MONITORING GROUP (T-DO)

ANTI-DOPING CONVENTION

Strasbourg, 11 June 2012 T-DO (2012) INF 16

Data protection issues in anti-doping

The Anti-Doping Convention and its Additional Protocol (CETS No.135 and No.188) underlines the political will of the States Parties to combat doping in sport in an active and co-ordinated manner. The body in charge of monitoring the implementation of the Anti-Doping Convention is the Monitoring Group (T-DO). This is a unique network of governmental experts and officials from anti-doping organisations and sports federations who leads the monitoring work of anti-doping policies among its 51 States Parties, including also non-European states. In 2003, the Monitoring Group was complemented by the Ad Hoc European Committee for the World Anti-Doping Agency (CAHAMA), a political tool aiming at harmonising policies of European governments in line with the World Anti-Doping Agency (WADA). In the CAHAMA, senior European officials meet regularly to prepare positions, before they are discussed and decided upon at worldwide level, among the representatives of both the Executive Committee and the Foundation Board of WADA.

The T-DO and the CAHAMA at their respective meetings, regularly discuss a number of issues related to data protection aspects of anti-doping work, which are binding for national anti-doping agencies and international sport federations by the World Anti-Doping Code and its International Standards[i].

One of the first results of this work was the identification of twelve data protection issues. In close co-operation with T-DO and CAHAMA in 2009, WADA adopted the International Standard on Protection of Privacy and Personal Information (ISPPI), which addressed seven of the data protection issues. Later in 2011 one more issue – retention time – was resolved by an annex to the ISPPI. Now the remaining four issues are consent; public disclosure; transfer: transborder flow of data/onward transfer using web-based secure database ADAMS; and proportionality[ii].

In 2011, WADA launched a process of revision of the World Anti-Doping Code and its International Standards, and thus it was presumed that outstanding data protection issues can be resolved during this process of revision. The T-DO and the CAHAMA jointly identified 48 issues that would have to be taken into account when revising the Code, including some issues regarding data protection[iii].

To ensure that there is no doubling of work, an agreement was reached between the CAHAMA and the European Union Expert Group on Anti-Doping (XG AD), defining that XG AD will deal with matters that are relevant to the enforceable EU secondary law (*acquis communautaire*). In this context, the XG AD submitted to WADA a list of recommendations to ensure data protection[iv].

However, a new development was seen in January 2012 when the European Commission released a proposal for regulation that would replace the current EU Data Protection Directive[v]. There are several crucial changes proposed in this draft regulation, but the most significant for the anti-doping work and for sports in general, is the issue on consent. Under the current Directive, consent from the athlete was, at large, accepted as a valid basis for the processing of personal data (some jurisdictions were more reluctant than others to accept that basis arguing that consent from athlete was not free). The new draft regulation however makes it clear that consent will not be valid where there is a significant imbalance between the position of the data subject and the data controller or, in other words, between the athlete and the Anti-Doping Organisations. The assessment on how the proposed Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data could impact the practices and activities essential to sport today, is reflected in the comments that WADA issued recently[vi].

The T-DO and the CAHAMA will continue to closely cooperate with the EU and WADA, since it is vital that the new developments equally comply with the interests of all the Council of Europe Member States. To this end, the T-DO and the CAHAMA would welcome any further discussions on possible issues and co-operation methods with T-PD on data protection in sports, especially in anti-doping.

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[i] See http://wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf and http://wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards

[ii] See Appendix I

[iii] See Appendix II

[iv] See Appendix III

[v] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF

[vi] See Appendix IV

APPENDIX I

MONITORING GROUP (T-DO)

ANTI-DOPING CONVENTION

Advisory Group on Legal Issues (T-DO LI)

Strasbourg, 8 April 2010

T-DO (2010) 10
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Monitoring Group of the Anti-Doping Convention (T-DO)
Advisory Group on Legal Issues (T-DO LI)

Paris, 15 April 2010 (11.00 – 18.00) and 16 April 2010 (09.30 - 13.00)
(Council of Europe Office, Room 1, 55 avenue Kléber, Paris 16e Metro: Boissière)

Working document on the remaining data protection issues

Item 5 of the agenda

(prepared by the Secretariat)

1. Introduction

1.1. During the May 2009 meeting of the Monitoring Group, a Study on the International Standard for the Protection of Privacy and Personal Information (ISPPI) was adopted (T-DO (2009) 4 INF). This Study identified twelve data protection issues, of which seven were addressed in the revised ISPPI[1].

1.2. The remaining issues are:

- Consent
- Retention times
- Public disclosure
- Transfer: transborder flow of data/onward transfer (ADAMS)
- Proportionality

These issues have been identified by the Article 29 Working Party (WP29) in its second Opinion.[2] WP29 represents the legal authorities on data protection in the countries of the European Union.

1.3. The Study described these points as "issues that cannot be 'fixed' on the short term, nor via amending the ISPP. Appropriate steps will have to be determined by the Council of Europe and its member states. These may include: Changing current working procedures, policies and practices, and/or adopting specific legislation".

[1] Adopted by WADA's Executive Committee on 9 May 2009, effective as of 1 June 2009.
[2] WP 162, adopted on 6 April 2009.

2. CAHAMA Expert Group on Data Protection

2.1. Since the revision of the ISPPI, a CAHAMA Expert Group on Data Protection has been working on the remaining issues. This Expert Group consists of representatives from various Council of Europe member states, the Council of Europe's secretariat, the European Commission and WADA, plus the chair of CAHAMA.

2.2. As expected, addressing the remaining data protection issues has been a challenge. While there has been progress on certain issues, discussions on others have stalled. One of the reasons for the current impasse on several issues, is the lack of information with regards to the practices and procedures related to the remaining issues that are currently in place in the Council of Europe member states. This lack of information makes it difficult to establish a 'European' position in the discussion or to present a European approach.

2.3. Addressing this information deficit will be beneficial to the discussions within the Expert Group, especially with WADA, and be crucial in creating European proposals with regards to the data protection issues.

3. Objective

3.1. Creating a unified European position on the five remaining data protection issues, and thereby creating a platform for European proposals aimed at addressing these issues. Such a coordinated and unified European approach was instrumental to the progress achieved in revising the ISPPI in 2009.

3.2. Drafting this paper should be considered as the first step in this process. After discussion in the next T-Do Legal Issues meeting (15/10 April 2010 in Paris) a final discussion-paper should be presented to the Monitoring Group for adoption in May.

4. Consent

4.1. This subject has been considered by the CAHAMA Expert Group as an issue that needs to be addressed by member states at the national level. That being said, consent is still very much on the table as a data protection issue.

4.2. Therefore, at some point member states will need to be asked (i) to what extent consent is an issue within their respective countries, (ii) whether an exemption has been granted by the national Data Protection Authority (DPA) and/or (iii) (specific) legislation has been or will be adopted or (iv) whether consent is accepted as a legal ground for processing (sensitive) data.

5. Retention times

5.1. As agreed with WADA a proposal on retention times has been drafted by the European members of the CAHAMA Expert Group. This proposal will be submitted to the WADA representatives in the Expert Group for their endorsement. The ensuing step would be the formal adoption of the proposal on retention times by WADA.

5.2. A significant question that needs to be answered, is the status of proposed retention and where they will be 'placed' within the structure of the Code and the International Standards. Will the proposed retention times be annexed to the ISPPI? Should they be considered fully mandatory or is their room for flexibility? If so, under which conditions?

5.3. The issue of retention times, including the questions mentioned under paragraph 5.2, has been included in the agenda for the next T-DO Legal Issues meeting on 15-16 April in Paris, with the aim of discussing the proposal, after which it can be forwarded to the Monitoring Group and CAHAMA for adoption.

6. Public disclosure

6.1. Although the rules provided by the Code[3] are clear, their practical application by Anti-Doping Organisations (ADOs) is not. In fact, a large variation exists regarding the public disclosure of decisions in doping cases. Some NADOs have even adopted a policy concerning public disclosure[4].

6.2. In its second Opinion, WP29 determined that the publication of personal data on internet constitutes interference with the right to respect of privacy and to personal data protection. For such interference to be valid, it has to be necessary in order to attain a specific legitimate purpose.

6.3. The Opinion goes on to discuss WADA's reasons for requiring public disclosure via the internet and possible conditions under which (certain) public disclosure could be proportionate.

6.4. In order to establish a unified European opinion and approach, the following information is needed:

a. The current practice in member states with regards to the public disclosure of decisions;
b. The opinion of the national DPA with regards to this practice;
c. Whether the member state's NADO has consulted the national DPA with regards to this practice and the requirements under the Code;
d. If so, (i) which questions have been submitted/which subjects discussed, and (ii) what has been the DPA's opinion/response.
e. If not, does the member state's NADO plan to consult the national DPA concerning this matter.

7. Transfer: Transborder flow of data/onward transfer (ADAMS)

7.1. The issue of transborder flow concerns the transfer of data from European countries to countries with a lower level of data protection. In short, such transfer is allowed when the other country has an adequate level of data protection.

7.2. The data protection regime in Canada has been deemed adequate, which is significant because ADAMS is located in Canada. However, written confirmation by the Canadian (and Quebec) authorities that WADA and ADAMS fall under their rules has not yet been provided. In some countries such a confirmation may be a prerequisite for the use of ADAMS.

7.3. In order to establish a unified European opinion and approach, the following information is needed:

a. The current practice in member states with regards to (i) transfer of data to non-European countries and (ii) the use of ADAMS;[5]
b. The opinion of the National DPA with regards to (i) transfer of data to non-European countries and (ii) this use of ADAMS;
c. Whether the member state's NADO has consulted the national DPA with regards to (i) transfer of data to non-European countries and (ii) the use of ADAMS;

[3] Code Article 14.2.
[4] For example: The Canadian Centre for Ethics in Sport (CCES).
[5] Is ADAMS used, and if so, which modules are used (whereabouts, TUEs)?

d. If so, (i) which questions have been submitted/which subjects discussed, and (ii) what has been the DPA's opinion/response.
e. If not, does the member state's NADO plan to consult the national DPA concerning this matter.

7.4. The issue of onward transfer concerns the transfer of data to third countries after they have been added to ADAMS by a European (N)ADO or athlete. Under European requirements, such a third country will also have to provide an adequate level of data protection.[6]

7.5. This is a very difficult and technical issue. The questions mentioned under paragraph 7.3 apply here as well.

8. Proportionality

8.1. Although this issue also concerns areas like public disclosure, it mainly applies to the whereabouts requirements, making it probably the most complicated data protection issue to address, especially now that there is a possibility of a landmark case before the European courts.[7]

8.2. The discussions in the Expert Group have focussed on the connection between establishing a proportionate Registered Testing Pool based on various risk analysis.[8] The International Standard for Testing (IST) provides several helpful elements in this regard. The question is to what extent these elements are used in practice. Article 11.2.2 IST requires NADOs to (i) define criteria for Athletes in the national Testing Pool, and (ii) to publish these criteria.

8.3. WADA has introduced a guideline concerning establishing an effective whereabouts program. These guidelines could provide an opportunity to improve the proportionality of the whereabouts requirements.

8.4. In order to establish a unified European opinion and approach, the following information is needed:

a. The current practice in member states with regards to establishing the national Testing Pool;
b. Are the elements provided by the IST used and/or are other instruments used (as for instance, risk analysis per sport/discipline);
c. Which criteria are defined by the member state's NADO for including athletes in the national Testing Pool;
d. The opinion of the national DPA with regards to this practice;
e. Whether the member state's NADO has consulted the national DPA with regards to this practice and the requirements under the IST;
f. If so, (i) which questions have been submitted/which subjects discussed, and (ii) what has been the DPA's opinion/response.
g. If not, does the member state's NADO plan to consult the national DPA concerning this matter.

9. Disclaimer

This paper is a discussion paper and does not reflect the opinion of the CAHAMA Expert Group or any of its members.

[6] Countries like Switzerland and Canada have been deemed to provide this level of protection.
[7] This refers to the legal proceedings of the Belgian athletes Wickmayer and Malisse.
[8] Article 11.2 IST: Requirements for establishing the Registered Testing Pool.

APPENDIX II

AH HOC EUROPEAN COMMITTEE FOR THE WORLD ANTI-DOPING AGENCY (CAHAMA)

THE CHAIRMAN

Ref: DJS-Sport 71- PD/PM/LK/fpf

Mr David Howman
Director General
World Anti-Doping Agency
800 Place Victoria, Suite 1700,
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Sent by e-mail to david.howman@wada-ama.org

Strasbourg, 29 November 2011

Dear Mr Howman, Dear David,

With regard to the World Anti-Doping Code (Code) revision process, which WADA officially launched on 28 November this year, Europe has already held a preliminary discussion on this process. We launched the discussions in the different advisory bodies of the Monitoring Group of the Council of Europe's Anti-Doping Convention and subsequently in the Monitoring Group itself. Finally, the discussion was followed up in CAHAMA, the body of the Council of Europe which is responsible for preparing European positions on issues on which decisions are to be taken by WADA governing bodies.
Through this approach we wish to show our pro-active, constructive and transparent contribution to this important revision process.

The 2009 Code was discussed at several extraordinary meetings of the advisory bodies in autumn this year with a view to identifying possible improvements for the revised Code. This process resulted in a list of items which we recommend that WADA take into account when reviewing the Code. You will find them in the appendix to this letter.

We would emphasize that these items should not generally be considered as definitive drafting proposals for the revised Code. At this stage they should be seen as suggestions and ideas to which the Monitoring Group gave its backing, after which the list was transferred to CAHAMA for endorsement and transfer to WADA.

The CAHAMA supports this list of ideas and suggestions for the revised Code. The result was also an agreement on six key issues or principles, which can be extracted from this list and which should be addressed in the Code Revision process. For each key issue or principle you will find references to examples taken from the list of items.

…/…

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The key issues and principles are:

- Transparency and comprehensibility. The revised Code should be shorter, more clear and accessible. It should only concern the core principles and obligations. In the current Code different rules can be found in different places, sometimes even in the comments to various articles. A possible solution would be to move all comments to an Explanatory Memorandum (in an appendix), which would be part of the Code. Furthermore, the revised Code should also give some more obvious rules for an appropriate consultation process when revising the Code and the International Standards.
  See for example items 42 (Transparency), 45 (Consultation with Stakeholders) and 1 (Covering up).
- Efficiency. The revised Code – and the International Standards – should ensure that the anti-doping programme can be conducted and monitored efficiently. The current anti-doping work – especially by NADOs – is already complicated by increasingly limited financial resources.
  See for example items 30 (Mutual recognition of TUEs), 11 (Provisional hearing) and 21 (Reinstatement testing), and 23 (IF appeal directly to CAS).
- Robust List. The Prohibited List is the cornerstone of nearly all anti-doping policies. That is why an appropriate and sufficient consultation-process must be guaranteed in respect of the Prohibited List. There are also other issues with respect to the Prohibited List, such as the composition, the monitoring programme, and so on. See for example item 4 (Prohibited List). A more general suggestion is that WADA organise a conference about the List issues at the beginning of the Code revision process.
- Minors. The position of minors in anti-doping policies is a particular one and should be specifically discussed in the Code review process. The legal status of minors has been shown to be problematic in everyday practice, especially where testing, sanctions, public disclosure, and so on, are concerned. Not only minors should get specific consideration, but also others who deal with minors (e.g. regarding aggravating circumstances)
  See for example items 13 (Establishing sanctions for athletes who are minors), 16 (Minors: aggravating circumstances) and 19 (Minors: return after completing 4 years of the period of ineligibility).
- Relationship between the Code and national legislation (flexibility). In the Code revision process it is necessary to discuss thoroughly the relation between the Code and national legislation. In the event of possible contradictions between Code obligations and national law, compliance (or not) has to be considered in a flexible and proportionate way.
  See for example items 28 (General data protection provisions) and 26 (Public disclosure).
- Blank spots. The revision of the Code provides a unique opportunity to address issues which are not covered in the 2009 Code or which– in the light of everyday practice – are not sufficiently addressed.
  See for example items 3 (Laboratory presumption), 37 (The role and position of NADOs) and 31 (Education).

Reference to the items mentioned does not mean that the other items are less important. All the items listed in the appendix are constructive suggestions and ideas on which there is a common understanding in Europe that they can be of high relevance and importance for the revised Code.

We trust that the result of our work will be carefully considered by WADA and taken on board at the start of the Code revision process. Of course, we will continue to contribute to the Review process. And of course, we are also prepared to provide you with any further clarification you may require with regard to this contribution.

Finally, we are looking forward to a fruitful Code revision process and are keen to develop our discussions and co-operation with WADA.

With kind regards,

Peter de Klerk

APPENDIX

Draft list of recommendations for the revision of the World Anti-Doping Code

as proposed by the (extra)ordinary meetings of the Advisory Groups on Legal Issues, on Education, on Compliance and on Science in Strasbourg, 16 June 2011 and in Paris, 12-14 October

T-DO SCI	Advisory Group on Science	**Strasbourg, 16 June 2011** 9:30am – 6:00pm
T-DO LI	Advisory Group on Legal Issues focusing on WADA code revision (Part I)	**Paris, 12 October 2011** 9:30am – 6:00pm
T-DO LI	Advisory Group on Legal Issues focusing on WADA code revision items discussed at the last T-DO SCI meeting, Strasbourg, 16 June 2011 (Part II)	**Paris, 13 October 2011** 9:30am – 12:30am
T-DO ED	Advisory Group on Education focusing on WADA code revision	**Paris, 13 October 2011** 2:00pm – 6:00pm
T-DO COMP	Advisory Group on Compliance focusing on WADA code revision	**Paris, 14 October 2011** 9:30am – 12:30am

1. Covering up (Article 2.8)

It is difficult to bring possible ADRVs to a disciplinary panel based on unspecified terms like "covering up" and "complicity". The Code should be clear about which circumstances or behaviour constitute a cover up or complicity. It is highly undesirable for federation officials to keep quiet about knowledge they have regarding anti-doping rule violations.

a. To include as an ADRV under article 2.8: Keeping information regarding ADRVs quiet by (IF or NF) officials;
b. To define the circumstances and conditions under which non-sharing of information by IF or NF officials is considered as covering up in the sense of article 2.8;
c. To clarify which behaviour falls within the scope of 'covering up' and 'complicity' (for instance by providing explanations or examples in the comment to article 2.8).

2. Status of reports/statements of DCO's as evidence (Article 3.2)

For certain ADRVs, most notably involving refusals or evading sample collection (article 2.3), the only pieces of evidence will be the report of the Doping Control Officer (pursuant to article A.3.2.c IST) and the DCO's testimony at the hearing. In these cases it is often the word the DCO against the word of the athlete. In the absence of other evidence, disciplinary panels may then be enticed to prefer the declaration of the athlete (as the weaker party) above the statement of the DCO. The Code does not provide a solution for this issue as it does not give more weight to statements/reports of DCOs in terms of evidence. Certain CAS awards discuss the position of DCOs (for example CAS 2010/A/2296 Simon Vroemen v/KNAU & ADAN) or the denial by an athlete (CAS 2008/A/1608 IAAF v/AFS & Javornik). This is however not sufficient. It should be the Code that stipulates that, unless proven otherwise by the athlete (or other person), considerable weight should be given to reports and statements by DCOs in terms of evidence under article 3.

Article 3 should recognise the reports and statements of DCOs as substantial evidence in establishing anti-doping rule violations. The Code should clarify that a report from a DCO is considered sufficient evidence to establish proof of an ADRV under article 2.3 (Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection).

3. Laboratory presumption (3.2.1)

The presumption in article 3.2.1 regarding WADA-accredited laboratories only concerns "analysis and custodial procedures", and not all the laboratory procedures as described in the ISL. While this presumption only covers part of the ISL, an athlete may rebut this presumption by showing that any departure from the ISL occurred. This departure may be directed at an element of the ISL that falls outside the scope of the presumption in article 3.2.1. CAS has addressed this issue by expanding the laboratory presumption to other elements of the ISL in recent case law (see point 5.22 in CAS 2009/A/1752 (Vadim Devyatovskiy v/IOC), CAS 2009/A/1753 (Ivan Tsikhan v/IOC)). The presumption in article 3.2.1 should be expanded to include all elements of the ISL.

To expand the laboratory presumption in article 3.2.1 in order to cover all the elements included in the ISL and the Technical Documents (and not only analysis and custodial procedures).

4. Prohibited List (4)

This article is one of the core issues of the fight against doping and there are clearly some improvements possible. The current process adoption of the List and the role of the different stakeholders should be clearer and more transparent. It should not happen that the finally adopted List has strongly changed compared to the List circulated to the stakeholders before (as it happened for the List 2011).

a. To state in article 4 only the principles of the List and be more specific and elaborate in the definition of the criteria, in the process how a new List is elaborated and in the responsibilities of the stakeholders in the International List Standard.
b. To make the process of the changes and adoption of the List more concise and more transparent (e.g. upgrade the List Expert Group to a Committee of its own and to clarify the decision process from the draft to the adoption of the List).
c. The criteria for granting a TUE, the authority for doing it and the reciprocal acceptance between different authorities (e.g. National Organization compared to International Federations) should be fully and comprehensively addressed in the International Standard for TUE.
d. To clarify who can request for substances being included into the Monitoring Program.

5. Testing (Article 5)

The current article 5 is some kind of mixture between jurisdiction over athletes and science on testing.

a. To straighten and focus rather on jurisdiction on testing, but the details on testing itself to include in the International Standard for Testing;
b. To produce "the models of best practice" to help countries to comply with article 5.

6. No advance notice testing (Article 5.1.2)

Article 5.1.2 stipulates that, except in exceptional circumstances, all out-of-competition testing shall be no-advance-notice, and that when possible in-competition testing should also be no-advance-notice.

To ensure that the Code dictates that, when possible, all in-competition testing shall be no-advance-notice.

7. Retired athletes returning to competition (Article 5.3)

According to article 5.3, each ADO shall establish a rule regarding retired athletes who seek to return to active participation in sport. In practice, considerable differences exist with respect to the rules addressing the return to competition by retired athletes.

With respect to retired athletes returning to competition, to introduce a fixed (practicable and proportionate) period, instead of allowing each ADO to fix one.

8. Analysis of Samples (Article 6)
The accessibility to testing samples for research should be increased without needing a written consent from athletes as long as the common research principles (anonymity of the samples, not traceable to a certain athlete) are fulfilled.

To increase the accessibility to testing samples for research as long as the anonymity of the samples is guaranteed and that it cannot be traced back to a certain athlete.

9. Provisional suspension for ADRVs other than Presence (Article 7.5.1)
If an athlete, who is using a non-specified prohibited substance, is tested and realizes that he will test positive, then this athlete may opt to refuse to be tested rather than undergo the doping control. By refusing to be tested, the athlete avoids the mandatory provisional suspension under article 7.5.1.

To include an (alleged) violation of article 2.3 as an ADRV requiring a mandatory provisional suspension under article 7.5.1.

10. Expedited hearing (Article 7.5.1/8.2)
The Code does not provide an explanation to the expedited hearing referenced in article 8.2. Neither does the Code clarify the difference between the provisional hearing and the expedited hearing. It may be that the expedited hearing is an accelerated version of the regular hearing before the disciplinary panel, but this is not clear from the wording of the Code. If an athlete wants an accelerated procedure, he should submit a request to this effect to the panel.

a. To clarify the differences between the provisional and expedited hearings; and
b. To stipulate when each may or shall be applied.

11. Provisional hearing (Article 7.5.1)
The purpose of the provisional hearing is unclear, as imposing a provisional suspension for an adverse analytical finding involving a non-specified substance is mandatory. As the Code does not allow any discretion with respect to imposing a mandatory provision in this case, why the Code requires a provisional (or expedited) hearing to be held in these cases, as it cannot affect the provisional suspension from being imposed. If, in the view of the athlete concerned, pressing reasons exist which justify to provisional suspension from being lifted, the athlete can appeal the provisional suspension (see article 13.2).

a. To explain the reason for and purpose of a mandatory (provisional or expedited) hearing in relation to the mandatory provisional suspension under article 7.5.1; or
b. To remove this mandatory (provisional or expedited) hearing from the Code.

12. Automatic disqualification of individual results (Article 9)
The Code should clarify that when an athlete's results that led to an athlete qualifying for a future event (like the Olympics, etc.) are disqualified, this also affects this athlete's qualification for this future event.

To include a reference to "future" event in article 9, in order to clarify that the disqualification of results may also affect the qualification for a future event (like the Olympic Games, world championship, etc.).

13. Establishing sanctions for athletes who are minors (Article 10.5.1/10.5.2)
Whether the position of minors, especially in exceptional circumstances, is sufficiently addressed in article 10.

To review whether the Code sufficiently allows the position of minors being taken into account when establishing the period of ineligibility.

14. Substantial assistance (Article 10.5.3)
The substantial assistance is a useful instrument that should be used more in practice. However this clause is rarely if ever used by most NADOs.

To review article 10.5.3 on substantial assistance in order to establish how this clause can be used more.

15. Avoiding aggravating circumstances by admission (Article 10.6)
According to 10.6, an athlete or person can avoid increased sanctions from being imposed under this article by admitting the anti-doping rule violation promptly after being confronted with this ADRV. It is inappropriate and undesirable that an athlete or athlete support personnel can avoid the consequences of committing a particular serious offence (organized doping, doping conspiracy) by a simple quick admission.

Considering the seriousness of the offences that fall within the scope of article 10.6, the Code should not allow an admission to prevent increased sanctions from being imposed. This admission-provision should be removed from article 10.6.

16. Minors: aggravating circumstances (Article 10.6)
ADRVs involving minors is a particularly serious offence. The Code includes a reference to this issue in article 10.3.2. However, this article only refers to article 2.7 (Trafficking) and 2.8 (Administration).

a. To consider all ADRVs involving minors particular serious violations;
b. To consider an anti-doping rule violation involving minors, if committed by athlete support personnel, as an aggravated circumstance under article 10.6.

17. Second violation (Article 10.7.4)
Due to the notification requirements under article 10.7.4 two separate ADRVs may count as a single violation for the purpose of imposing sanctions. This can happen when the second ADRV is discovered before the first ADRV. It cannot be the intention of the Code to let a second separate ADRV go unpunished.

To revise article 10.7.4 in order to prevent two separate ADRVs from counting as a single violation for the purpose of imposing a sanction.

18. Meaning and interpretation of "any capacity" (Article 10.10.1)
Article 10.10.1 stipulates that no athlete or other person may, during a period of ineligibility, participate in any capacity in a competition or activity. This wording leaves (too) much room for questions and interpretation.

To clarify article 10.10.1.

19. Minors: return after completing 4 years of the period of ineligibility (Article 10.10.1)
Article 10.10.1 allows athlete support personnel subject to a period of ineligibility longer than four years to participate in local lower level sport events in a sport other than the sport in which the ADRV was committed after completing four years of the period of ineligibility. It undesirable that athlete support personnel involved in such a serious ADRV that a period of ineligibility longer than four years was imposed, is allowed to work with minors four years after committing such an offence. This provisions does not allow for sufficient protection of minors.

To amend article 10.10.1 in order to protect young athletes (minors) who participate in youth /junior events/activities. Serious offenders (serving a period of ineligibility longer than four years) should not be allowed to return after four years to work with minors.

20. Status during ineligibility (Article 10.10.1)
Although article 10.10.1 applies to athlete support personnel via the reference to "other Person", it would be beneficial to include a direct reference to athlete support personnel.

In addition to the references to athletes and persons, to include Athlete Support Personnel (who are currently not mentioned but fall within the scope of this article through the definition of Person).

21. Reinstatement testing (Article 10.11)
For athletes who are ineligible for an ADRV involving a substance that is only prohibited in competition, there appears to be no clear reason why they should make themselves available to be tested out-of-competition. In these cases, there are also no benefit or need for an ADO to test an athlete.

Either (i) article 10.11 should not be mandatory for athletes who are ineligible for an ADRV involving a substance that is only prohibited in competition, or (ii) the Code should introduce a clear reason or purpose for out of competition testing in these cases.

22. Consequences for teams (Article 11)
Article 11 lacks specification and is not practical to apply - Article 11.1 should also apply to national competitions (basketball, football, etc.) when more than one member of a team in a team sport has been notified of an ADRV. Article 11.2 stipulates that, if more than two members of a team in a team sport are found to have committed an ADRV during an event period, the ruling body of the event shall impose an appropriate sanction on the team. The Code does not specify who is authorized or required to bring such cases before the disciplinary panel. This may have as a consequence that such a case is not brought before the disciplinary panel (for instance because an NF may refuse to do so).

a. To amend article 11 in order to make it (better and more clearly) applicable at the national level; b. To Clarify who is responsible for testing on the national and for bringing cases before the relevant disciplinary panels.

23. IF appeal directly to CAS (Article 13)
Article 13 does not clarify whether (i) IFs have to exhaust all domestic appeal options before appealing to CAS, or (ii) IFs have the right to appeal a decision directly to CAS (with respect to international level athletes and international events).

To clarify whether IFs have the right or not to appeal decision directly to CAS without having to exhaust all the national appeal options. And if so, under which circumstances this is the case.

24. Confidentiality and Reporting (Article 14)
There should be an open formulation on the review of atypical findings to cover all possible cases.

The text of article 7.3 on reporting of atypical findings should carefully be revised as to accommodate the different types of atypical findings and its further management (profiling, retesting of a suspicious athlete, reporting of possible health problems).

25. Confidentiality and Reporting (Article 14)
There is an issue on if and at what time athletes should receive the detailed results of blood testing, as well as if data from blood testing should be considered as "medical data" or "anti-doping data.

To add a new sub-article for the reporting of profile results (blood and endocrine) containing aspects like reporting time, reporting details and data sharing.

26. Public disclosure (Article 14.2.2/14.2.4)

Public disclosure in many cases will be necessary and justified. However, mandatory provisions regarding public disclosure that do not allow any flexibility will lead to continued (significant) non-compliance with respect to these sections of the Code.

Public disclosure as a tool for communicating doping sanctions to the sporting and anti-doping community is not effective (as it is not clear when and where decisions are published, by whom and in which language). So, it cannot be verified whether an suspended athlete does not participate in the same or another sport or in another capacity.

a. To introduce more flexibility with respect to public disclosure.

b. Concerning the communication of doping sanctions to the sporting and anti-doping community, recommends WADA to create a mechanism which allows each NADO, IF, NF and each event organizer to check the status of an athlete, athlete support personnel or other person and verify whether this athlete or person is serving a period of ineligibility for an ADRV (such a mechanism could for instance be a secured website, managed by WADA).

27. Access to athlete's whereabouts (Article 14.3)

The access of ADOs with jurisdiction to test an athlete to this athlete's whereabouts is instrumental in conducting no advance notice testing. This access is currently hindered by the lack of cooperation between ADOs.

Article 14.3 stipulates that the athlete's whereabouts information "will be accessible, through ADAMS where reasonably feasible, to other Anti-Doping Organizations having jurisdiction to test the Athlete as provided in Article 15". However, this wording is not strong enough.

To ensure that ADOs with jurisdiction to test an athlete shall have access to his whereabouts, regardless of which IF or NADO is the recipient of these whereabouts in accordance with the IST.

28. General data protection provisions (Article 14.6)

Considering that the ISPPPI was drafted after the adoption of the 2009 Code, the data privacy article in the Code (14.6) is amended in accordance with the ISPPPI (Article 5.1).

Article 14.6 is amended as follows:

Anti-Doping Organizations 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.

29. Event testing (Article 15.1)

Article 15.1 prohibits NADOs from conducting tests in an international event in their own country without permission from either the IF or WADA. Such a strict rule is not compatible with the authority of NADOs to conduct testing in their own country.

To amend article 15.1 in order to respect the authority of NADOs to conduct testing in their own country, while ensuring that testing is conducted in a coordinated manner.

30. Mutual recognition of TUEs (Article 15.4)

With respect to mutual recognition, the comment to article 15.4.1 states that NADOs do not have the authority to grant TUEs to international level athletes. In the same vein, IFs do not have authority to grant TUEs to national level athletes (under article 4.4).

To allow the mutual recognition of TUEs when (i) the TUE is granted by a NADO which is considered Code compliant, (ii) the TUE is granted in accordance with the ISTUE, and (iii) the TUE is not revised by WADA.

31. Education (Article 18)

a. Education on whereabouts should be added to the list of mandatory programs and activities.
b. Recommends that the aspect of evaluation of educational activities (outcome) should be addressed either in the Code or in a more elaborated guideline.

32. Education on food supplements (Article 18.2)

Article 18.2 - education programs should include information on illegal trafficking of prohibited substances and the danger of using food supplements that may be contaminated with pro-hormones, hormones and other prohibited substances.

a. To specify the phrase "Managing the risks of nutritional supplements" in the article 18.2;
b. To amend article 20.5 with a new rule that NADO's shall assist the governments in implementation of Article 10 of UNESCO;

33. Research (Article 19)

There is an important issue of a good accessibility of doping control samples for research (see also the recommendation on article 6) in conflict to the right of athletes for the protection of privacy.

a. Article 19.2 could be deleted to not exclude future new types of research. However, a new sentence stating that all relevant anti-doping research should be addressed could be included in article 19.1.
b. To ensure that WADA regulates the ownership of a sample not only in the International Standard for Testing (art. 10) but in the Code and to make the accessibility of test-samples for research easier.

34. Role and position of education in the Code (Part Two and Article 20)

The current structure of the Code is emphasising on control, but it has to be taken into consideration that prevention, information and education are better tools to fight the use of doping. To show the paramount importance of prevention, the rules concerning prevention should be placed before control.

a. To move the Part Two: education and research before Part One: Doping Control;
b. To reorder the items in Signatories roles and responsibilities to place the role to promote education much higher; (e.g. from 20.3.11 to 20.3.3).

35. Provision of prevention (Article 20)

The current roles and responsibilities for Signatories envisage the task: "To promote anti-doping education", which could be broader and include also prevention and information as stated in Article 18;

To amend respective articles (20.1.9, 20.2.8, 20.3.11, 20.4.9, 20.5.7, and 20.6.7, 20.7.6) to reflect broader role in prevention, information and education.

36. Role of National federations in education (Article 20.3)

The national federations are highly responsible to educate athletes, but currently the responsibility of national federations in educating its athletes is very vague 20.3.2.

To include the requirement for national federations to establish, develop and implement prevention programs under Article 20.3, but keep in mind that defining the responsibility of one or the other Signatory to educate athletes, could lead to an unwanted situation when athlete would claim that he had not been sufficiently educated and thus committed an ADRV.

37. The role and position of NADOs in the Code (Article 20.5)
It is essential that the Code establishes and confirms the independence of NADOs.

To include a reference in article 20.5 (Roles and Responsibilities of National Anti-Doping Organizations) which states that NADOs shall be independent in terms (i) of how they operate and (ii) with respect to decision making.

38. Strengthening the role of NADOs (Article 22)
In order to avoid situations when representatives of the governments at the WADA statutory bodies are not aware of anti-doping activities in the country, the governments should be in contact with their NADOs.

To enhance NADOs role and ensure liaising of governments with their NADOs in the Article 22.

39. Quality (Article 23)
Improved quality regarding anti-doping activities being conducted by ADOs would lead to increased trust between ADOs. The current lack of trust is preventing more cooperation and better coordination between NADOs and IFs.
Ensuring and improving that through monitoring and assessment will lead to (i) more trust between ADOs, and (ii) a more 'level anti-doping field' in which there are no more areas in the world where athletes have an unfair advantage because of, for instance, the lack of testing.

To create a mechanism whereby the competence/quality of ADOs can be assessed in order (i) to erase the lack of trust IFs and NADOs have towards each other, and (ii) to ensure that all athletes receive at least comparable education, testing and enforcement of the Code.

40. Flexibility in implementation of the Code (Article 23.2.2.)
Article 23.2.2 does not allow any flexibility, including possibility to have stronger rules than the Code prescribes.

To consider the flexibility and to allow some space for translation and interpretation, e.g. for national legislation.

41. Monitoring the compliance with the Code (23.4)
Currently there are quite severe consequences for noncompliance with the Code, and therefore the measuring mechanism must be very precise and clear.

a. To improve the text with a positive approach – to stress that noncompliance is not only a punishment but also a way to emphasize on possible improvements;
b. In Article 23.4.4 to provide that compliance is measured and decided by an impartial body at WADA, and not by Foundation Board, where there could be conflict of interest, because the members of Foundation Board may be evaluating compliance of their own organisation;
c. To envisage some monitoring of practical implementation (no only on paper); examples of practical evaluation – unannounced inspections at IF championships, joined efforts of all organisations (WADA, Council of Europe, UNESCO) in monitoring.

42. Transparency (Code)

The content of the Code should be clear, transparent and tailored equally to International and National Level Athletes. It would be beneficial to the Code's transparency to move comments that in nature are rules to the main text of the article. The current use of comments in the Code hinders the Code's transparency.

a. Where possible the wording of the Code should be simplified, its scope clarified and that (for the purposes of implementing the Code) its provisions should be tailored equally to International Level and National Level Athletes.
b. To move comments that in nature are rules to the main text of the articles, in order to improve transparency.
c. The comments in the Code are cleaned up. Comments that are not applied in practice should de deleted (For example comment to Article 10.5.2, 10.4)

43. Relations to the other existing international instruments (Code)

The changes in the Code need to be carefully considered in relation to the existing international instruments, keeping in mind those changes to may lead to necessary amendments in international treaties, which could mean even a new ratification round for the States Parties.

To keep in mind existing provisions of the UNESCO and Council of Europe conventions, when introducing new items to the Code.

44. General remark (Code)

The text of the Code is very strict and binding.

When reviewing the text, softer and more encouraging language would be used.

45. Consultation with stakeholders (The Purpose of the Code, Article 23 and International Standards)

Consultation with stakeholders of key importance before new or revised International Standards, Technical Documents or other requirements is adopted by WADA. The reference to consultation in the Code does not reflect the importance of the consultation process.

a. The wording regarding consultation in the Code (currently: "reasonable consultation with the Signatories and governments") is strengthened and clarified, and that emphasis is placed on the transparency of consultation process;
b. The term "signatories" is replaced by the more appropriate term 'Stakeholders', as WADA-accredited laboratories are not Signatories to the Code, but should be included in the consultation process;
c. The English and French versions of this text are brought in line with each other. The current wording in English ("reasonable consultation") is not identical to the wording in French ("consultations suffisantes").

46. Revising the IST (IST)

The structure of the IST needs improvement, that it needs to be clarified and simplified, and that errors need to be addressed.

The IST needs to be cleaned up: Its structure needs to become more logical, its provisions need to be clarified and become more accessible/simple and errors need to be corrected.

47. Suspending the 18-month expiration period in case of retirement (IST)

It is undesirable that athletes with two whereabouts failures may opt to temporarily retire from sports in order to avoid a third whereabouts failure (filing failure/missed test) being recorded within the eighteen-month period. By retiring from sport these athletes will terminate their whereabouts requirements. They will stay retired until the eighteen-month period dating back to their first whereabouts failure has run out. This first whereabouts failure will then expire, after which the athlete will return to competition.

To include in the he IST a provision which states that the 18-month expiration period for whereabouts failures is suspended in case an athlete retires.

48. Data protection: International Standard for the Protection of Privacy and Personal Information (ISPPPI)

To introduce a reference in the Code to the International Standard for the Protection of Privacy and Personal Information (ISPPPI), as this International Standard did not yet exist when the 2009 version of the World Anti-Doping Code was adopted.

APPENDIX III

EUROPEAN COMMISSION
Directorate-General for Education and Culture

Sport

Brussels, 17 October 2011

Expert Group "Anti-Doping" (XG AD)
- 19 October 2011 -

Agenda Item:	5
Subject:	EU contribution to the revision of the WADA Code
Purpose:	For Discussion
Author:	Commission
Annex:	I. List of fiches II. Fiches II.1, II.2, II.3, II.4, II.5, II.6, II.7, II.8 III. Proposal for Amendments to WADA's Whereabouts Guidelines

DISCUSSION DOCUMENT

On 20 May this year, the Council adopted a "European Union Work Plan for Sport for 2011-2014." In so doing, the Council created the XG AD and assigned the following task to it: "Prepare draft EU comments to the revision of the WADA Code", as well as the following target date: "Preliminary draft EU comments by early 2012." To this end, the Commission has prepared the enclosed material:

- Eight thematic texts ("fiches") on selected aspects (Annex II) (for an overview of the fiches, see Annex I)

- A draft proposal for amendments to WADA's Whereabouts Guidelines, previously prepared informally within the Council of Europe's CAHAMA Expert Group on Data Protection (Annex III)

While the XG is at liberty to add material to this contribution, XG members are advised that the enclosed material has been prepared by the Commission in its role of guardian of the Treaties, i.e. by focussing on applicable EU law (*acquis communautaire*).

Annex I

List of fiches in Annex II

1. Emerging data privacy principles
2. Use of ADAMS
3. RTPs and Whereabouts
4. Whereabouts Guidance
5. Public services or agencies
6. Public disclosure
7. Respect arbitration
8. Harmonisation

Annex II

1. Emerging data privacy principles

Scope	Proposal for a **legal** contribution with a **political** dimension
Issue	Is the reference to "emerging data privacy principles" sufficient for running the ADAMS database and making its use partly or entirely mandatory?
WADA reference texts	Article 14.5 (Doping Control Information Clearinghouse) IST, sec. 14.3, 14.5, 15.2
EU reference texts	Charter Article 8 Directive 95/46/EC (data protection)
Problem formulation	Under Charter Article 8, *"data must be processed fairly for specified purposes,"* while Directive 95/46/EC, Article 25 (1), required Member States to ensure that personal data are solely transferred to third countries when these afford adequate protection. This may pose a problem in relation to data-sharing tool designed to facilitate data sharing at a global level, including data sharing with private organisations, not always operating in countries with a strong data protection culture. The mandatory use of such a data-sharing tool is potentially harmful. The Whereabouts system and the use of the ADAMS database are, from the point of view of actual litigation, as well as in respect of ongoing political[1] and social-dialogue discussions,[2] the most controversial parts of the entire WADA rules system. The mandatoriness of ADAMS use poses serious legal concerns, given the technical possibilities afforded by ADAMS in terms of data sharing at a potentially global scale, on conjunction with WADA's mission as a global clearinghouse. Many Member States only allow limited or restricted use of ADAMS and some have either banned it or are effectively not using the database.[3] Accordingly, in its Second Opinion on WADA (2009),[4] 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

[1] 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.

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

[3] 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 falf of 2010. The Hague: T.M.C. Asser Instituut. http://www.asser.nl/upload/documents/9202010_100013rapport%20Asserstudie%20(Engels).pdf

[4] 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://www.garanteprivacy.it/garante/document?ID=1619300

	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 IS in this respect. Much of section 2.2 of the Opinion is about ADAMS use, although the Working Party has not taken a clear position for or against ADAMS use. Against this backdrop, it is clear that mandatory ADAMS use, whether explicit or implicit, must be opposed by the EU. WADA's role as a global "Doping Control Information Clearinghouse" is defined unambiguously in Article 14.5 WADC 2009. Whereas the actual practice may be difficult to gauge (the Commission is trying to gain as much insight as possible), the language of Article 14.5 appears to be highly problematic in that it requires data-sharing on a wide scale, worldwide, between public and private actors. [5] If such language can be accepted at all, the EU must require, at the very least, that WADA provides a very high level of legal certainty. This does not appear to be the case at present. The principle of legal certainty is recognised in ECJ case law, not only as regards EU Institutions' application of EU law (the scope of the Charter as a binding instrument), but also with implications for MS' rules and practices in such areas as VAT, including a case involving a sport organisation,[6] telecommunications regulation,[7] etc. Crucially, WADA's comments to Article 14.5 (WADC 2009, p. 89) state 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 seems set to pave the way for arbitrary practices, potentially violating athletes' rights as data subjects.
Assessment	"Emerging data privacy principles" is too vague. For the sake of

[5] *"WADA shall act as a central clearinghouse for Doping Control Testing data and results for International-Level Athletes and national-level Athletes who have been included in their National Anti-Doping Organization's Registered Testing Pool. To facilitate coordinated test distribution planning and to avoid unnecessary duplication in Testing by the various Anti-Doping Organizations, each Anti-Doping Organization shall report all In-Competition and Outof-Competition tests on such Athletes to the WADA clearinghouse as soon as possible after such tests have been conducted. This information will be made accessible to the Athlete, the Athlete's National Federation, National Olympic Committee or National Paralympic Committee, National Anti-Doping Organization, International Federation, and the International Olympic Committee or International Paralympic Committee."*

[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

	legal certainty these principles should be specified. 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.
Solution proposed	The EU must demand the omission of the reference, in the comments to Article 14.5, to "emerging data privacy principles". The EU must oppose prescription or quasi-prescription of mandatory ADAMS use in the Code and all IS. The EU must resubmit its track-change proposal for amendments to be made to the IST, as developed informally within the CAHAMA Expert Group on Data Protection ("Data Protection – Non-Fiche A REV 3 240310"). The text is attached (Annex III). Specifically, the EU must ask for amendments to IST, sec. 14.3, 14.5, 15.2

2. Use of ADAMS

Scope	Proposal for a **legal** contribution
Issue	How can the use of the ADAMS database be adapted so as to allow the EU to recommend it?
WADA reference texts	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
EU reference texts	Charter Article 8 Directive 95/46/EC (data protection)
Problem formulation	The mandatory use of the ADAMS database appears to be a controversial. Are requirements to use ADAMS compatible with

	EU data protection law? 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 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). There is good reason to believe that organisations affected by these rules see ADAMS use as mandatory or quasi-mandatory. Nevertheless, not all MS use ADAMS, some have even paid their own in-house database systems to ensure higher levels of data safety and/or user-friendliness, and some MS do not use ADAMS at all. Switzerland, the USA and Australia are well-know users of other database systems, although ADAMS is offered by WADA free of charge. Is it possible 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? Within the Council of Europe's CAHAMA Expert Group on Data Protection a document was prepared, in close dialogue with WADA, which aims to amend the IST.
Assessment	This is a technical issue which depends on the specific modalities of ADAMS. 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 must ask for a revision of all the Code and IS provisions cited above, potentially of other provisions also. The EU must resubmit its track-change proposal for amendments to be made to the IST, as developed informally within the CAHAMA Expert Group on Data Protection ("Data Protection – Non-Fiche A REV 3 240310"). The text is attached (Annex III). The EU must ask WADA to publicly issue assurance that organisations based in the EU will not be subjected to duress for

[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

	not using ADAMS.

3. RTPs and Whereabouts

Scope	Proposal for a **legal** contribution
Issue	Are the requirements regarding registered testing pools (RTPs), athletes' availability for testing and whereabouts proportionate?
WADA reference texts	Articles 5.1.1, 14.3
EU reference texts	Charter Article 8 Directive 95/46/EC (data protection)
Problem formulation	Under the terms of Article 5.1.1, *"in coordination with other Anti-Doping Organizations conducting Testing on the same Athletes, and consistent with the International Standard for Testing, each Anti-Doping Organization shall: Plan and conduct an effective number of In-Competition and Out-of-Competition tests on Athletes over whom they have jurisdiction, including but not limited to Athletes in their respective Registered Testing Pools. Each International Federation shall establish a Registered Testing Pool for International-Level Athletes in its sport, and each National Anti- Doping Organization shall establish a national Registered Testing Pool for Athletes who are present in that National Anti-Doping Organization's country or who are nationals, residents, license-holders or members of sport organizations of that country. In accordance with Article 14.3, any Athlete included in a Registered Testing Pool shall be subject to the whereabouts requirements set out in the International Standard for Testing."* Under the terms of Article 4.3, *"[...] The International Federations and National Anti-Doping Organizations shall coordinate the identification of Athletes and the collecting of current location information and shall submit these to WADA. This information will be accessible, through ADAMS where reasonably feasible, to other Anti-Doping Organizations having jurisdiction to test the Athlete as provided in Article 15."* Neither of these provisions would appear to impose limits on over-zealous NADO's or IF's: no notion of proportionality can be found in these prescriptions. Some Member States have disproportionately big RTP's. Within the Council of Europe's CAHAMA Expert Group on Data Protection a document was prepared, in close dialogue with WADA, which aims to amend the IST. However, in this case, it would seem that not only the IST but also the Code itself should be amended.

Assessment	The prevention of doping in sports is in principle 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. In this context, availability of resources is not a factor which can justify the processing of personal data. Refer to the Article 29 Working Party opinion as regards whereabouts.
Solution proposed	The EU must ask for a reference to proportionality to be inserted in Articles 5.1.1 and 14.3 of the Code. The EU must resubmit its track-change proposal for amendments to be made to the IST, as developed informally within the CAHAMA Expert Group on Data Protection ("Data Protection – Non-Fiche A REV 3 240310"). The text is attached (Annex III).

4. Whereabouts Guidance

Scope	Proposal for a **legal** contribution with a possible **political** dimension
Issue	Is the current Whereabouts Guidance sufficient in terms of excluding disproportionate, over-zealous and excessive interpretations of the whereabouts requirements?
WADA reference texts	Article 2.4 IST Whereabouts Guidance, section 2.10, 2.11.2, et al.
EU reference texts	Charter Article 8 Directive 95/46/EC (data protection)
Problem formulation	Is the current Whereabouts Guidance sufficient in terms of excluding disproportionate, over-zealous and excessive interpretations of the whereabouts requirements? Are statements such as *"testing must be made a priority, and a substantial amount of Testing must be conducted Out-of-Competition"* (2.11.3) proportionate? Neither of these provisions would appear to impose limits on over-zealous NADO's or IF's: no notion of proportionality can be found in these prescriptions. Some Member States have disproportionately big RTP's. This has been under intense discussion with WADA. No direct

	result but WADA signalled readiness to look at the issue again as part of Code Review. Within the Council of Europe's CAHAMA Expert Group on Data Protection a document was prepared, in close dialogue with WADA, which aims to amend the IST. However, in this case, it would seem that not only the IST but also the Code itself should be amended.
Assessment	The prevention of doping in sports is in principle 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. In this context, availability of resources is not a factor which can justify the processing of personal data. Refer to the Article 29 Working Party opinion as regards whereabouts.
Solution proposed	The EU must resubmit its track-change proposal for amendments to be made to the IST, as developed informally within the CAHAMA Expert Group on Data Protection ("Data Protection – Non-Fiche A REV 3 240310"). The text is attached (Annex III). If the Council wishes to take a more political line on this issue, further amendments to the Code might be envisaged.

5 Public services or agencies

Scope	Proposal for a **legal** contribution
Issue	Is the obligation upon Governments to "encourage all of its public services or agencies to share information with Anti-Doping Organizations which would be useful […]" lawful?
WADA reference texts	Article 22.2
EU reference texts	Charter Article 8 Directive 95/46/EC (data protection)
Problem formulation	Article 22.2 states: *"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."* This is an extremely far-reaching obligation for any government to assume. It is submitted that signing up to such a general

	commitment might in itself carry the risk of being ^potentially in breach of the law. The phrase *"information with Anti- Doping Organizations which would be useful"* is seriously lacking in precision and hence in legal certainty. It is submitted that this phrase may, if understood very literally, lead to excessive data sharing. Is this obligation under EU data protection law?
Assessment	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 Commission is not in a position to verify the pertinence, in each of the Member States, of the grounds set out in Article 7 of the Directive. 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, it may appear doubtful whether consent is in fact still freely given; in this case, a transfer by public authorities is only 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. Not necessarily unlawful. It is possible to procure consent by persuasion.
Solution proposed	The EU should ask for omission of Article 22.2. If omission cannot be achieved, the EU should ask for insertion of a clause referring to applicable national law.

6. Public disclosure

Scope	Proposal for a **legal** contribution
Issue	Is the obligation to Public Disclosure compatible with EU data protection law?
WADA reference texts	Article 14.2
EU reference texts	Directive 95/46/EC (data protection)
Problem formulation	Article 14.2 includes an obligation to disclose athlete-related information, followed by a number of specific procedural requirements. Is the obligation to Public Disclosure compatible with EU data protection law or does it need additional guidance to be lawful in

	the EU?
Assessment	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. 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.*
Solution proposed	The EU should ask for insertion of a clause referring to applicable national law.

7. Respect arbitration

Scope	Proposal for a **legal** contribution with **important** political implications
Issue	Is the obligation upon Governments to "respect arbitration as the preferred means of resolving doping-related disputes" in line with the general principles in EU law?
WADA reference texts	Article 22.3
EU reference texts	Directive 95/46/EC (data protection) Charter Article 47-49
Problem formulation	Article 22.3 reads as follows: *"Each government will respect arbitration as the preferred means of resolving doping-related disputes."* Although there are different interpretations regarding the exact nature of Governments' obligations as Code Signatories, the presence of such a provision is unhelpful as it suggests to athletes that they are not entitled to go to public courts. This is the more serious given that the sporting system has traditionally been promoting arbitration and has discouraged litigation before public courts. The anti-doping system includes many mechanisms designed to suggest to athletes that they do not have access to state courts. See the 2007 Olympic Charter (Rule 45, p. 104): *"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration."* See also Bye-law to Rule 45, pp. 84-85):*"6. Any participant in the Olympic Games in whatever capacity must sign the following declaration: (...)"* Is the obligation in line with the procedural requirements of Directive 95/46/EC? Is this obligation in line with the general principles in EU law and

	Charter Article 47-49?
Assessment	As regards the duty to "respect arbitration", with respect to processing of personal data, the according to Article 22 of Directive 95/46/EC, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question. A judicial remedy requires the possibility of recourse to a public court which enjoys adequate guarantees of independence and impartiality. As regards Article 47 to 49 of the Charter of Fundamental Rights, in accordance with its Article 51 (1), the Charter is applicable to the institutions, bodies, offices and agencies of the EU, and to the Members States only when they are implementing Union law. To the extent that the Charter is applicable to matters arising in the context of the application of the Code, ultimately, access to a court may not be restricted. If the admissibility of legal proceedings is made conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection. Such restriction is only justified if it pursues objectives of general interest (such as the quicker and less expensive settlement of disputes) and if it does not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[9] This could have civil justice ramifications – limiting an individual's right to redress. In any event, an individual should ultimately have access to a court of law.
Solution proposed	The EU should ask for omission of Article 22.3. If omission cannot be achieved, the EU should ask for insertion of a clause referring to applicable national law. The EU should use the Code Review consultation process as an opportunity to make a strong case for the viewpoint that athletes, like everyone else, are entitled to go to court, and that no official WADA text should discourage them from so doing.

8. Harmonisation

Scope	Proposal for a **legal** contribution with important **political** implications
Issue	(i) Is the harmonisation requirement in Article 22.4 compatible with the principles of sincere cooperation and uniform application

[9] Cf. Judgment of the Court of 18 March 2010, Alassini, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, ECR [2010] Page 1-2213, at grounds 62-66.

	of EU law? (ii) Is the obligation under Article 24.3 to disregard national law when interpreting Code provisions lawful?
WADA reference texts	(i) Article 22.4 (ii) Article 24.3; see also Introduction, pp. 14-17
EU reference texts	Principle of sincere cooperation Principle of uniform application of EU law Directive 95/46/EC (data protection) Potentially other legal acts
Problem formulation	(i) *"All other governmental involvement with anti-doping will be brought into harmony with the Code"* (Article 22.4). Is this requirement in line with Member States' obligation, under EU law, to cooperate sincerely and ensure uniform application of EU law? Even though the provision contains no reference to any specific piece of legislation, it is submitted that it cannot be accepted without being potentially in breach of the principles of sincere cooperation and uniform application of EU law, given its universally phrased language. (ii) *"The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments."* (Article 24.3). Is this requirement in line with Member States' obligation, under EU law, to cooperate sincerely and ensure uniform application of EU law? Both of these provisions should be read in conjunction with the following provision in the Introduction (p. 18): *"These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters. 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."* (emphasis added)
Assessment	This should not be a problem regarding processing generally, but could be in relation to processing sensitive data, which includes health data. In the latter case, personal data may only be processed if there are reasons of substantial public interest, suitable safeguards, and the Commission has been notified.

Solution proposed	(i) In Article 22.4, the EU should ask for insertion of a clause referring to applicable national law, with a special focus on Member States' international obligations, including under EU law. (ii) The EU should ask for omission of Article 24.3. If omission cannot be achieved, the EU should ask for insertion of a clause referring to applicable national law. The EU should ask for omission, in the Introduction (p. 18), of the text: *"These sport-specific rules […] in fair sport."* If omission cannot be achieved, the EU should ask for insertion of a clause referring to applicable national law.

Annex III

"Data Protection – Annex to Annexes II.1, II.2, II.3, II.4

Subject: Proposal for Amendments to WADA's Whereabouts Guidelines

Analysis of WADA's Whereabouts Guidelines

One of the three main issues related to Proportionality and Whereabouts is the inclusion of athletes in Registered Testing Pools (RTPs). The Whereabouts system has been confirmed by the Article 29 Working Party as being necessary and legitimate, while practice needs to be proportionate.

On two occasions (Montreal 05/11, Strasbourg 19/11) WADA referred to their Whereabouts Guidelines, suggesting that NADOs and IFs were already in possession of a document allowing them to implement the Whereabouts system with the necessary level of proportionality. The purpose of this short analysis is to provide a prima facie assessment of the Whereabouts Guidelines (version 2.0, 2008)[10] and to determine the extent to which they can be said to provide guidance to ensure proportionality. These Guidelines complement the International Standard on Testing (IST) and if amendments are needed, similar amendments to the IST may also be needed.

As their title indicates, these Whereabouts Guidelines aim at providing guidance *"for Implementing an Effective Athletes Whereabouts Program".* The rationale for these Guidelines is as follows. The 2009 Code "harmonises" the Whereabouts system and allows Whereabouts failures to be *"recognized and aggregated for purposes of determining violations of Code Article 2.4"* no matter which NADO has detected them. The new system thus provides for mutual recognition.

The Whereabouts Guidelines provide detailed guidance on numerous different aspects of the issue, in particular on the composition of RTPs, but it fully confirms the IST in the sense *"that each International Federation and each NADO has discretion to determine the size and make-up of its Registered Testing Pool that best meets the needs of the sport/country over which it has anti-doping jurisdiction"* (section 2.6). If the selection for, composition of and size of RTPs is discretionary, any guidance provided on their proportionality must be interpreted as being optional (!).

NADOs and IFs are required to demonstrate that they operate a risk assessment when organising their RTPs, and that they assess the balance needed between in-competition and out-of-competition testing (sections 2.7-2.8) but the values underpinning this risk assessment do not appear to be directly linked to individual rights of athletes, but rather only to criteria of efficiency and effectiveness (cf. the title of the Guidelines).

NADOs and IFs are required to draw up a Test Distribution Plan (section 2.10): *"The purpose of the Test Distribution Plan is to allocate the limited resources that are available*

[10] The World Anti-Doping Program. Guidelines for Implementing and Effective Athletes Whereabouts Program. Version 2.0. December 2008.
http://www.wada-ama.org/rtecontent/document/Athlete_Whereabouts_Guideline_v2_0_en.pdf

for Testing efficiently and effectively across the different sports (in the case of a NADO), the different countries (in the case of an International Federations) and the different disciplines, age-groups etc. under its jurisdiction (in the case of both NADOs and International Federations" (section 2.11.2).

Similar considerations apply to the balance between in-competition and out-of-competition testing (section 2.11.3): *"Once it has decided how much Out-of-Competition Testing it is going to do in the relevant period, there is a considered evaluation of the risks of doping for the sport(s)/country(ies)/discipline(s) in question. This must include an allocation of Testing resources as between In-Competition periods and Out-of-Competition periods, depending on an assessment of the relative risks of doping in each such period. Where it is perceived that the risk of doping is higher in In-Competition periods than in Out-of-Competition periods, then In-Competition Testing must be made a priority, and a substantial amount of Testing must be conducted In-Competition. On the other hand, where it is perceived that the risk of doping is higher in Out-of-Competition periods than in In-Competition periods, then Out-of-Competition Testing must be made a priority, and a substantial amount of Testing must be conducted Out-of-Competition."*

The central role attributed to the resources available is at variance with the kind of rationale which one would normally find in a document inspired by the need to protect individual rights. The impression (confirmed via informal contacts with one NADO) is that this document is concerned with how to run an efficient and effective Whereabouts program, not with individual rights.

Put in very simple terms, if a NADO/IF has enough money to run a disproportionately big RTP, and if this NADO/IF considers a disproportionately big RTP to be an interesting option in view of running an efficient and effective Whereabouts program, these Whereabouts Guidelines do not prevent this NADO/IF from maintaining a disproportionately big RTP.

The conclusion of this prima facie assessment must be that these Whereabouts Guidelines are an interesting and technically good document with relevance to the issue of proportionality. As the Chair of the CAHAMA Expert Group pointed out (Strasbourg, 19 November 2009), this offers a good point of departure for our work but in its current phase does not suffice as a basis for building proportionate RTPs. It should be noted that WADA did not oppose this reflection.

<u>Options available</u>

In operational terms, these Whereabouts Guidelines can be used for further discussions with WADA, complementing them for the important work they have achieved with this complex document and suggesting amendments which could strengthen the proportionality of the guidance provided. It would be crucial to have proportionality inserted as a central value in this document. The current document may be said to provide some level of proportionality; however, the aim is to make it explicit and, when necessary, to take it further.

The following four key principles should guide the process throughout:

- A. "as few as possible, as many as necessary";
- B. "risk analysis based on a weighing between sporting values and individual rights" (rather than sporting values and resources available);

- C. "respect for national law" whenever applicable (including EU law applicable to EU Member States).

- D. the Whereabouts system has been accepted as necessary and legitimate in relation to the need to track athletes for the purpose testing them, but not to collect movement profiles, and certainly not for substituting testing with a (much less resource demanding) practice of sanctions based on whereabouts failures.

The juxtaposition of individual rights and the needs of the anti-doping system to function effectively should not obscure the fact it is the individual's right itself which mandates this balancing exercise. The tangible benefit of this right is that NADOs/IFs collect nothing in excess of that which is necessary to pursue their legitimate purpose.

As a joint proposal of the European Union and the Council of Europe, the criterion "necessary in a democratic society" (Articles 8-10 ECHR) is proposed inserted on a number of occasions.

The enclosed draft proposal includes amendments proposed in track-change.

The title of the proposal *"Enhanced Guidelines for Implementing an Effective and Equitable Athlete Whereabouts Program"* aims to signal WADA ownership of the amended document (the word "Enhanced" was already used by WADA when adopting the amended International Standard on the Protection of Privacy and Personal Information (ISPPI) in May 2009), thereby providing WADA with potential "selling arguments" in relation to their stakeholders.

The name also aims to underline the need to balance effectiveness and efficiency, on the one hand, and individual rights, on the other. The addition to of the words "and Equitable", following the word "Effective", should be seen in this perspective.

Talks with WADA should continue as agreed, including by pursuing the aim of presenting the enclosed proposal to WADA, as agreed by the CAHAMA Expert Group on Data Protection (13 January 2010). However, it should be borne in mind that the Whereabouts system is also covered by prescriptions enshrined in the Code as well as in the International Standard for Testing (IST). Reform of these provisions should remain a long-term priority for European governments, the Council of Europe and the European Union.

APPENDIX IV

WORLD ANTI-DOPING AGENCY
play true

WORLD ANTI-DOPING AGENCY (WADA)

Comments to the
Proposed EU Data Protection Regulation

INTRODUCTION

The World Anti-Doping Agency (WADA)[1] noted with great interest the publication of the proposed Data Protection Regulation by the Commission in January 2012, and would like to take this opportunity to comment on the Regulation as currently conceived. WADA believes it can offer a unique perspective on the Regulation, given the unique role it performs in the fight against doping in sport. That fight remains a matter of concern and a priority both for organized sport and governments worldwide. WADA's aim is to ensure that athletes are able to compete in an environment that is free from doping and fundamentally fair.

In WADA's view, although the proposed Regulation has several positive features, it also includes some provisions that could have a serious and adverse impact on sport. As a matter of urgency, WADA wishes to highlight its concerns in order to avert a potential conflict between EU data protection laws and the practices and activities essential to sport today. In particular, WADA wishes to focus on two points that demonstrate the potential adverse impact the Regulation could have on the sports community in Europe (and more globally) if adopted in its present form: first, further restrictions that would be placed on the use of consent, and second, the Regulation's failure to take adequate account of the "specificity of sport" sanctioned by the EU Treaty. There are other matters, as well, that we would wish to highlight.

COMMENTS ON THE PROPOSED REGULATION

To appreciate WADA's concerns, it may be helpful to explain some of the characteristics that define sport today. First, the fight against doping involves a *collaboration between both the private and public sector*, and is therefore subject to a complicated legal framework. While some countries have enacted legislation and established public authorities to regulate sport (*e.g.*, France), others simply allow private bodies to perform this function (*e.g.*, Germany). Second, sport today is essentially *international in nature*. As athletes train and compete around the globe, sports bodies and anti-doping authorities must be able to convey personal data from the EU to third countries to fulfill essential tasks. Third, athletes must accept that anti-doping efforts will involve the *processing of sensitive health data* (such as in the context

[1] WADA is a Swiss private law foundation, with its seat in Lausanne, Switzerland and headquarters in Montreal, Canada. It was established in 1999, following the First World Conference on Doping in Sport, as an international, independent agency composed and funded equally by the sport movement and governments, with a mandate to coordinate the fight against doping worldwide. The Code provides the framework for the adoption of clear and consistent anti-doping rules across all sports and nations, around the world. WADA is made up of representatives of the sport movement and governments, including a number of European governments. All EU governments have approved the Code, as well as ratified the UNESCO Anti-Doping Convention, thereby expressing support for the Code and its associated standards. More information about WADA's constitution, structure and governance can be located on its website: *http://www.wada-ama.org*.

of therapeutic use exemptions and test results) in order to compete on a level playing field. While these data obviously deserve special protection, such protection should not render athlete performance monitoring and anti-doping efforts impossible.

Topic #1: Consent (Article 7)

The Regulation, as drafted, would jeopardize the ability of sports bodies and anti-doping organizations to rely on consent to process data, which will have dramatic and harmful consequences for sport and European athletes.

The conceptual bedrock underpinning modern sport, including anti-doping programs, is that it is a voluntary, consensual activity, whereby athletes accept that in order to compete fairly, everyone needs to abide by a common set of rules. This includes agreeing that one's privacy is subjected to certain restrictions, such as doping controls, but only to the extent necessary to ensure fairness among participants and prevent cheating.

The current draft of the Regulation would make reliance on consent, which is already difficult, more challenging in the sports context. Specifically, the Commission has suggested adding a new provision that would exclude reliance on consent where there is a "significant imbalance" between the data subject and the data controller (Article 7). While it appears that this language would limit consent-based processing in the employment context, it is currently unclear whether this new standard would prevent processing athlete data by sports organizations, including anti-doping agencies. If regulators were to conclude that athletes and sports bodies are not in a "balanced" relationship – whatever that means – then the consequences for sport would be dire. In various scenarios, processing by sports bodies could be made virtually impossible given the absence of other viable legal bases.

WADA questions whether adopting this new standard is necessary or desirable. Plainly, the drafters' intent was to make clear that where consents are coerced or compelled, they cannot be treated as valid. That is understandable. However, the definition of consent in the Regulation already addresses this concern sufficiently, by expressly requiring consents to be "freely given". Injecting a "significant imbalance" standard would only engender confusion. If additional text is deemed necessary, then surely the better approach would be to rely upon well-settled European legal principles, rather than import a novel and untested legal standard (*i.e.*, "significant imbalance") into EU data protection law. Most notably, there is a large body of case law and precedent in European contract and civil law that already provides that where consents are made under duress or coercion, they are deemed invalid.

Today, many European (and non-European) sports organizations must rely on a form of consent when collecting, using and transferring personal data relating to athletes and other participants. This approach was not adopted for the sake of convenience; on the contrary, it was the result of the fundamentally voluntary nature of sport and respect for the autonomy of the athlete. There was an additional reason besides. Simply put, consent quite often is the *only* viable legal basis for processing athlete data available to European sports bodies and anti-doping authorities. Thus, in the absence of consent, European sports bodies are left without any other options upon which to base their activities. WADA has conveyed this message to European authorities time and time again, both in in-person meetings and via written submissions.

We are not overstating the seriousness of the issue. We illustrate below some scenarios that are likely to arise if European sports bodies and doping agencies cannot rely on consent.

Example:
Elite athletes travel around the world to train and participate in sports, often at short notice. Their data (whereabouts information in particular) must be shared with competent bodies (public and private) in the countries where athletes are active in order to perform anti-doping tests. If athletes cannot consent to such transfers, they cannot be subject to appropriate Code-mandated testing in those countries, as a result of which they would be barred from participating in sporting events. The multiple and time-sensitive transfers of personal data required by international sport can only realistically be accommodated through consent.

Example:
Elite athletes sometimes need to take medicines that contain banned substances to treat legitimate health conditions. In order to permit this, athletes must apply for an exemption from their anti-doping organization, often referred to as a therapeutic use exemption or TUE. The assessment involves the collection and processing of health data relating to the relevant athlete (by physicians). In addition, the TUE, once granted, must be shared with competent bodies in countries where the athlete trains or competes. If athletes cannot consent to this process, they would be foreclosed from participating in sport while taking such medicines. Or, if they participated in sport while taking such substances without a TUE, they would be sanctioned for a doping violation. The TUE process can only be based on consent – no other legal bases are appropriate.

Example:
Athletes who want to participate in the Winter Games in Sochi will have to accept that their personal information is shared with the Olympic Games Organizing Committee in Russia. Failure to do so will bar them from participating, as this organizing committee will be responsible for organizing doping controls. WADA and the International Olympic Committee prefer that the information is supplied by competent anti-doping and sports bodies via secure systems such as WADA's ADAMS system, rather than having athletes transmit it themselves over insecure networks (*e.g.*, by e-mail or fax), as some have suggested. This is a good example of how the inflexible application of EU data protection laws can bring about less protection for personal data rather than more.

WADA is aware, of course, that some European regulators have reservations about the use of consent in the sports context. Indeed, the Working Party 29 released two separate papers expressing their desire to see sports bodies invoke other legal bases for processing

athlete data. Unfortunately, it was unable to offer viable alternatives to consent. Meanwhile, European regulatory or policy making communities appear to be unaware of the consequences that would flow from proscribing the use of consent in the sport context. As the above illustrates, it will effectively prevent many European athletes from participating in events or competing overseas.

Topic #2: Specificity of Sport (Article 6)

The Regulation does not sufficiently account for the specificity of sport, by both failing to include appropriate exemptions for sport and compelling Member States to enact further laws and regulations that inevitably will regulate sport.

The "specificity of sport" remains a well-settled feature of EU law, codified at Article 165(1) of the Treaty on the Functioning of the EU, which notes the "specific nature of sport, its structures based on voluntary activity and its social and educational function." As such, it is necessary that any EU data protection regime respects the unique qualities associated with sport and contains appropriate exemptions given the contributions sport makes in terms of health, education, social integration and culture in Europe. European lawmakers must recognize this fact and strive to adopt laws that protect the specificity of sport, not undermine it.

To be clear, the specificity of sport does not mean that sport or the sport movement is above the law. Instead, it means that governments should refrain from regulating sport (or at least have this choice) and recognize the sports movement's autonomy and that it involves "structures based on voluntary activity." Thus, WADA believes it would be appropriate for the Regulation, at a minimum, to expressly acknowledge this principle in ***a recital to the Regulation and, ideally, incorporate express, but narrow, exemptions in the Regulation designed to ensure that sport, and anti-doping activities in particular, can continue without undue restraint or impediment.***

Moreover, WADA is very concerned that the Regulation, in its current form, will actually compel Member States to enact laws without due regard for the specificity of sport. Below we offer some illustrations of how the Regulation's reliance on law-making is potentially harmful:

- *The Regulation restricts the use of consent, which will require governments to enact laws specifically for sport to compensate. (Article 7)*

  In a number of areas, European national governments will be required to enact laws to provide an alternative basis for processing data beyond consent. As noted above, Member States will have to legislate on doping, otherwise their citizens will be excluded from participating in modern sport or else competent local anti-doping bodies will need to breach the Regulation. Yet, to date, many Member States have consciously elected to refrain from legislating for sport or anti-doping, out of respect for the specificity of sport (often for cultural or historic reasons).

- *The Regulation, as drafted, limits reliance on "legitimate interests" to justify data processing, which could be harmful to organized sport and require EU Member States to enact further legislation to compensate. (Article 6§(1)f)*

The Commission proposal would limit the ability of controller organizations, including sports organizations, to rely upon identified "legitimate interests" to justify their processing of data. It would do so in three significant ways: (1) by preventing organizations from citing the legitimate interests of *third parties* when processing data; (2) by preventing organizations from relying upon legitimate interests to engage in *further data uses*; and (3) by preventing public authorities from relying upon legitimate interests to process data altogether.

As a result, many public sports bodies, in particular public anti-doing authorities, will be prevented from relying upon the legitimate interests basis when processing the personal data of athletes. This, in turn, may require EU Member States to enact additional laws simply to allow such processing to continue. Moreover, the justification for eliminating references to the legitimate interests of third parties is unclear. Sports arbitration bodies, for example, often process personal data where it only serves the interests of third parties (athletes, sport organizations, etc.).

Example:
Some Member States have decided to set up public bodies to organize anti-doping efforts. While the creation of these bodies and the general rules are set out in laws, these laws do not regulate each processing aspect of anti-doping. In particular, these laws are often nation-oriented and do not take into account the international dimensions of sport. None of the sports laws we aware of, for example, offer a clear legal basis for the sharing of data with other doping authorities. As a result, the sharing can only take place on the basis of consent or a legitimate interest of the organization.

- *The Regulation's treatment of the public interest basis for processing data will make it more difficult for sports bodies to engage in data processing activities and will again require intervention through legislation. (Article 6§(1)e)*

Unlike the current Directive, the proposed regulation provides that where processing of personal data is justified based on the public interest, that interest must necessarily be expressly set out in EU or national law. The public interests served by anti-doping, in particular, are well known. They include the protection of public health and our youth. By requiring that these interests and associated processing operations are expressly stated in a statute or regulation risks foreclosing this ground for processing to sports bodies. In our view, this is excessive and again would compel the EU or individual states to engage in a spate of law-making to compensate.

Public interests evolve as much as society does. Requiring that such interests only be recognized where a Member State has adopted corresponding explicit legal rules will undermine valuable initiatives by a variety of stakeholders that directly advance the public interest. Many have not yet been regulated as such, and are unlikely to be subject to particular laws in the future. Important and valuable initiatives in welfare, public health, sports, culture, youth and other domains risk being undermined as a result.

Topic #3: Other Important Matters

In addition to the two main topics above, the WADA wishes to highlight some additional area in which it believes there might also be some concern.

- **Territorial scope (Articles 3 & 25)**

The proposed Regulation should not apply extra-territorially to organizations located in countries deemed to provide "adequate" protection for EU personal data, as this is not necessary to protect EU citizens and would give rise to conflicts of law.

- **Sensitive data (Article 9(2)(d))**

The Regulation's provisions on processing of sensitive data by religious, political and related bodies are too narrow and, as such, unworkable for sports organization and other private parties. It should be expanded so that it becomes available for organizations, like sports bodies, which may need to process data on their "members".

- **Right to be forgotten – RTBF (Article 17)**

While the Regulation's "right to be forgotten" (RTBF) may be a good initiative for some industry sectors, it also risks becoming a tool serving motives unrelated to privacy. The exceptions to the RTBF should be expanded.

- **Profiling (Article 20(3))**

Some of the Regulation's provision on profiling are vague, and it is difficult to understand their meaning and impact. They should be clarified in order to prevent unwelcome outcomes.

- **International data transfers (Article 40)**

As indicated above, anti-doping efforts are inherently international. The transfer rules should allow for such transfers either based on consent or another exemption. Formalistic adequacy instruments (adequacy, contracts, BCRs) are unlikely to work given the variety of the transfers, both in terms of destinations and recipients (public and private), and required speed.

* * *

As the Commission indicated in its 2007 White Paper, sport is an area of human activity that greatly interests citizens of the European Union and has enormous potential for bringing them together, irrespective of age or social origin. It generates important values such as team spirit, solidarity, tolerance and fair play. It contributes both to personal development and fulfillment and to the active contribution of EU citizens to society. The Olympic ideal was and remains to develop sport as a means to promote peace and understanding among nations and cultures as well as the education of young people. It is an ideal born in Europe, just like data protection. WADA calls on European legislators to balance their ideals and not to sacrifice one in favor of the other.