an analysis of case law until the late 1990s, see: Nikolinakos, N.T. (1999): Access Agreements in the Telecommunications Sector - Refusal to Supply and the Essential Facilities Doctrine under EC Competition Law. In: European Competition Law Review, vol. 20, no. 8, pp. 399-411

In conclusion, "Emerging data privacy principles" is too vague. For the sake of legal certainty these principles should be specified.

The definition in Article 4 of the International Standard for the Protection of Privacy and Personal Information (ISPPPI) is accurate and state clearly that national laws and legislation evidently prevail above the rules of the ISPPPI, also in terms of measuring compliance. This general rule should be reflected directly or indirectly in the revised Code also, as a general rule and with special regard to Data Protection Principles.

Solution proposed

- To further strengthen data protection in the Code, the EU suggests the following addition to Art. 14.6 of the Code:
  "Anti-Doping Organisations shall only process Personal Information where necessary and appropriate to conduct their Anti-Doping Activities under the Code (such as those identified in Articles 2, 4.4, 5-8, 10-16 and 18-20) and International Standards, or where otherwise required by applicable law, regulation or compulsory legal process, provided such Processing does not conflict with applicable privacy and data protection laws.

2. Use of ADAMS

WADA references

- Code Articles 4.4 (Therapeutic Use), 14.3 (Athlete Whereabouts Information), 14.5 (Doping Control Information Clearinghouse), 15.2 (Out-of-Competition Testing)
- IST, sec. 14.3, 14.5, 15.2
- ISPPPI, sec. 4.2 (primacy of national law)

EU references

- EU Charter of Fundamental Rights (Charter) Article 8
- Directive 95/46/EC (data protection)

EU concerns

The EU would prefer if it could recommend ADAMS use to its Member States and private organisations based on EU territory. However, prescriptions for the use of the ADAMS database appear to be controversial and there are different viewpoints with regard hereto. In its Second Opinion on WADA (2009),[8] the Article 29 Data Protection Working Party noted that *"ADAMS can be used as a data sharing tool by those ADOs wishing to use it, although information suggests that WADA intends eventually to make the use of ADAMS compulsory"* (p. 4). *"So far, the use of ADAMS is not mandatory."* (p. 13) However, this assessment made by the Article 29 Data Protection Working Party must be seen in the light of WADA's interpretation guidance: *"All provisions of the Code are mandatory in substance"* (Introduction, p. 16). Not all Member States currently use ADAMS.

The grounds for processing data (within the meaning of the Directive) need further clarification. Is it possible to reconcile the existing arrangements, not only with EU data protection law, but also with the recent Article 29 Working Party Opinion 15/2011 on the definition of consent?

This is a largely technical issue, which depends on the specific modalities of ADAMS, but the problem formulation set out above applies with regard to EU and national law. Note that any personal data to be transmitted to third countries in application of the Code can only be transmitted under the conditions set out in Articles 25 and 26 of the Directive, which in principle require an adequate level of data protection in the country of destination.

Solution proposed

- The EU proposes to use the solution set out in section 1 above.

[8] Second opinion 4/2009 on the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on related provisions of the WADA Code and on other privacy issues in the context of the fight against doping in sport by WADA and (national) anti-doping organizations. Adopted on 6 April 2009. 0746/09/EN. WP 162. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp162_en.pdf

3. Registered Testing Pools (RTPs) and Whereabouts

WADA references

- Code Articles 5.1.1, 14.3

EU references

- EU Charter of Fundamental Rights (Charter) Article 8
- Directive 95/46/EC (data protection)

EU concerns

Under the terms of Code Article 5.1.1, ADOs are obliged to have Testing Pools and Whereabouts rules. Article 4.3 obliges IFs and NADOs to make testing-relevant information available and to share it with other organisations. These provisions are goal-driven but do not set any limits to their implementation as no notion of proportionality can be found in these prescriptions. For example some EU Member States are known to have disproportionately big RTPs. This has caused unnecessary problems in some cases, and negatively impacted on the potential effectiveness of the whereabouts system, but it is not contrary to any WADA rules. It is important that testing pools should be based among others upon risk assessment.

The prevention of doping in sports is a legitimate objective which may justify the processing of personal data. However, in line with Article 52 (1) of the EU Charter of Fundamental Rights and Article 6 (1) (c) of Directive 95/46, the processing of personal data must remain necessary and proportionate to the legitimate aims pursued. This requires an adequate balancing of the legitimate aims pursued by the processing, and the rights of the data subject.

Refer also to the Article 29 Working Party opinion (see above) as regards whereabouts.

Solution proposed

- The EU suggests that a reference to proportionality be inserted in Articles 5.1.1 and 14.3 of the Code, which would be consistent with the International Standard for Testing. This can also be clarified by WADA when describing obligations for IFs and NADOs to establish testing pools.
- The EU also proposes to use the solution set out in section 1 above.

4. Involvements of Governments

WADA references

- Code Article 22
- ISPPPI, sec. 4.2 (primacy of national law)

EU references

- EU Charter of Fundamental Rights (Charter) Article 8
- Directive 95/46/EC (data protection)

EU concerns

Whereas the roles of Governments, as defined in the Code, are not legally binding per se, they are nevertheless backed by Member States' recognition of the principles of the Code as an appendix to the UNESCO Convention. In addition hereto, it may not be obvious to athletes and other citizens that the expectations set forth in Code Article 22 are not actual obligations. To avoid possible risk of misunderstanding from signatories and others concerning Governments' possibilities to live up to the expectations set forth in Article 22, this issue could be further clarified. National legislation and States' international obligations, including under EU law, sets limitations.

Whereas the idea of streamlining the work of "*encourage all of […] public services or agencies"* may already appear to be sufficiently confined by natural limitations as to pose no problem in practice, the phrase *"share information with Anti- Doping Organizations which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited"* raise considerations such as if this data sharing would be proportionate and if it could lead to excessive data sharing. In the Introduction (p. 18), the text: *"These sport-specific rules […] in fair sport."* indicate a certainly non-intentional disrespect of national legislation that contradicts other texts in the Code.

Signatories' expectations on Governments might as in Code Article 22.4 include anti-doping measures outside or in the fringe of organised sport related to EU law and national legislations, or as in Article 22.3 touch upon issues related to the particularities on constructions of national legal systems. As in Code Article 22.2 any transfer of personal data from a public authority to an anti-doping agency would require that the transfer respects the principles of Article 6 of Directive 95/46/EC, and that there is a legal basis for the transfer within the meaning of Article 7 of the Directive. The pertinence, in each of the Member States, of the grounds set out in Article 7 of the Directive is difficult to verify. However, as regards the requirement of consent (Article 7 (a) of the Directive), in accordance with Article 2 (h) of the Directive, such consent must be "freely given". Where consent of a sportsperson is a requirement for him or her to continue exercising the profession, some may wish to question whether consent is in fact still freely given; in this case, a transfer by public authorities would only be possible if one of the other grounds in Article 7 is present.

As regards transfers to third countries, it has already been pointed out that the conditions of Articles 25 and 26 of the Directive would have to be respected.

Solutions proposed

- The EU suggests that the last sentence of the first paragraph of Article 22 be amended to include a reference to national law (within the EU, national data protection law in conjunction with relevant EU law).
- In the Introduction (p. 18), the EU suggests the omission of the text: *"These sport-specific rules […] in fair sport."* Such omission will not lead to any difference in interpreting the Code or International Standards.

5. Public disclosure

WADA references

- Code Article 14.2

EU references

- Directive 95/46/EC (data protection)

EU concerns

Article 14.2 includes an obligation to disclose athlete-related information, followed by a number of specific procedural requirements.

As regards the publication of sanctions concerning sportspersons, note that such publication equally constitutes processing of personal data. The publication must therefore be necessary and proportionate to the attainment of a legitimate objective.[9]

Solution proposed

- The EU suggests that a reference be made to the International Standard for the Protection of Privacy and Personal Information within which detailed guidance is provided on such disclosures, this with the understanding of compliance with applicable national law.

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[9] For further guidance on this issue, see the recent judgment of the Court of Justice in cases C-92/09 and C-93/09, *Schecke.*