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The European Union and the fight against doping in sport: on the field or on the sidelines?

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ABSTRACT

With the adoption of the European Anti-Doping Convention in 1989 the European continent claimed a flagship role in the fight against doping in sport. Moreover, in one way or another doping appeared on the limited but developing sports agenda of the European Union. Especially in the aftermath of the infamous 1998 'Festina Tour', expectations of the EU's anti-doping policy

were high. As the European Commission was actively involved in the creation of the World Anti-Doping Agency, it seemed that the European Union was willing to take a leading role.

However, a lack of legal competence at EC/EU level combined with financial issues at WADA level induced the European Union to moderate its ambitions. Concurrently, the worldwide struggle against doping was strengthened by the adoption of the World Anti-Doping Code at the World Conference on Doping in Sport (Copenhagen, March 2003) which resulted in an International Anti-Doping Convention adopted under the auspices of UNESCO.

This paper undertakes an analysis of the EU's anti-doping policy in a global context and explores the possible legal bases for a more profound action. A preliminary question would be whether the European Union should play a role at all in the fight against doping. The present EU's anti-doping policy will then be analysed on the basis of the actions that have been undertaken so far. The Union's possible future role will be outlined in the light of the limited legal competences the Community/Union is endowed with. In addition to the direct policy, the possible consequences of the Union's indirect involvement in the anti-doping policy will be considered, including whether the Community rules on free movement and competition should be applied to sports regulations and anti-doping regulations in particular. Although this question was brought only rather incidentally before the Community judges in the Meca Medina case, the reasoning of the Court of First Instance may have some influence on the Union's direct action.

KEYWORDS

Sport - Anti-doping - European Community / Union - Legal Competences

INTRODUCTION

Doping has a long history. Ever since sporting competition began, athletes have used a variety of methods to increase performance. Ancient Greek victors used combinations of plants and fungi. In the Roman era, feeding substances were given to horses to make them run faster and to gladiators to make them fight in a more spectacular way. However, Emperor Theodosius abolished the ancient games in the fourth century and thereafter professional sport and spectator sport re-emerged only at the end of the nineteenth century. Doping re-emerged too, and modern chemistry induced a drastic change in doping practices (Epstein, 2003, p. 181). Although substances like steroids and amphetamines had been in use since the first half of the twentieth century, it was the death of the cyclists Jensen (1960) and Simpson (1967) that sparked public awareness of the use of drugs in sport. Since then, both the sporting federations and the public authorities developed actions against doping (Buti and Fridman, 2001, pp. 27-39). 1

Traditionally, the fight against drugs use in sport was justified on the double basis of public health and fair play concerns. Doping was considered as cheating and examples illustrated the negative consequences of (uncontrolled) use of doping on the physical condition of athletes. More recently, the protection of the image of sport was introduced as a third argument in the fight against doping (Soek, 2002, p. 2). The establishment of the World Anti-Doping Agency (WADA) in 1999 illustrates the joint and reinforced commitment of the governments and the sporting world in the fight against doping (Constitutive instrument of foundation, Antoine Rochat, Notary Lausanne, 10 November 1999; Soek, 2

2003, p. 2). The involvement of the European Union raises a number of questions.

SHOULD THE EUROPEAN UNION PLAY A ROLE IN THE FIGHT AGAINST DOPING?

Traditionally, the European continent played a flagship role in the fight against doping. States like Italy, France and Belgium adopted anti-doping legislation in the 1950s and 1960s (Law n° 1055 on the protection of health in sport, 28 December 1950; Loi n° 65-412 tendant à la répression de l'usage des stimulants à l'occasion des compétitions sportives, 1 June 1965; Law prohibiting doping at competitive sporting events, 2 April 1965. See Chaker, 1999, p. 78). Moreover, the Council of Europe dedicated special attention to European co-operation in the field of anti-doping. Numerous meetings of expert groups and political statements resulted in the adoption of the Anti-Doping Convention in 1989 (< <http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm>>. The Convention, which was also open to non-members of the Council of Europe, focused firmly on the need for harmonisation of anti-doping efforts across countries and sports. In this respect, the International Olympic Committee (IOC) doping list was recognised as a reference document. Articles 2 and 11 of the Convention prescribe a mechanism of approval of the IOC list and its updates by the Convention's Monitoring Group. Moreover, the Convention emphasised the central role of both the international federations and the importance of making use of the financial, administrative and legal resources of states (Houlihan, 1999). In practice however, states retained a large discretionary power to fill in the concrete commitments. Each country could define the scope for action of its public authorities in accordance with its own 'constitution, sports legislation and tradition'. A 2002 Protocol provides for the mutual recognition of doping controls, the acceptance of WADA's competence to conduct out of competition controls and a binding monitoring mechanism (Strasbourg, 12 September 2002, < <http://conventions.coe.int/Treaty/EN/Treaties/Html/188.htm>>.

Moreover, the worldwide commitment to the fight against doping shifted attention from European to international fora. The establishment of WADA brought some changes in the relations between the different actors involved in the fight against doping. First, the IOC's initiative to launch the Agency can be seen as an attempt to consolidate its own role. The massive criticism following the 1998 'Doping Tour' together with the powerful intervention by the French authorities challenged the IOC to prove its commitment to the anti-doping policy (Houlihan, 1999). Second, the creation of WADA illustrates a shift in power between public authorities. Although the European continent was strongly involved in the creation of WADA, the chairmanship of Canadian Richard Pound together with the fact that Montreal won the permanent seat for the Agency, demonstrate the increasing power of Canada and other non-European nations.

The rather unbalanced allocation of seats in the WADA Foundation Board points to a loss of influence by the Europeans in shaping policy for the fight against doping. Whereas Europe pays 47,5% of the governmental share of the WADA budget (see < http://www.wada-ama.org/en/dynamic.ch2?page_Category.id=401>, it is entitled to only 5 seats (Cape Town Declaration on Anti-Doping in Sport, agreed in the framework of the International Intergovernmental Consultative Group on Anti-Doping in Sport, 30-31 May 2001, < http://www.dcita.gov.au/drugsinsport/cape_town/cape_town_declaration.htm>. Conversely, the Americas have to pay only 29% while they are entitled to 4 seats. During the second World Conference on Doping in Sport (March 2003) representatives of the sports world and of governments agreed on the text of the World Anti-Doping Code (< http://www.wada-ama.org/rtecontent/document/code_v3.pdf>. Public authorities signalled their acceptance of the Code as the foundation in the worldwide fight against doping in the Copenhagen Declaration on Anti-Doping in Sport (as of April 2006, 185 governments have signed it: see < http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf>. However, the governments did not meet their commitment to implement all relevant obligations 'on or before the first day of the 2006 Turin Winter Olympic Games' (item 2 Copenhagen Declaration). As governments cannot be legally bound by a non-governmental document like the Anti-Doping Code, it was agreed to create an International Anti-Doping Convention under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). After two years of work, the International Convention against Doping in Sport was adopted at the 33rd session of UNESCO's General Conference, meeting in Paris from 3 to 21 October 2005 (< http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf>. On the opening of the 2006 Winter Games only nine states had ratified or accepted the Convention, the criteria for its entering into force had not been fulfilled (Article 37 UNESCO Convention requires ratification, acceptance, approval or accession by thirty states before the Convention can enter into force. On 10 February, only Australia, Canada, Cook Islands, Denmark, Iceland, Monaco, New Zealand, Norway and Sweden had ratified or accepted the Convention). However, even if the ratification process should take more time than was originally anticipated, the International Convention will provide governments with a legal framework for an intensified harmonisation of the worldwide anti-doping policy (WADA, 2005).

In the light of the forgoing, it can be questioned whether the European Union (still) has a role to play in the worldwide fight against doping. European public opinion seems to favour increased EU involvement.

The 2004 Eurobarometer survey shows a great level of public expectation (80%) in relation to EU action in the fight against doping. The Eurobarometer reports even that '(i)ndirectly, one can even observe a certain criticism arising from interviewees who blame the European Union for not being active enough in this area' (Eurobarometer, 2004, p. 38). At political level, the communication on the role of the Union in this respect is not always straightforward. Overall, the political will to undertake some action amplified during the last decade, whereas in practice it proved to be difficult to carry out major actions. In 1999, Romano Prodi even explicitly mentioned the fight against doping as an issue to be addressed by his new Commission because 'it really matters to people's everyday lives' (Prodi, 1999). Although he admitted that Europe cannot tackle the issue comprehensively, he pleaded for an action on European level because by its very nature the fight against doping 'clearly goes beyond purely national boundaries'. Only a few months earlier, the Commission had taken a more modest point of view in a consultation document on the European Model of Sport (1998). It first stated that the Community has no powers to develop a policy to combat doping. Subsequently, it acknowledged the importance of the problem and pronounced its willingness to act 'under different policies and in the context of co-operation in the fields of justice and home affairs'.

As the former Commission president correctly pointed out, the central rationale of Community action in the field of doping lies in the trans-national character of the issue. In the light of the subsidiarity principle, the Community can only take action (in areas that are not within its exclusive powers) where objectives can better be attained by action at Community rather than at national level (Art. 5 EC Treaty). Even today, despite harmonisation efforts in various international fora, different approaches are apparent in the EU Member States. This was plainly demonstrated by the recent clash between the Italian health ministry and the Olympic Committee at the occasion of the 2006 Winter Games in Torino. Contrary to the IOC and WADA –and a large number of states– that foresee only sports sanctions, the Italian Anti-Doping Law considers the use of doping as a criminal offence that can be punished by imprisonment between 3 months and 3 years and a fine of between 5 and 100 million Lit (these penalties can be increased in certain circumstances, Art. 9 Law N. 376 of 14 December 2000, Regulation of health standards in sports activities and the fight against doping, < http://www.coe.int/t/e/cultural_co-operation/sport/Resources/ITLegislation.asp>. Only days before the opening of the Games, Italy and the IOC reached a compromise. It was agreed that Italy would not jail any athletes and the IOC and WADA would be in charge of the doping controls, while the Italian ministry of health would be represented in the doping commission during the Games (NBC, 2006). Admittedly, doping also does not stop at the EU borders. Therefore, the outcome of the subsidiarity test will be less convincing when taking into account the international aspects of the fight against doping. Moreover, because the competences of the European Community/Union are based on the principle of conferral (Art. 5 EC), one has to examine whether the Community has legal competence to take some action before carrying out the subsidiarity test. In this respect, it should be mentioned that neither doping nor sport in general are mentioned in the European Treaties. Consequently, when looking for a legal basis for a Community anti-doping policy, related policy domains such as health, research and the internal market come into play.

From a pragmatic point of view, the forgoing seems less important because in practice the European Union already plays a (limited) role in the fight against doping. Arguably, this can be seen as a *de facto* affirmative answer to the question of whether the Union has a role to play in the fight against doping. Whether it can effectively fulfil this role is addressed in the two following sections.

THE EUROPEAN UNION'S ANTI-DOPING POLICY

During the second half of the 1980s, the issue of drug-taking in sport was brought to the attention of the European Commission by a number of parliamentary questions. While some of these questions were plainly informative (for example: Written question 1508/88 Anne André; Written question 1510/88 Anne André), others asked the Commission whether it envisaged developing policies or urged the Commission to initiate legislative measures (for example: Question 20 Mr Delorozoy (H-701/87); Written question 1856/87 Jack Stewart-Clark; Written question 2511/87 Luc Beyer de Ryke; Written question 2778/87 Peter Duetoft; Written question 346/90 James Scott-Hopkins). The Commission rebuffed these suggestions by referring to the actions in the framework of the Council of Europe and the responsibilities of the Member States and the sporting bodies. The Commission even seemed to play down the importance of the issue as it stated that the actions to combat the use of drugs had to be given absolute priority because the use of drugs in sport was a relatively minor problem in comparison with the consumption of illegal drugs generally (Question 20 Mr Delorozoy (H-701/87); Written question 1856/87 Jack Stewart-Clark). A first Commission step related to the drafting of the Code of Conduct on Doping in Sport (SEC (91) 2030 Final). The Council, who had asked the Commission in a resolution (OJ, 1990, C 329/4) to draft the text, adopted the Code in February 1992 as an instrument to inform and educate the public (OJ, 1992, C 44/1). The Code emphasised the shared responsibility of parents, schools and universities, athletes, health professionals, sports entourage, sports organisations, testing laboratories and the media. It was widely disseminated via posters, stickers and postcards (see Written question

1446/92 Anne André). Be that as it may, after the adoption of the 1992 Code of Conduct, the Community institutions did not undertake any ground-breaking actions in the fight against doping for a long time.

Again, it was the European Parliament that kept the issue within the attention of the other institutions. In 1993, the Parliament's Committee on culture, youth, education and media organised a hearing that resulted in the adoption of a resolution on sport and doping (OJ, 1994, C 205/484). The Parliament emphasised the need for a cross-border approach and stated that, although the main responsibility in the fight against doping lies with athletes, clubs and federations, the government has to support their activities and take action itself in case the sports world fails to make the necessary efforts. According to the Parliament, 'a more active policy on the part of the European Union [was] therefore necessary'. The Parliament called on the Commission and the Council to acknowledge expressly the EU's responsibility both from an ethical and a public health standpoint. Subsequently, the Parliament addressed all parties involved and suggested concrete action, such as a network of European laboratories for doping research; a European databank collecting information; harmonisation of legislation on the possession and use of stimulants in sport. Moreover, individual Members of the European Parliament pointed out that the regulation of doping differed in the Member States and asked the Commission whether it envisaged Community legislation to tackle this problem (Written question P-1514/95 Niels Sindal; Written question E-2592/95 Amadeo Amadeo; Written question E-471/96 Gian Boniperti and Antonio Tajani). The Commission systematically replied that the use of drugs in sport might contravene certain provisions of Community Directives on the harmonisation of various matters concerning health and medicinal products (Directive 65/65/EEC; Directive 75/319/EEC; Directive 92/28/EEC) but that it had no intention to propose specific legislation relating to the testing of sportsmen for the illegal use of performance enhancing substances.

Be that as it may, the issue of doping provoked quite a lot of paperwork within the Community institutions. This was only an illustration of the general awareness of the problem, without concrete actions being undertaken (Siekmann and Soek, 2004). The infamous 1998 Tour de France, during which a large quantity of prohibited substances was intercepted by the police in a bus belonging to the Festina team, seemed to bring greater political willingness. Inspired by the reaction of the French government, a general consensus emerged in favour of a more active role for the European Union in the fight against doping (Tokarski et al, 2004, p. 72). In the aftermath of the 'doping Tour', not only the 15 EU sports ministers but also the Vienna European Council, the European Parliament and the Committee of the Regions called on the Commission to make proposals for a more harmonised public health policy with a view to combating doping (see <http://www.europa.eu.int/comm/sport/action_sports/dopage/dopage_overview_en.html>). In its support plan to combat doping (COM (1999) 643 Final), the Commission suggested a three-layer approach:

- o to assemble the experts' opinions on the ethical, legal and scientific dimensions of doping;
- o to contribute to preparing the creation of WADA; and
- o to mobilise Community instruments and competences relevant to the field of doping

Apart from some reservations and remarks suggesting that the proposal was at some points too timid, the Commission's plan was enthusiastically welcomed (Opinion of the Committee of the Regions (OJ, 2000, C 317/63); Opinion of the Economic and Social Committee (OJ, 2000, C 204/45); Resolution of the European Parliament (OJ, 2001, C 135/270)). In practice however, it did not lead to a structured Community anti-doping policy. In fact, it proved difficult to even achieve the three stipulated goals. The troublesome participation in WADA perfectly illustrates the complex position of the Union in the fight against doping. The Commission was actively involved in the creation of WADA in 1999 and acted (together with a representative from the EU Presidency) for two years as EU representative in the WADA Foundation Board (OJ, 2000, C 356). Due to the fact that the Board was 'not prepared to take decisions which are necessary to reconcile the WADA budgetary rules with Community financial rules' (European Commission, 2001), the Commission refused to present a proposal for the structural funding of the Agency. Accordingly, Commissioner Reding withdrew from the Board and the Member States had to look for alternatives to arrange the 'European' contribution to WADA. Today, the Member States of the European Union have three representatives in the Board (following the 'troika' principle, see <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=469>>). The Council of Europe has two representatives. The Member States of the European Union co-ordinate their (financial) commitments towards WADA within the framework of the Council of Europe (see <http://www.coe.int/T/E/cultural_co-operation/Sport/Doping/>). In addition, the competition between three EU cities (Bonn, Stockholm and Vienna) for the permanent WADA headquarters illustrates the lack of solidarity among the Member States in this field. As a result, the European continent 'lost' the headquarters to the city of Montreal. Despite the promising words in the aftermath of the 'doping Tour', the participation of the Community in WADA is limited to an ad-hoc co-operation. Three concrete results of this collaboration were the Independent

Observers Programme, the Athlete's Passport and the WADA E-Learning Tool, which were developed by WADA with a total financial Community support of €2 million in 2001 (European Commission, 2002).

With regard to the third point of the Commission's plan, the mobilisation of Community instruments and competences, the outcome seems relatively limited. Whereas the Commission had indicated it would focus efforts on five issues (intensification of research; mobilisation of education, vocational training and youth programmes; making the most of the police and judicial co-operation programmes; reinforcement of information on medicines; developing actions relevant to public health policy), it appears that the major part of the achievements relates to pilot projects and research studies. The focus on research is unsurprising because one could build on existing experience in this field. Reference can be made to the 1999 HARDOP project under which the medical commission of the IOC identified the research needs necessary for improving the way in which doping is combated (Final Project Report SMT'-CT98-6530, 1999). In 2000, a budget of €3 million was awarded for 16 pilot projects (Evaluation report on 16 pilot projects, Contract No 2002-4505/001-001 SPO-SPOAST, 2003) for campaigns to combat doping together with 3 consultancy studies. In 2001, the same amount was awarded for the financing of 22 pilot projects. These projects covered two types of action: information campaigns on doping and conferences on ways to harmonise the fight against doping at European level (Heading B-3-2020 of the European Community's budget). In addition, a number of research projects were developed under the 'Growth' programme (< <http://www.europa.eu.int/comm/research/growth/gcc/projects/antidoping.html>>. Moreover, in the context of the Public Health Programme 2003-2008, one project on doping has been selected. The programme aims to harmonise knowledge about biomedical side effects of doping. 13

With regard to police and judicial co-operation, it appears that no major progress has been achieved. In answer to a parliamentary question on the existence of organisations that supply illegal substances to sportsmen, the Commission referred to a seminar that was organised in March 2002 at La Toja in co-operation with the Spanish presidency, bringing together officials of the ministries of sport and colleagues from the border police and customs. While most of the Member States seemed to be aware of the problem, the Commission recorded that 'it did not prove possible to adopt conclusions following this meeting' (Written question P-147/04 Bart Staes). Moreover, the Commission referred to an expert seminar organised by Interpol in July 2004 on the traffic of anabolic substances by criminal organisations (Written question E-2257/04 Manolis Mavrommatis). On the question of whether the Commission intended to punish those selling illegal substances, the Commission replied briefly that this is not a Community competence (Written question E-2257/04 Manolis Mavrommatis). 14

Moreover, the reinforcing of information on pharmaceutical specialities containing prohibited substances seems to be partly in place. The Commission raised the issue of special labelling for doping products and the feasibility of an early warning system at meetings of the EC Pharmaceutical Committee in 2000 and 2002. However, the implementation of such a system at Community level appeared to be too difficult (Written question P-428/00 Pietro-Paolo Mennea; Written question E-700/03 Bart Staes). Conversely, the European Commission pointed at the Community code relating to medical products for human use (Directive 2001/83/EC). Following Article 59(1)(c) of this Directive, package leaflets have to include a list of information which is necessary before taking the medicinal product. This includes information on special warnings and on appropriate precautions for use. The Commission stated that the information that the use of the product could have an effect on anti-doping tests is an example of such special warnings and appropriate precautions. According to the Commission, the package leaflet must state whether the use of the product could produce a positive analysis result in such a test (Written question E-3830/02 Michl Ebner). Concerning the outer packaging, a similar obligation is not foreseen. As the information contained on the outer package has to be reduced to a minimum, the inclusion of any specific symbol on potential effects of the product in anti-doping tests is not permitted (Written question E-3830/02 Michl Ebner). Moreover, the Commission referred to the Directive on food supplements as an important development (Directive 2002/46/EC; Written question E-700/03 Bart Staes). Finally, the Commission's intention to put forward a proposal for a Council recommendation under Article 152 EC on the prevention of doping in sport, especially in amateur sport, was not endorsed (Written question E-2052/04 Dimitrios Papadimoulis). 15

The foregoing illustrates that the realisation of the support plan and the development of a comprehensive EU anti-doping policy in general has proved to be rather troublesome. Remarkably, the issue of doping did not disappear from the EU agenda. Quite the opposite; doping remained an issue of debate at several Union fora but without any ground-breaking results. 'Anti-doping' was included in the sports rolling agenda, agreed in the aftermath of the finalisation of the Constitutional Treaty in order to ensure continuity of the European policy approach on sport (Reding, 2004, p. 6). In 2005 the discussions on doping at the level of the EU directors and ministers focused primarily on the preparation of the UNESCO anti-doping Convention and the functioning of WADA, including the nomination of government representatives for WADA appointments and the review of the principles that underpin the WADA list of 16

prohibited substances and methods (European Commission, 2006). The European Parliament confirmed its role as promoter of a more intensified Union action in the field of doping. This was illustrated by a number of initiatives. Apart from several parliamentary questions on the topic (especially at the occasion of the 2004 Olympic Games, see < <http://www.europarl.eu.int/QP-WEB/home.jsp?language=en&redirection> >, the Parliament's Committee on Culture and Education organised a public hearing bringing together various stakeholders (Brussels, 29 November 2004). On this occasion it became apparent that the Commission envisages a 'soft' approach for its future actions (Figel', 2004, pp. 7-8). Careful not to 'jeopardise the distribution of roles between relevant actors', the Commission suggested three fields where it could intervene: information, education and research. These initiatives resulted in a Parliamentary resolution on combating doping in sport that can be seen as a plea to all responsible parties, particularly the Commission, to combat doping in a more substantive and effective manner (OJ, 2006, C 33E/590). The Parliament called on the Commission not only to implement an integrated policy in all related fields, to support a sustained information campaign and to propose further research into doping detection and control in the Seventh Framework Programme, but also to fight trafficking in illegal substances, to ensure that the Union's external borders are effectively controlled, and to encourage co-ordination between the Member States in order to develop common effective methods for controlling and certifying the use of chemical substances in sports centres frequented by young people. More generally, the Parliament called on the Commission to involve all those concerned with sport 'in order to effectively address the problem and to promote a clean image of sports and physical exercise' and to intensify, in concert with the Member States, international collaboration 'in a way which enables the European Union to act effectively with regard to the prevention with regard to the prevention and control of doping'. The participants of a workshop on the future EU anti-doping work confirmed the call for a greater role for the European Commission. Next to the 'classic' or 'soft' activities concerning education or nutritional supplements, they also saw a role for the Commission in the counteracting of illegal trafficking of doping substances (Consultation Conference with the European Sport Movement, 14&15 June 2005).

TOOLS FOR A MORE COMPREHENSIVE EUROPEAN UNION ANTI-DOPING POLICY?

Despite the numerous discussions and documents dedicated to the fight against doping, the concrete results of the Union's action are rather limited. The explanation for this weak outcome appears to be complex. One of the reasons stated is a lack of budgetary means. This was plainly illustrated by the Commission's account for the suspension of a Commission proposal for a Community anti-doping programme focusing on information, education and prevention (Written question E-700/03 Bart Staes). Lacking determination or political will seems to be another factor. While the European Parliament can be considered as a loyal supporter of the Community action in the field of doping, the Commission openly blamed the Council for lack of backing (Oral question H-249/04 Athanasios Pafilis). The reason most frequently given, which also covers the aforementioned elements, relates to the lack of legal competence. Especially concerning the absence of criminal sanctions and harmonisation efforts, the lack –or at least the complexity– of a legal basis is often recalled (Lapouble, 2001-2002, pp. 390-391). The aforementioned overview illustrates that despite the lack of a legal basis for sport or anti-doping, the Union has developed some actions in the field of doping. Public health (Art. 152 EC) seems to be the most 'natural' legal basis, though education (Arts. 149 and 150 EC) and research (Arts. 163-173 EC) also provide for some possibilities. However, a comprehensive anti-doping policy, including harmonisation measures, is not feasible on these grounds because Article 152, paragraph 4 EC leaves the possibility of harmonisation open only for a set of strictly defined purposes of common safety concerns in public health matters. Then again, this does not mean that harmonisation in the field of doping is completely ruled out. Without arguing for or against, it is useful to consider two ways in which harmonisation could be broached at EC level.

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A first option relates to the common employment and social policy (Arts. 136 to 145 EC) which foresees minimum requirements concerning working conditions and workers' health and safety. As professional sportsmen can be defined as workers (Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 1333, paragraph 12; Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921, paragraph 73), their situation could be covered by Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health at work. Under Articles 5 and 6 of this Directive, employers have a duty to ensure the safety and health of workers in every aspect related to the work and to take measures necessary for the workers' safety and health protection. Employers must implement these measures on the basis of general principles of prevention, including avoiding the risks, evaluating the risks that cannot be avoided and combating the risks at source. Moreover, Article 14 foresees health surveillance. Consequently, when the use by (professional) sportsmen of pharmaceutical products in order to improve their physical fitness would have side-effects that may represent a risk to their health, the employer should take measures to avoid this (see also Written question 2906/98 Gianni Tamino). Furthermore, it appears not implausible that Directive 98/24/EC on the protection of workers from the risks related to chemical agents could provide a legal basis for a Community list of prohibited doping substances. Indeed, it does seem that the definition of a

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chemical agent (Article 2: 'any chemical element or compound, on its own or admixed, as it occurs in the natural state or as produced, used or released, including release as waste, by any work activity, whether or not produced intentionally...') could cover substances prohibited as doping. Annex III of this Directive entails a list of chemical agents of which the production, manufacture or use at work and a number of activities is prohibited (to the extent specified). Concerning young athletes, reference can be made to Council Directive 94/33/EC on the protection of young people at work.

A second option relates to the functioning of the Internal Market. Differences in anti-doping legislation between Member States may constitute a barrier to free movement of professional and amateur sportspersons, the freedom to provide professional sports services and the free movement of doping products. Accordingly, approximation of laws, regulations or provisions of the Member States directly affecting 'the establishment or functioning of the common market' (Art. 94 EC) or for 'the establishment and functioning of the internal market' (Art. 95 EC) appears to be a possibility which cannot be ruled out completely. However, it must be emphasised that a measure adopted on the basis of Article 95 EC 'must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market' (Case C-376/98 *Germany v European Parliament and Council of the European Union* [2000] ECR I-8419, paragraph 84). The fact that anti-doping measures are generally taken on a triple basis of fair play, public health and ethical concerns seems to limit the possibility of invoking Article 95 EC as the legal basis for harmonisation measures in the field of doping. Additionally, the European Court of Justice stated that other Treaty Articles cannot be used as a legal basis 'in order to circumvent the express exclusion of harmonisation' laid down in Article 152, paragraph 4(c) EC (*Germany v European Parliament*, paragraph 79). Conversely, the Court of Justice also stated that once the conditions for recourse to Article 95 EC as a legal basis are fulfilled, 'the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made' (*Germany v European Parliament*, paragraph 88). Therefore, the adoption of anti-doping measures on the basis of Article 95 EC appears not entirely implausible.

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As regards the criminal aspects of the anti-doping policy, such as combating the trafficking of illegal substances or the penalisation of athlete support personnel, reference should be made to Title VI of the EU Treaty. Article 29 EU provides for police and judicial co-operation in preventing and combating crime whereby illicit drug trafficking is explicitly mentioned. Yet, as a significant part of the prohibited doping substances or products are only banned in the context of sport – a number of prohibited substances can be found in legitimate pharmaceutical products – actions in this area can cover the issue only partially. Moreover, specific actions could be developed relating to training, raising awareness, improved information pooling etc. (the Commission referred at the OISIN and GROTIUS programmes). Finally, Article 32 EU enables the adoption of 'measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'. In this context, reference should be made to the judgment of 13 September 2005 from the Court of Justice on the competence of the Community –within the first pillar– to require the Member States to lay down criminal penalties (Case C-176/03 *Commission of the European Communities v Council of the European Union* not yet reported).

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A final ground for a more comprehensive European Union anti-doping policy could be in Article III-282 of the new Constitutional Treaty (OJ, 2004, C 310). Admittedly, the fate of this Treaty is still uncertain. But it reflects nevertheless the common agreement of the 25 Member States on the future role of the Union in the field of sport. Article III-282 would provide the legal and financial basis for the further development of a more coherent sports policy (Van den Bogaert and Vermeersch, forthcoming). This provision focuses mainly on the social and educational aspects of sport. It comprises general and high-profile goals such as the development of the European dimension in sport, the promotion of fairness and openness in sporting competitions and co-operation between sports bodies, and the protection of the physical and moral integrity of sportsmen and sportswomen. The fight against doping could be covered both by the promotion of fairness and the protection of physical and moral integrity. Concurrently, the Union is given only a limited set of instruments 'to contribute to the achievement of these objectives' as European laws or framework laws can merely establish incentive measures. In addition, the Council can adopt recommendations. Moreover, harmonisation of the Member States' laws and regulations is explicitly prohibited. These restrictions illustrate that the role of the Union in the field of doping and sport in general is deemed to remain limited. The Union can only take supporting, co-ordinating or complementary action. The competence in this context would thus rest primarily with the Member States and the sporting federations. While it is correct to bestow on the Union only a secondary role in the domain of sport, the total exclusion of harmonisation is regrettable. In the fight against doping for instance, the Union could fulfil a complementary role by providing a legal framework for the uniform implementation (in all Member States) of arrangements agreed upon on the international level, such as within WADA. Since harmonisation of relevant laws and regulations in this domain will not be possible on the basis of Article III-282, and the Constitutional Treaty does not strengthen alternative harmonisation grounds either, it appears that even if the Constitutional Treaty would to enter into force, the Union's

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intervention in the field of doping will continue to be limited to the subsidising of research and initiatives to raise public awareness and educate (young) sporting people. Accordingly, the insertion of sport in the Treaty has partially a symbolic character, for it would 'legitimise' initiatives already taken both in the domain of doping and sport in general.

IMPLICATIONS OF THE EUROPEAN UNION'S INDIRECT INVOLVEMENT IN THE ANTI-DOPING POLICY?

Apart from the abovementioned direct involvement in the anti-doping policy, rather by chance the Union has also become involved indirectly in the anti-doping policy (on the distinction between direct and indirect sports approach see Tokarski, et al, 2004, p. 61). This indirect involvement relates to the application of European Community rules, especially the rules on free movement and competition law, to sporting activities. Whether the Community competition rules are applicable to anti-doping regulations was raised only two years ago in the case of *Meca-Medina & Majcen* (Case T-313/02 *David Meca-Medina and Igor Majcen v Commission of the European Communities* 30 September 2004 not yet reported). In reality, this case was the first judgment from the Luxembourg courts on the relationship between the Community competition rules and sport. All cases previously decided concerning sport addressed the application of rules concerning free movement of workers and persons, with the *Bosman* judgment as the most prominent example. 22

Meca-Medina & Majcen were two professional long distance swimmers who had tested positive for nandrolone. The international swimming federation suspended both athletes for a period of four years, which was reduced to two years by the Court of Arbitration for Sport (the CAS) after certain scientific experiments had showed that nandrolone's metabolites can be produced endogenously by the human body at a level which can exceed the accepted limit. *Meca-Medina & Majcen* filed a complaint with the European Commission, challenging the compatibility of the IOC's anti-doping regulation with the Community competition rules. The Commission concluded that the anti-doping legislation did not fall foul of the prohibition under Articles 81 and 82 EC and rejected the complaint (COMP 38.158, *Meca-Medina et Majcen/CIO*). *Meca-Medina & Majcen* brought an action before the Court of First Instance. The Court of First Instance stipulated that 'the principles extracted from the case-law, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition' (*Meca-Medina*, paragraph 42). The Court of First Instance continued that 'the fact that purely sporting legislation may have nothing to do with economic activity, with the result, according to the Court, that it does not fall within the scope of Articles 39 and 49 EC, means also that it has nothing to do with the economic relationships of competition, with the result that it also does not fall within the scope of Articles 81 and 82 EC' (*Meca-Medina*, paragraph 44). The Court of First Instance acknowledged that high-level sport has become, to a great extent, an economic activity, but pointed out that the fight against doping does not pursue an economic objective. As the campaign against doping intends to safeguard the health of athletes and to preserve the spirit of fair play, 'it forms part of the cardinal rule of sport' (*Meca-Medina*, paragraph 44). The Court of First Instance emphasised that 'sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport' (*Meca-Medina*, paragraph 45). Therefore, it concluded that the prohibition of doping and the anti-doping legislation concern exclusively 'a non-economic aspect of that sporting action, which constitutes its very essence' (*Meca-Medina*, paragraph 45). Consequently, the rules to combat doping 'are intimately linked to sport' [...] and do not come within the scope of Articles 49, 81 and 82 EC (*Meca-Medina*, paragraph 47). Remarkably, the Court of First Instance emphasised that if the anti-doping legislation would be discriminatory in nature, it would not escape the Treaty provisions (*Meca-Medina*, paragraph 49). The Court of First Instance rejected the two arguments brought forward by *Meca-Medina & Majcen* on the economic nature of the contested anti-doping regulation. In its opinion, the eventual economic repercussions for the athletes and the fact that the IOC might possibly have had in mind the economic potential of the Olympic Games when adopting the anti-doping legislation 'is not sufficient to alter the purely sporting nature of that legislation' (*Meca-Medina*, paragraphs 51-57). On these grounds, the Court of First Instance dismissed the action (Ibáñez Colomo, 2005). 23

Whereas the final outcome of this case can be defended, the reasoning of the Court of First Instance seems less convincing. Admittedly, the exclusively sporting nature of drug control rules has been recognised in English case law (*Edwards v the British Athletic Federation and the International Amateur Athletic Federation* [1998] 2 CMLR 363; Blackshaw, 2005, pp. 51-52). Conversely, the Swiss Federal Court has stated that the suspension from international competitions exceeds a simple rule/sanction assuring the smooth progress of sporting competitions (*Ligue Suisse de Hockey sur Glace contre Dubé* [1994] BGE 120 II 369 available at <<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>>; *G. contre Fédération Equestre Internationale et tribunal arbitral du Sport* [1993] BGE 119 II 271 available at <<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-> 24

[recht-leitentscheide1954.htm](#)>). What seems to be at stake, is the problematic attempt to make a clear distinction between purely sporting and economic rules (Weatherill, 2005). Arguably, the rules of the game *sensu strictu* such as the length of matches or the number of players on the field can be qualified as purely sporting rules. For rules concerning the composition of national teams (Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405); the conduct of anti-doping controls or selection criteria for international high-level sports events (Joined Cases C-51/96 and C-191/97 *Deliège v Ligue Francophone de Judo et Disciplines ASBL and others* [2000] ECR I-2549) this seems less evident. Whereas these rules are not primarily aimed at profit making, they clearly have economic repercussions. Therefore, they can be regarded as both 'sporting' and 'economic' in nature (Weatherill, 2005, p. 420). Moreover, by qualifying anti-doping rules as rules of a purely sporting interest which therefore fall outside the scope of Community law, it appears as if the Court of First Instance has granted too much room for manoeuvre to the sporting federations (Van den Bogaert and Vermeersch, forthcoming). A better way to tackle the issue, as Weatherill (2005) advocates, would be to examine the contested rules on the basis of an analysis founded on the *Wouters* judgment (Case C-309/99 [2002] ECR I-1653). The Commission had made such an analysis, 'for the sake of completeness' (*Meca-Medina*, paragraph 62) and found that the anti-doping rules at issue are intimately linked to the proper conduct of sporting competition, that they are necessary to combat doping effectively and that the limitation of an athlete's freedom of action does not go beyond what is necessary to attain that objective. Accordingly, the Commission concluded that these rules did not contravene the prohibition under Article 81 EC (COMP 38.158, *Meca-Medina et Majcen/CIO*, paragraph 55). Refusing to discuss whether anti-doping regulation, or any other sporting rule, is economic in nature or not, enables focus to be put 'on the key questions about which rules are truly necessary for the organisation of a particular sport and therefore sheltered from the impact of EC law' (Weatherill, 2005, p. 421). Nonetheless, the Court of First Instance departed from this reasoning. As the case is under appeal to the Court of Justice (Case C-519/04 P), the latter will also have the opportunity to rule for the first time on the applicability of Community competition rules to sporting issues. Moreover, it remains to be seen whether the Court of Justice will validate the reasoning of the Court of First Instance or whether it will develop a sounder alternative.

Apart from its significance for the overall application of Community rules to sporting cases, the ruling from the Court of First Instance in *Meca-Medina & Majcen* might also have some implications for the Community's direct involvement in the fight against doping. By emphasising the purely sporting nature of anti-doping legislation, the Court of First Instance, probably unintentionally, seems to neglect the involvement of public authorities such as the European Union in the anti-doping campaign. Moreover, by ignoring all economic aspects of anti-doping regulation, it is not excluded that the judgment from the Court of First Instance, again probably unintentionally, takes away arguments for the adoption of Community legislation in the field of doping on the basis of Articles 94 and 95 EC (see *supra*). Whereas it is very unlikely that the Court of First Instance took into account these considerations when ruling this case, they cannot simply be ignored. The uncertainty on this issue was plainly illustrated by the fact that when the Commission was questioned on its further actions in the field of doping, it referred to the *Meca-Medina & Majcen* ruling without further explanation (Written question E-2052/04 Dimitrios Papadimoulis; Written question E-2075/04 José Ribiero). 25

CONCLUSION

The fight against doping appeared on the European Union agenda long ago, even though the legal basis for anti-doping or sport is absent in the Treaties. But still, due to this troublesome legal basis and the lack of political will, the role of the EU has remained limited to the position of an enthusiastic supporter shouting at the sidelines of the playing field. 26

It has nonetheless been revealed that – to a certain extent – alternative means can be found in order to strengthen the Union's action, regardless of whether the new Constitutional Treaty comes into force. Even if these possibilities were to be exploited extensively, it remains to be seen whether the Union can develop a comprehensive anti-doping policy given the international challenges as well as the Union's poor track record to date. The sports provisions in the Constitutional Treaty seem to confirm the half-hearted position of the European Union. One may well question whether the European Union should be allowed wider competence and greater problem-solving expectation in this policy domain. Better regulation is a major concern of the EU of today. Arguably, the EU should avoid taking on new tasks or even avoid maintaining current tasks insofar as it cannot perform them conclusively. Yet, in the struggle against doping, surely all forces should be mobilised? Subsidiarity and regulatory housekeeping mean little to the average man on the street. Surely, citizens' expectations and perception of the Union as the appropriate vehicle for countering the doping crisis in sports imparts a democratic legitimacy for concerted action by the EU Member States. If nothing else, for the unconvinced, EU actions that are welcomed by its citizens should be embraced as positive means of raising the Union's profile. Of course, for this to be meaningful, the Member States would have to be willing and prepared to follow through their commitments to concerted action. Despite the promising words in the aftermath of the 1998 'doping Tour', one has to 27

conclude that whereas the role of the European Union is merely limited to funding research projects and campaigns to raise public awareness, the actual decisions and the implementation of the world wide anti-doping policy are left to other actors such as WADA, the Council of Europe, UNESCO and the individual Member States. As the 'anti-doping team' already includes a lot of (governmental) players, the question remains: is it not too late for the Union to claim its position on the field?

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LINKS

Anti-Doping projects under the Growth programme

< <http://www.europa.eu.int/comm/research/growth/gcc/projects/antidoping.html> >.

Cape Town Declaration on Anti-Doping in Sport

< http://www.dcita.gov.au/drugsinsport/cape_town/cape_town_declaration.htm >.

Case-law Swiss Federal Court

< <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm> >.

Copenhagen Declaration on Anti-Doping in Sport

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Council of Europe Anti-Doping Convention

< <http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm> >.

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