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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
- *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 EU contribution, which was agreed by the Council¹ and submitted to WADA on 14 March 2012 by the Presidency, 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, and
 - public disclosure.

3. Given that the latest draft of the revised World Anti-Doping Code 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 second phase of the World Anti Doping Code review process. At its meeting on 24 September 2012, 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. 1404/12

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****1. Introduction**

The European Union (EU) welcomes the initiative to revise the World Anti-Doping Code.

The first EU contribution, which was submitted to WADA (14 March 2012), 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, and
- public disclosure.

The current EU contribution to the World Anti-Doping Code (Code) Review intends to address issues pertaining to the Code and proposes amendments to certain specific Code provisions.

However, 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).

Therefore, the second EU contribution to the Code revision has two objectives:

- to comment on the first version of the draft Code 2015 (draft Code) which was put into worldwide consultation by WADA, on 1 June 2012, and where needed to reiterate the comments made by the EU in its first contribution, with the aim that they be taken into account as part of the second Code consultation phase (1 June-10 October 2012);
- to submit the EU's considerations and proposals in view of the current revision of the International Standards.

In order to facilitate the Code revision process and to engage a dialogue with WADA, the EU and its Member States wish to receive written explanations to the proposed changes of the Code and justifications why certain amendments have been rejected.

2. Comments on the first version of the Draft Code 2015 (1 June 2012)

2.1.1. Emerging data privacy principles (Code Article 14.7)

Having examined the draft Code circulated on 1 June 2012, the EU is satisfied that this issue has adequately been dealt. Therefore the EU does not wish to make additional remarks in relation to this issue.

2.1.2. Use of ADAMS (Code Articles 4.4, 14.4, 14.6, 15.2)

Having examined the draft Code circulated on 1 June 2012, the EU is satisfied that this issue has adequately been dealt **as there is now a reference to privacy**. Therefore the EU does not wish to make additional remarks in relation to this issue.

2.1.3. High-Profile Athlete Pools (HPAP's) (ex-Registered Testing Pools (RTPs)) and Whereabouts / respect of the principle of proportionality and human rights (Code Articles 5.1.1, 14.4)

In its first contribution, the EU raised the concern that testing pools could be constructed and used in excessive manners without any limitations imposed to avoid over-zealous approaches, and asked that they should be based, among other things, on risk assessment. Although the prevention of doping constitutes a legitimate goal, the goal-driven provisions on RTPs and whereabouts regrettably do not set any limits to their application as no notion of proportionality can be found in these prescriptions. This sets them into conflict with applicable EU laws such as Article 52 (1) of the EU Charter of Fundamental Rights and Article 6 (1) (c) of the Directive 95/46/EC that render the processing of personal data under the requirement of necessity and proportionality to the legitimate goals pursued.

Therefore, the solution proposed by the EU was to incorporate a reference to the principle of proportionality in Articles 5.1.1 and 14.4 of the draft Code.

The draft Code contains, apart from the wording, the basic ideas of the EU's proposed solution. The relevant provisions are Article 5.1.1 (*"Plan and conduct an effective and appropriate number of [tests] on Athletes over whom they have jurisdiction, [...]"*) and the amended Article 5.1.3 (*"The size and scope of both International and National High Priority Athlete Pools must be commensurate with the size and scope of those Testing programs that they seek to support. The composition of High Priority Athlete Pools therefore must adhere to the principle of proportionality."*).

An additional reference to the proportionality principle was made in the "Purpose, Scope and Organization of the World Anti-Doping Program and the Code", adding the sentence: *"The Code shall be applied in a manner that respects the principles of proportionality and human rights."* WADA has thus clarified that human rights and proportionality principles are overriding methods of interpretation for the application of the Code.

Notwithstanding these important changes, the EU is concerned that the Code does not presently impose rules and procedures guaranteeing a level of transparency demonstrating to athletes that decisions have been taken in an evidence-based manner. The EU believes that this state of affairs may in part account for some of the current controversies surrounding the whereabouts system.

- The EU considers that the respect of the principles of proportionality and human rights now included in the Introduction applies to the entire Code and does not deem it necessary to ask for a reiteration in Article 5.1. The EU welcomes the statement that *"Testing shall only be undertaken for anti-doping purposes"* (Article 5.1) but remains unconvinced that this language will be sufficient as a limit to excessive interpretations.

- However, the EU feels that the general application of the principles to the entire Code and the change introduced in Article 5.1.1 of the draft Code cannot achieve the desired effect of enhanced protection of the athlete. It is only by making proportionality and necessity prerequisites for the application of Article 14.3 of the Code that adherence to the principles can be considered effective to achieve the desired protection of athletes.

2.1.4. *Involvement of Governments (Code Introduction; Code Article 22)*

In its first contribution, the EU highlighted the problematic nature of provisions contained in Article 22 and, in so doing, identified a need for clarification in regard to Article 22 of the Code. The first EU contribution addressed the fact that Article 22 of the Code contains only expectations and not actual obligations. The proposed solution to establish more clearly the scope of application of Article 22 is that reference should be made to national laws.

- The EU is of the view that its considerations made under this point have not been adequately dealt with and would like WADA to reconsider the above.

2.1.4.1. Rationale and interpretation (Code Introduction)

Also in relation to Article 22, the EU asked for removal of the phrase "*These sport-specific rules (...) with an interest in fair sport*" (Code, Introduction, p. 18 and draft Code, section preceding Article 1).

The EU notes that the deletion of this text was also called for in another contribution submitted during the first review phase. The EU continues seeing the current introduction as problematic and wishes to remove doubts which may influence athletes' perceptions of their own rights. Despite that this proposal was not included in the draft Code EU would like to reiterate its request as above. However, as a spirit of compromise and in order to send an equally strong signal to the athletes the following rewording in the Introduction, p. 18 is proposed:

- *"These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are to be applied in a manner that respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport."*

2.1.4.2. Signatories' expectations on Governments (Article 22)

As Governments are only bound by the UNESCO Convention and not by the Code provisions in Article 22, the wording must be such as reflecting this fact. Consequently, the EU invites WADA to reconsider the following amendment of Article 22: .

- *"Each government's commitment to the Code will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003, and by ratifying, accepting, approving or acceding to the UNESCO Convention. The following Articles set forth the expectations of the Signatories inviting governments to apply them where appropriate."*

The EU believes that it will be sufficient to maintain Articles 22.1 and 22.6 in the Code and invites WADA to make the following changes.

- Article 22.1 receives the following wording: *"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 22.5 are repealed.
- Article 22.6 stands as it is.

As stated above EU's preference is delete Articles 22.2, 22.3, 22.4 and 22.5. We do not consider them necessary. In case WADA wishes to maintain some of them in the Code, in the spirit of good co-operation the EU sees the need of rephrasing them and suggests the following changes.

- Article 22.2: *"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 State Parties to 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.)
- In Article 22.3, the word "promptly" (proposed amendment) is deleted and the text of the current Code is maintained: *"Each government will encourage all of its public services or agencies to 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."*
- Article 22.4: *"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 22.5 is repealed as it would otherwise risk giving rise to unjustified expectations among athletes regarding the obligations of governments.

2.1.5. Public disclosure (Article 14.3)

Having examined the draft Code circulated on 1 June 2012, the EU considers that the text of Articles 14.3 and 14.7 may now need to be coordinated more carefully, while taking into account the provision on public disclosure found in Article 10.11, so as to take account of the reinforced provisions in Article 14.2, to rule out practices which take public disclosure for granted and to refer to applicable national law.

The EU sees an essential need to ensure that prosecution and defendant maintain similar levels of access to press and media contacts. While International Federations and National Anti-Doping Organisations have a legitimate interest in using public disclosure to justify their actions, so do athletes or other persons accused of having committed doping offences. At the same time, public disclosure must be used in ways which respect the rights of the defendant as customarily understood, including the presumption of innocence, and which will not lead the public to assume, based on statements found on the internet but meanwhile overruled by subsequent decisions, that defendants are guilty if actually they have been acquitted.

- The EU would like to recall the encouraging experience, in 2010-11, of negotiations between the EU, the Council of Europe and WADA which led to the adoption of an annex on retention times (annex to the International Standard for the Protection of Privacy, ISPPPI). The EU believes that the same approach should be followed by WADA adopting a similar set of rules on public disclosure.
- The EU invites WADA to develop appropriate and proportionate provisions, as well as non-binding guidance, reflecting the good practice found in some jurisdictions limiting public disclosure to printed publications only, or to restricted websites.

2.2. Assessment of other aspects of the Draft Code (1 June 2012)

The EU considers that certain suggestions in the draft Code (1 June 2012) may have a fundamental rights dimension.

2.2.1. Appeals (Code Article 13)

Article 13 (Appeals) has been rephrased, including the statement that no limit to the scope of the right to appeal is foreseen. This is a helpful addition which the EU explicitly welcomes, as athletes should not be discouraged from making use of their human rights and fundamental rights. However, it would be preferable if these rights could be underlined more specifically, as Article 13 is an important provision (not least in connection with the expectations presented to governments in Article 22) to which reference is made in numerous other provisions of the Code.

In the EU, Article 47 of the Charter on Fundamental Rights guarantees the right to an effective remedy and to a fair trial in the following terms: *"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."* The exclusivity of arbitration varies from one national jurisdiction to another and an appreciation of the balance of power between the parties involved, as well as the procedural guarantees afforded to defendants, may in some jurisdictions lead to legal problems if arbitration can be construed, from the point of view of anti-doping rules, as having supplanted the rights of appeal afforded by state courts.

- EU suggests that Article 13 should contain the elements set out above.

2.2.2. *Issues related to Whereabouts requirements and the ADAMS database*

2.2.2.1. Filing Failures and Missed Tests (Code Article 2.4)

The EU notes with satisfaction that the new text proposed for the Comment to Article 2.4 underscores that "High Priority Athlete Pools are expected to be proportionate as necessary to conduct an effective Testing program using the whereabouts information provided."

The EU welcomes this Code-level prescription as an important step towards ensuring proportionality.

2.2.2.2. Therapeutic Use (obligations of International Federations) (Code Article 4.4.1)

The EU notes with satisfaction the new wording "shall be promptly reported to WADA through ADAMS, *or any other system approved by WADA,*" (emphasis added) and encourages the incorporation of this formula into all other provisions in the Code and International Standards where reference is made to the use of the ADAMS database.

- The EU would encourage WADA, as a means of legal certainty, to annex a list of systems approved by WADA, to the Code and/or International Standards.

New 2.2.2.2 Notification after review regarding adverse analytical findings

The EU is concerned that the proposed wording for Article 7.2 risks severely undermining the legitimacy of the fight against doping by abolishing the B sample.

The EU considers this as an infringement on the presumption of innocence.

- **The EU does not accept WADA'S proposal**

2.2.2.3. Identification of Prior Anti-Doping Rule Violations using ADAMS (Code Article 7.6)

- In line with its remarks on Article 4.4.1, the EU suggests the following wording: "Before giving an Athlete or other Person notice of an anti-doping rule violation as provided above, the Anti-Doping Organization shall refer to ADAMS, *or any other system approved by WADA*, and contact other relevant Anti-Doping Organizations to determine whether any prior anti-doping rule violation exists." (emphasis added)

2.2.2.4. Consequences for Team Sports (Code Article 11.2)

The EU is concerned that the new wording proposed for Article 11.2 is far more prescriptive than the current wording and foresees, for the first time, the introduction of collective sanctions irrespective of proven individual guilt. In connection with the controversies surrounding the ADAMS database, Whereabouts requirements, data protection issues and the gravity of sanctions more generally, the introduction of collective sanctions is unacceptable for the EU since they violate fundamental rights and they have negative effect to the fight against doping. As if no individual failure is needed for a sanction to be imposed, the anti-doping system will be severely compromised.

- The EU calls for WADA to **maintain** to the current wording of Article 11.2 or, alternatively, to delete Article 11.2 completely.

2.2.2.5. Athlete Whereabouts Information (Code Article 14.4)

- The EU notes with satisfaction the new text proposed, including the reference to "ADAMS *or any other system approved by WADA.*" (emphasis added). The EU accordingly encourages inserting reference to Article 14.4 into other provisions as a means of enhancing clarity and legal certainty.
- The EU notes with satisfaction the formula "accurate, current location information" (already found in the Code 2009), as a helpful addition to references to Whereabouts requirements in general, and encourages its insertion into other Code provisions and/or the insertion of references to Article 14.4.

2.2.2.6. Doping Control Information Clearinghouse (Code Article 14.6)

The EU notes with satisfaction the new text proposed, including the reference to "ADAMS *or any other system approved by WADA.*" (emphasis added).

The EU notes with satisfaction the new text proposed, including the phrase "ADAMS, that reflects data privacy principles," including the deletion of the word "emerging" (Code).

2.2.2.7. Out-of-Competition Testing (Code Article 15.2)

- In line with its remarks on Article 4.4.1, the EU suggests the following wording: "Out-of-Competition Testing shall be coordinated through ADAMS, *or any other system approved by WADA*, where reasonably feasible in order to maximize (...)" (emphasis added).

3. Comments on the current International Standards

3.1. Current International Standard on Testing (IST 2012)

3.1.1. IST Section 2, IST comment on Code Article 10.3.3

The EU understands that the text of the revised Article will reflect the revised wording of Code Article 10.3.3.

The EU has a problem with regards to the word "inexcusable". The very restrictive prescription found in this comment is apt to partly overrule the provision itself and, as such, does not help interpreting the provision. It could lead to excessive, unfair interpretations which should be avoided.

- The EU accordingly calls for deletion of the comment, considering that the provision of Article 10.3.3 can stand alone.

3.1.2. Objectives (IST Clause 5.1)

- The EU notes with satisfaction the comment on Clause 5.1 . The EU encourages maintaining this important piece of guidance, as it ensures proportionality

3.1.3. Athlete Whereabouts Requirements (Objective/general principles) (quarterly Whereabouts Filing) (IST Clause 11.1.3)

- In line with its remarks on Code Article 14.4, the EU suggests the following wording: "An Athlete in a Registered Testing Pool is required to make a quarterly Whereabouts Filing, *within the meaning of Code Article 14.4*, that provides accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, so that he/she can be located for Testing at any time during that quarter: see Clause 11.3." (emphasis added)

3.1.4. *Athlete Whereabouts Requirements (Objective/general principles) (60-minute slot) (IST Clause 11.1.3)*

- The EU notes with satisfaction the comment on Clause 11.1.3. The EU encourages maintaining this important piece of guidance, as it ensures proportionality.

3.1.5. *Whereabouts Filing Requirements (IST Clause 11.3)*

- In line with its remarks on Code Article 4.4.1, the EU suggests the following wording: "[11.3 Comment: ADOs are encouraged to use the ADAMS system, *or any other system approved by WADA*, to facilitate the information-sharing required under this Section 11." (emphasis added)

3.2. Current International Standard on TUEs (ISTUE 2011)

3.2.1. *Therapeutic Use (ISTUE Section 2, IST comment on Code Article 4.4)*

- At the end of the second paragraph, in line with its remarks on Article 4.4.1, the EU suggests the following wording: "International Federations and National Anti-Doping Organizations shall promptly report to WADA through ADAMS, *or any other system approved by WADA*, the granting of any therapeutic use exemption except as regards national-level Athletes who are not included in the National Anti-Doping Organization's Registered Testing Pool."

3.2.2. *Doping Control Information Clearinghouse (IST Section 2, IST comment on Code Article 14.5)*

- The EU reiterates its comments made during the first Code consultation phase and proposes deleting the word "emerging" from the expression "emerging data privacy principles", resulting in the following wording: "To enable it to serve as a clearinghouse for Doping Control Testing data, WADA has developed a database management tool, ADAMS, that reflects data privacy principles."

3.3. Current International Standard on the Protection of Privacy and Personal Information (ISPPPI 2009)

3.3.1. *Annex on Retention Times*

- The EU reiterates its satisfaction with the advances made by WADA, in 2009, in adopting the current Annex on Retention Times and calls for it to remain unchanged as to avoid potentially excessive interpretations of relevant requirements. Differentiated retention times remain a key element of proportionality in relation to personal data, and longer retention times than those granted to law enforcement agencies cannot be accepted. The EU strongly encourages WADA to uphold the level of data protection created in adopting this Annex.