

cult to substantiate such a foundational endangerment for the sports system.²⁸

A justification of minimum quotas can also be construed under the unwritten justification of 'pressing reasons of public interest', which has evolved in the Court's jurisdiction.²⁹ In the field of sports, the maintenance of a sportive balance within a league and the training of younger players have been recognized as pressing interests by the Court.³⁰ Yet, the Court has pointed out that merely *non discriminatory* and *indirectly discriminatory* rules could be justified by the 'pressing reasons of public interest', whereas *directly discriminatory* rules could only be justified by written clauses that are included in the EC Treaty's provisions.³¹ Nevertheless, in the Court's ruling, a development toward an encompassing extension of this unwritten justification to all kinds of (even directly) discriminatory rules can be observed.³² Some voices in the legal literature welcome an extension of the unwritten justification clause as well.³³

5. Conclusion

Even in the light of the *Bosman* ruling, European law does not seem to be so cemented as to completely prohibit minimum quotas in sports. In recent documents, the European Commission and the European Parliament have expressed their understanding for the need of the sporting associations to take measures to promote young players and national representative teams.

Specifically, the Commission and the Parliament view UEFA's

'home-grown player' rule as compatible with European law. On the other hand, minimum quotas such as FIFA's '6+5' rule are more difficult to justify, because they explicitly relate to the nationality of the players and are therefore directly discriminatory. Nevertheless, the Lisbon Treaty strengthens the legal position of the sporting associations by way of putting the basic right of the freedom of associations on the same level as the freedom of movement. When the basic rights and the fundamental freedoms of the EC are in conflict (as they are in the case of minimum clauses) the Court of Justice is being called not to overemphasize one position at the expense of the other position, but to balance these positions in a convincing way.

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- 28 Heidersdorf, *Ausländerklauseln im Profisport*, 1998, p. 51; *Klose*, *Die Rolle des Sports bei der Europäischen Einigung. Zum Problem von Ausländersperrenklauseln*, 1989, p. 149.
- 29 For the first time in Case 120/78, *Cassis de Dijon* [1979] E.C.R. p. 649.
- 30 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [104 and 106].
- 31 Case C-388/01, *Commission ./. Italy* [2003] E.C.R. I-721, at [19 f.].
- 32 Case C-2/90, *Wallonian Garbage* [1992], E.C.R. I-4431; Case C-379/98, *PreussenElektra* [2001] E.C.R. I-2099.

- 33 A.G. Jacobs, in: Case C-379/98, *PreussenElektra* [2001] E.C.R. I-2099, at [233]; *Koenig/Kühling*, NVwZ 2001, p. 770; *Kingreen*, *Grundfreiheiten*, in: von Bogdandy (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* [2003], p. 674; *Groß*, *Rechtfertigungsmöglichkeiten von Sportverbänden bei Beschränkungen der Grundfreiheiten*, in: Vieweg (ed.), *Perspektiven des Sportrechts* [2005], p. 55 f.

Anti-Doping in and beyond the European Commission's White Paper on Sport*

by Jacob Kornbeck**

1. Introduction

The European Commission's White Paper on Sport¹ is the first strategic document on sport at EU level. It provides orientation in an area which until now was not covered by any article in the EC Treaty.² The section on doping included in the White Paper (section 2.2) is important as the potential and actual role of the EU (in particular the Commission) in relation to doping has previously been debated by proponents as well as opponents of more integration via the "Community method" (the First Pillar based on Community Law, as opposed to the Second and Third Pillars of the EU). The White Paper thus provides clarification on some issues which are currently very topical. It is, however, a political document and not a legal act, and should be interpreted as such.

2. Discussion of anti-doping and the EU in legal literature

There may be a margin for additional regulatory activity at EU level via a range of existing legal acts that are already in force.³ The EU's role has, moreover, been amplified by recent case law, as one specific case, for the first time, was concerned with anti-doping rules: *Meca-Medina and Majcen v Commission*. This case led to judgements by the Court of First Instance (CFI) and the Court of Justice (ECJ)⁴ and inspired a small, but well-informed body of commentaries by legal scholars.⁵ The case is also occasionally commented by Soek⁶ who finds it to raise some issues of principle, including in relation to the transportation of samples and the unbroken chain of custody.

The *Meca-Medina* case is significant, not only because it was the first piece of case law regarding anti-doping rules, but also because it deals with the implications of decisions taken by the organs of sports

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1 COM (2007) 391. 11.07.2007: White Paper on Sport.

2 Colucci, M. (2007): L'Union européenne et le sport : au-delà du Livre blanc. In: *Revue du droit de l'Union européenne* 2007, n. 3, octobre, p. 633-652; Husting, A. (2007): Le livre blanc de la Commission sur le sport: Un document "timoré et indécis" ou le point de départ d'une politique européenne du sport? In: *Revue du Marché commun et de l'Union européenne*, no. 511, pp. 513-517; Krejza, M. (2007): The European Commission's White Paper on Sport. In: *The International Sports Law Journal*, vol. 2007, no. 3-4, pp. 73-76.

3 Vermeersch, A. (2006): The European Union and the Fight against Doping in Sport: on the field or on the sidelines? In: *Entertainment and Sports Law Journal*, vol. 4, no. 1.

4 Court of First Instance (T-313/02), judgement of 30.09.2004; European Court of Justice (C-519/04), judgement of 18.07.2006.

5 Ballesteros Moffa, L.A. (2007): La intervención administrativa en materia de dopaje deportivo a la luz de la Ley Orgánica 7/2006, de 21 de noviembre, de protección de la salud y de lucha contra el dopaje en el deporte. In: *Revista de Administración Pública* 2007, mayo-agosto, n. 173, p. 355-405; Choquet, A. (2006): La lutte contre le dopage au regard du droit communautaire de la concurrence : à propos de l'arrêt "Meca-Medina et Majcen" du Tribunal de première instance des Communautés européennes (30 septembre 2004). In:

Revue du Marché commun et de l'Union européenne 2006, n. 494, janvier, p. 29-34; Cortés Martín, J.M. (2007): Deporte profesional y Derecho europeo de la competencia en la jurisprudencia el TJCE. In: *Revista de Derecho Comunitario Europeo* 2007, v. 11, n. 28, septiembre/diciembre, p. 857-882; Icard, P. (2007): La spécificité du sport menacée? In: *Revue Dalloz*, vol. 2007, no. 9, pp. 635-639; Summerer, 2007; Weatherill, 2005, 2006; Zylberstein, 2007.

6 Soek, J. (2006): The strict liability principle and the human rights of athletes in doping cases. The Hague: T.M.C. Asser Press, pp. 110, 112, 124, 171.

organisations. Various legal conceptions regarding the autonomy of sport emerged in the analyses made. Italian readers should note that an equivalent to article 117 of the Italian Constitution (*autonomia dell'ordinamento sportivo*, in conjunction with the concept of *legislazione concorrente*)⁷ is not found in EU law and does not seem to exist in the national law of any other Member State. While the German legal order places great emphasis on the autonomy of private associations, doctrine and case law do not attribute the same implications to the decisions taken by the governing bodies of sport, as this is the case under the terms of article 117 of the Italian Constitution. Since professional athletes are totally dependent on organisations with a monopoly structure, they are not free to promote their own interests and thus (in accordance with the case law of the German Constitutional Court) need protection from public authorities.⁸ As sport organisations do not meet the usual requirements of German courts in terms of democratic organisation⁹, it seems problematic that the same structures that develop and enforce the rules cannot also interpret them.

And yet, in Meca-Medina, a seemingly banal case regarding two swimmers who had tested positive for nandrolone (and claimed that they might inadvertently have produced the substance via metabolism, due to the consumption of uncastrated boar meat via a Brazilian dish called *sarapatel*), some scholars would see a potential threat to the autonomy of sporting organisations¹⁰, while others identified a clash between “sporting rules” and “economic” rules.¹¹ One author noted that the Court did not decide about the relevance of anti-doping rules to EU competition law as such, but did consider the principles of freedom of movement as sufficiently relevant for the case.¹² Yet according to one legal opinion a sharp distinction between “sporting rules” and “economic” rules may not always be realistic¹³, and the judgement rendered by the Court of First Instance in 2004 was criticised by a leading scholar in the field¹⁴ who subsequently greeted the Court’s decision to withdraw from this line of thought.¹⁵

Clarification is needed in this field where the only tangible EU law is made up of two judgements, and where the Commission has not until now seen it as appropriate to propose more targeted intervention. Taking stock of the situation is also rendered difficult by the limited number of publications from legal scholars, the vast majority being commentaries to the Meca-Medina case.¹⁶ Significantly, the major English-language textbooks published by major UK academic publishers still lack entries (let alone chapters or sections) on “sport” and/or “doping”.¹⁷ The same applies to a more practical policy guide intended for decision makers and journalists (Leonard, 2005), and this surprising situation is mirrored even within Council of Europe law, where the Council of Europe’s own standard textbook does not even mention sport, despite this being a policy field underpinned by an international law convention.^{18, 19} Surprisingly, even the textbook published by the arguably most active commentator of the relevant case law²⁰ has no such entry.

So while the White Paper certainly leaves many questions unaccounted for, it is remarkable simply for addressing the issues in question. While the EU has provided crucial funding to anti-doping research²¹, it has not until now played a regulatory role - with the punctual exception of the Meca Medina case - which makes the White Paper so much more relevant to anti-doping issues. But before this relevance can be assessed, the general characteristics of the White Paper will need to be identified.

3. The White Paper on Sport: nature, structure and rationale

A White Paper is a Commission Communication is not a piece of legislation, though it may (or may not) include proposals for legislative initiatives. There is no legal difference between a White Paper and a simple Communication, but certainly a political one. When the Commission decides to give the label White Paper to a Communication, it automatically ensures it a very high visibility, as only a handful of White Papers are published each year (some years as few as one). The White Paper on Sport consists of:

- A Political Document (*White Paper on Sport*) (20 pp.) which is available in all official languages. This is the main text, addressing all decision makers in various sectors and at various levels around Europe. (*Quotes made from, and references made to it in this paper all refer to the Political Document.*) The length is limited as the Commission operates a strict limit (usually 15 pp.) on this type of texts and the genre is one which automatically receives a very high level of visibility. It is followed by:
- An annex listing the Action Points (numbered deliverables from the Political Document) (*Pierre de Coubertin Action Plan*) (6 pp.). These deliverables are not legally binding but the Commission has committed itself politically to putting them into practice. In this White Paper they do not represent proposals for legislative measures, but in many cases they promise more efficient use of existing structures, capacities and resources.
- A long, technical report for a specialist public (Staff Working Document: *The EU and Sport: Background and Content*) (129 pp.).
- An Impact Assessment (as required for all initiatives of this type) (40 pp.), followed by a Summary of Impact Assessment (3 pp.).²² The preparation and publication of Impact Assessments is obligatory for texts of this type, although their exact legal status and practical implications are open to various interpretations, as highlighted in a recent doctoral thesis.²³

Part 2 of the White Paper is entitled “The Societal Role of Sport” (Part 1 is an Introduction) and includes sections on public health (counteracting overweight and obesity via physical activity); the fight against doping (to be discussed below in more detail); education and training (with proposals for a more targeted use of Community funding as well as linking up certain mechanisms of soft cooperation with

7 Coccia, M. (2004); De Silvestri, A.; Forlenza, O.; Fumagalli, L.; Musumarra, L. & Selli, L.: *Diritto dello sport*. Grassina (Firenze): Le Monnier università, pp. 20-22.

8 Pfister, B. (2007): Einführung. In: Fritzweiler, J.; Pfister, B. & Summerer, T.; Reinhardt, B. & von Coelln, C.: *Praxishandbuch Sportrecht*. 2. Aufl. München: Beck, p. 15.

9 Ibid., p. 26

10 Icard, P. (2007): La spécificité du sport menacée? In: *Revue Dalloz*, vol. 2007, no. 9, pp. 635-639.

11 Zylberstein, J. (2007): Collision entre idéaux sportifs et contingences économiques dans l’arrêt Meca-Medina. In: *Cahiers de droit européen* 2007, vol. 43, no. 1/2, pp. 213-237.

12 Choquet, A. (2006): La lutte contre le dopage au regard du droit communautaire de la concurrence : à propos de l’arrêt “Meca-Medina et Majcen” du

Tribunal de première instance des Communautés européennes (30 septembre 2004). In: *Revue du Marché commun et de l’Union européenne* 2006, n. 494, janvier, p. 29-34.

13 Olfers, M. (2008): From Case-By-Case to a General Playbook. In: *International Sports Law Journal*, vol. 2008, no. 1-2, pp. 93-94.

14 Weatherill, S. (2005): Anti-doping rules and EC law. In: *European Competition Law Review* 2005, vol. 26, no. 7, pp. 416-421.

15 Weatherill, S. (2007): *Cases and Materials on EU Law*. Oxford: Oxford University Press.

16 See references above

17 Berry, E. & Hargreaves, S. (2007): *European Union Law*. 2nd ed. Oxford: Oxford University Press; Chalmers, D.; Hadjiemmanuil, C.; Monti, G. & Tomkins, A. (2006): *European Union Law: texts and materials*. Cambridge:

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18 Council of Europe: *Anti-Doping Convention*. Strasbourg, 16.XI.1989. (European Treaty Series - No. 135).

19 Benoît-Rohmer, F. & Klebes, H. (2005): *Council of Europe Law: towards a pan-European legal area*. Strasbourg: Council of Europe Publishing.

20 Weatherill, S. (2007): *Cases and Materials on EU Law*. Oxford: Oxford University Press.

21 See: European Commission. Directorate-General for Research (2002): *Antidoping: la lotta all’uso dei farmaci che alterano le prestazioni sportive*. UE, Commissione europea. Lussemburgo: EUR-OP; Italian

version: European Commission. Directorate-General for Research (2002): *Anti-doping: the fight against performance-enhancing drugs in sport*. EU, European Commission. Luxembourg: EUR-OP.

22 All documents are available in E-format on-line, the Political Document having been translated into all official EU languages while other documents are available solely in English, with French and German versions planned in some cases. A hardcopy version of the Political Document (all languages), as well as one hardcopy publication including all documents (English only), are available in very limited quantities.

23 Meuwese, A.C.M. (2008): *Impact Assessment in EU Law Making*. Alphen aan den Rijn, et al.: Wolters Kluwer Law & Business.

education and training for sport occupations and sport professions); volunteering and active citizenship (with ideas for support to these activities, including a vow, together with Member States, to look at the challenges they are facing); social inclusion, integration and equal opportunities (strongly focused on the mobilisation of funding from existing EU programmes, but also aiming at furthering political cooperation around these issues via existing cooperation mechanisms); the fight against racism and violence (including networking with civil society as well as concrete proposals for cooperation with Member States enforcement and prosecution authorities); the external dimension (making sport more visible and more present in the EU's external policies); and finally sustainable development (ensuring that the construction and running of sports facilities, as well as sporting practices, are environmentally friendly).

Part 3 on "The Economic Dimension of sport" deals with two major types of problems (the need to make sport policy making more evidence-based at European level, via the development of more targeted statistical tools, as well as a promise to support the continued existence of VAT exemptions and reduced rates for the benefit of non-profit sport organisations). Part 4 on "The Organisation of Sport" looks at a variety of organisational and legal issues, some of which are also potentially relevant to the fight against doping (measures against corruption and money laundering in sport).

Significantly, however, the White Paper action points on doping (numbered deliverables on which the Commission has committed itself to deliver results) are included in Part 2 (Societal Role), thereby underlining the non-economic and non-organisational aspects of this fight which make it important for the EU to make its contribution. It is by defining sport as a socio-cultural good worthy of protection (in terms of ensuring access to sporting activities to the greatest possible number of residents of the Union, but not in terms of protecting specific structures which have grown out of the associative practices of the 19th and 20th centuries) that the fight against doping takes on a very specific and singular meaning of its own. Anti-doping work is laden with economic aspects as it represents heavy investments from public authorities and sport organisations, and because sanctions have grave consequences for professional athletes (loss of income, and often a premature end to a professional career). It is also true that legal and organisational aspects play an important role in the complex realities of doping and anti-doping practices. Yet it is due to the (negative) societal role of doping (as a threat to sport itself, as well as to the surrounding societies) that doping deserves special attention.

4. Proposals regarding the fight against doping

Section 2.2 of the White Paper ("Joining forces in the fight against doping")²⁴ is founded on the understanding that doping is more than just a problem for sport. It is as much a societal problem as it poses a serious threat to individual and public health, as it has a seriously corrupting effect on individuals and groups and furthers the formation of organised illegal networks, thereby posing a public order problem. At the same time, given the multitude of actors involved in anti-doping both nationally and internationally, and taken into account the well-developed rules and structures in many Member States as well as the very dissimilar division of labour between public authorities and sports organisations, it was important for the Commission only to propose measures which would represent a clear added value at European level. This is the background to point 4 of the Action Plan:

"(4) Partnerships could be developed between Member State law enforcement agencies (border guards, national and local police, customs etc.), laboratories accredited by the World Anti-Doping Agency (WADA) and INTERPOL to exchange information about new doping substances and practices in a timely manner and in a secure environment. The EU could support such efforts through training courses and networking between training centres for law enforcement officers."²⁵

Via existing programmes in the field of police cooperation it is possible to support networks for the purpose of sharing information and good practice, and/or for the purpose of further training. While there

is a recognised need to involve law enforcement agencies more, it is only legitimate if they do not feel equipped to deal with such novel tasks. Partnerships with such actors as WADA-accredited laboratories, national anti-doping organisations (NADO's), WADA and Interpol could be useful in a highly operational way.

At this stage, the White Paper includes an point which is significant although it is not part of the Action Plan:

"The Commission recommends that in illicit doping substances be treated in the same manner as trade in illicit drugs throughout the EU."²⁶

The Commission considers that the fight against doping should not only target athletes but also those who provide them with doping substances. The continued trade in doping substances represents a serious public order challenge and the existence of illegal networks is a reason for concern.

There is no obligation for Member States to follow what is merely a political statement, yet this short sentence about the criminalisation of trade in doping substances seems to have sparked a much-needed debate in some Member States. While it is true that attachment to the subsidiarity principle is strong in some Member States where eurosceptic actors are well organised, it is remarkable how well this recommendation was received. One of the three major national newspapers brought two big articles, one dealing with the White Paper in general, and the other solely with the recommendation about the criminalisation of trade in doping substances. The journalist presented the Commission's proposal to the president and the CEO of the national cycling union of Denmark (*Dansk Cykle Union*) (DCU) who greeted it whole-heartedly.²⁷

The Rasmussen case in the 2007 Tour de France had certainly played a role in the active cycling nation of Denmark, but it is still remarkable that such a far-reaching proposal addressed at other actors than the EU itself should be welcomed in this way. That DCU embraced the White Paper's proposals, shows that many leading people in organised sport do look to public authorities, including the EU, to take action and ensure the existence of a level-playing field.

The White Paper goes on in the same vein, calling on "all actors with a responsibility for public health to take the health-hazard aspects of doping into account".²⁸ Obviously, this exhortation includes public authorities, sports organisations and potentially all other members of civil society with a manifest capacity to make a contribution and bring about a positive change. The Commission calls on sport organisations to "develop rules of good practice to ensure that young sportsmen and sportswomen are better informed and educated of doping substances, prescription medicines which may contain them, and their health implications"²⁹, but it is equally obvious that Member States' governments (especially the ministries of education and public health), local authorities (via their education, youth, sport or health departments) and socio-cultural organisations (especially those whose activities address children and young people) have the potential to make substantial contributions. Potentially, the Commission's message includes any kind of actor with a capacity and a willingness to contribute. This type of network-based policy-making, where a state actor acts via communication and networking rather than via coercion based on the adoption and implementation of binding legal arrangements, is becoming increasingly important. In the fight against overweight and obesity, not only Member States but also the EU is resorting to many initiatives of soft cooperation.

In the field of sport, until now not covered by a specific provision in the Treaty, the mixture of "hard law" and "soft law" has always been a predominant feature of the EU's initiatives, with a strong accent on "soft law".³⁰ With a phrase borrowed from Snyder³¹, "soft law" can be defined as rules which "have no legally binding force but which nev-

24 Political Document, pp. 4-5; Staff Working Document, pp. 10-11.

25 White Paper on Sport, pp. 4-5.

26 White Paper on Sport, p. 5.

27 Aagaard, M. (2007): EU vil sidestille

dopingbagmænd med narkohandlere. In: Politiken, 12 July 2007, p. 12.

28 White Paper on Sport, p. 5.

29 Idem.

ertheless may have practical effects".³² A more restrictive use of the term foresees it to cover solely a specific set of text genres.³³ In any case, practical, real-term implications thus outweigh legal-dogmatic limitations and the perspective needed to assess them comes closer to a political science approach than to a conventional legal analysis, which makes it necessary, for the purpose of such assessments to draw on the "governance" literature of political scientists, especially in this emerging EU activity field of sport and physical activity.³⁴ Yet while some legal scholars³⁵ tend to list categories of "soft law" instruments (thus still following a conventional legal approach), for a fuller understanding of the issues at stake, the opportunities offered and the difficulties to be confronted, it may be necessary to expand the focus to also include "soft cooperation" networks and "soft decision" mechanisms, thus focussing as much on the *de-facto* aspects, as on the *de-jure* aspects of issues.

This practice has been matched by a slow development away from a situation where sport was an entirely "horizontal" field of activity (layered into a multitude of other policy sectors, but without any defined territory of its own and with only very limited own resources), towards gradually becoming a "vertical" policy field (with own powers, structures and resources)³⁶ - albeit still seconded by strong "horizontal" arrangements (as can be seen from the White Paper, the preparation of which was coordinated with 15 different Directorates-General of the Commission). The EU being a structure with "hard law" prerogatives in certain fields, such as the internal market, but without equivalent powers in other fields, such as sport or youth, its ability to take action is very different from one area to another. The EU may decide to legislate, when it holds powers to do so (as in the case of food labelling), or it may need to resort to voluntary self-regulation between stakeholders (as it does via the EU Platform for Action on Diet, Physical Activity and Health)³⁷, or to soft political cooperation with Member States (as in the case of the recurrent informal meetings of Member States' Sport Ministers). The non-binding doping-related recommendations put forward in the White Paper should be understood in this spirit.

The White Paper goes on underlining the need for "a more coordinated approach in the fight against doping," suggesting that "defining common positions in relation to the Council of Europe, WADA and UNESCO" would be beneficial, and that an "exchange of information and good practice between Governments, national anti-doping organisations and laboratories" should be aimed at.³⁸ Finally, the Commission has profited from the White Paper to remind Member States of the need for "proper implementation of the UNESCO Convention against Doping in Sport".³⁹ This exhortation goes beyond a mere invitation to sign and ratify the Convention which was adopted in 2005 and which obliges State Parties to recognise the World Anti-Doping Agency (WADA) and its World Anti-Doping Code. The only concrete obligations laid down in the Convention are to "adopt appropriate measures at the national and international levels which are consistent with the principles of the Code", to "encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research" and "foster

international cooperation between States Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency" (article 3)⁴⁰. All Member States of the EU have also ratified the Council of Europe's Anti-Doping Convention, which provides the basis for a monitoring system,⁴¹ although the mutual recognition of doping tests has only been added later with an Additional Protocol (signed 2002, which will enter into force in 2008).⁴²

The difference between mere ratification and "proper implementation" lies in the concrete measures taken to put the Convention's objectives into practice. Given the vague nature of the most central provisions of the Convention (no obligation for State Parties to implement it via specified legal instruments, no obligation to set up specific structures), the need for implementation to be whole-hearted, substantial, effective and visible is thus even higher than it would be, had the Convention been of a more conventional type (with more measurable and verifiable obligations).

Section 2.2 is rounded off by the second and last point inserted into the Action Plan:

"(5) The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States."⁴³

To this end, the creation of an EU Working Group on Anti-Doping was decided by Member States' Sport Directors, meeting in Brdo (Slovenia) on 5 February 2008.⁴⁴ The Working Group will be complementary to the Council of Europe whose anti-doping system is well-established (1989 Convention with follow-up system and Monitoring Group).

Of related interest is a section of Part 4 of the White Paper (The Organisation of Sport) dealing with "Corruption, money laundering and other forms of financial crime". Concerns about illegal financial practices in the field of sport are shared by Member States and the EU alike and the problems are well-known to the public as critical journalists are increasingly reporting about them.⁴⁵ The White Paper proposes public-private partnerships which may help to identify vulnerabilities to corruption in sport and to develop preventive and repressive strategies to counter corruption implementation of EU anti-money laundering legislation with regard to the sport sector.⁴⁶

Future developments would be closely linked to the entry into force of the Lisbon Treaty if this Treaty is ratified by all Member States of the EU. Article 149 TEC, as amended by the Lisbon Treaty, foresees a role for the EU in relation to

"developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen"⁴⁷

Both the promotion of fairness and openness in sporting competitions and the protection of the physical and moral integrity of sportsmen and sportswomen are phrases circumscribing major aspects of anti-doping work.

30 Kornbeck, J. (2006a): Governance als Soft Law: Innovation oder Notwendigkeit im sportpolitischen Handeln der EU? In: Tokarski, W.; Petry, K. & Jesse, B. (eds): Sportpolitik. Theorie- und Praxisfelder von Governance im Sport. Cologne: Sportverlag Strauß (Veröffentlichungen der Deutschen Sporthochschule Köln, vol. 15), pp. 31-52.

31 Snyder, F. (1993): The Effectiveness of European Community Law: institutions, processes, tools and techniques. In: Modern Law Review, vol. 56, no. 1, pp. 19-54; Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press.

32 Chalmers, D. & Tomkins, A. (2007): European Union Public Law. Cambridge: Cambridge University Press, p. 137.

33 Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press, p. 87.

34 Kornbeck, J. (2006a): Governance als Soft Law: Innovation oder Notwendigkeit im sportpolitischen Handeln der EU? In: Tokarski, W.; Petry, K. & Jesse, B. (eds): Sportpolitik. Theorie- und Praxisfelder von Governance im Sport. Cologne: Sportverlag Strauß (Veröffentlichungen der Deutschen Sporthochschule Köln, vol. 15), pp. 31-52.

35 Snyder, F. (1993): The Effectiveness of European Community Law: institutions, processes, tools and techniques. In: Modern Law Review, vol. 56, no. 1, pp. 19-54; Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press.

36 Kornbeck, J. (2006b): Sport und EG/EU - Ein horizontales oder vertikales Thema? Eine Zwischenbilanz der ersten dreißig Jahre (1974-2004). In: Sport und Gesellschaft, vol. 3, no. 1, pp. 81-103.

37 See the website of the EU Platform for Action on Diet, Physical Activity and Health.

38 White Paper on Sport, p. 5.

39 Idem.

40 UNESCO (2005): International Convention against Doping in Sport. Paris, 19 October 2005.

41 Council of Europe (1989): Anti-Doping Convention. Strasbourg, 16.XI.1989. (European Treaty Series - No. 135).

42 Council of Europe (2002): Additional Protocol to the Anti-Doping Convention. Warsaw, 12.IX.2002.

43 White Paper on Sport, p. 5.

44 See press release: Republic of Slovenia [EU Presidency] (2008): EU Directors General Discuss White Paper on Sport.

45 Weinreich, J. (ed): Korruption im Sport. Leipzig: Forum Verlag, pp. 214-227.

46 Section 4.6, action points 44-46, p. 16

47 Lisbon Treaty as published, Official Journal of the EU, C 306, 17.12.2007, p. 82, pt. 124.



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Presentation

Larrauri & López Ante Abogados has been created with the main objective of offering the client an absolutely professional and complete service in all areas of Business Law.

The Firm, with Offices in Madrid and Bilbao, combines integral advice for the prevention of conflicts with extensive experience in the practice of law, with the intention of solving all of our clients' needs in a quick and efficient way.

Due to the experience acquired by its professionals throughout the years and the multidisciplinary character previously mentioned, **Larrauri & López Ante Abogados** carries out its activity with national and international clients

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If ratified by all, this provision would provide the EU with a competence to take action on sport matters, albeit without any harmonisation of national legislation. Some Member States are keen to have this confirmed⁴⁸, although the Lisbon Treaty is in fact crystal clear precisely on this point. Support from the European Parliament, the Committee of the Regions and the Economic and Social Committee is strong. On 8 May 2008, Parliament adopted its report on the White Paper⁴⁹ and voted a Resolution which includes the following section:

“MEPs request Member States to agree on a common legislative approach towards doping and to define common positions in relation to WADA, UNESCO and the Council of Europe. In particular, MEPs call on Member States to treat the trade in illegal doping substances in the same manner as the trade in illicit drugs and to combat doping by avoiding excessively busy schedules that put pressure on athletes. They recommend checks, increased research and testing, long-term monitoring by independent doctors and measures focusing on prevention and training of athletes. MEPs call for an action plan on the fight against doping, in the run-up to the London 2012 Olympics. Member States are asked to ensure more comprehensive information and education for young sports competitors regarding performance-enhancing drugs, prescriptions which may contain them and their effect on health.”⁵⁰

It will thus be seen that the philosophy chosen by the Commission has largely been adopted by Parliament also.

5. Beyond the White Paper

To round off this discussion, we shall look at some likely developments for the coming months and years.

1. The Commission will follow up on its promises made in the White Paper with various means, reflecting the diversity of the proposals made. The European Parliament can be expected to show a continued strong interest in anti-doping matters. Member States' collaboration within the newly founded EU Working Group on Anti-Doping is likely to provide more clarity as to how much EU involvement is really wanted. This is likely to provide a climate where more decisions (albeit legally non-binding) could be taken at EU level which would affect anti-doping work. Closer cooperation with the Council of Europe could also lead to various concrete results.
2. CFI and ECJ case law might in the future become more instrumental in defining some aspects of anti-doping work. Case law can be expected to continue keeping a close orientation with the likely economic impact of anti-doping rules.
3. Finally, the most palpable impact of the White Paper in relation to anti-doping might be of a more informal nature, namely by fostering debate leading to changes at national level towards a more penal approach. Even in countries with no anti-doping law, such as Germany, inspiring legal debates on the criminalisation of doping trade⁵¹, and sometimes even of doping itself (punishing athletes, as in Italy)⁵² can be found. The theory and practice of anti-doping work around Europe has been presented in an edited book, which

includes some chapters on legal aspects.⁵³ The strict liability of athletes has been analysed in a human rights perspective.⁵⁴ Certainly, academic literature can be expected to develop in this field where practice leaves innumerable questions unanswered. How many policy initiatives will follow, remains to be seen, yet a number of Member States have moved towards criminalisation. Laws were changed recently in some countries and in Germany the Medicaments Act (*Arzneimittelgesetz*) now includes a provision entitled “Ban on Medicaments for the Purpose of Doping in Sport” (§ 6a *Verbot von Arzneimitteln zu Dopingzwecken im Sport*). The law includes penal provisions providing for prison sentences up to three years for those who trade substances or administer them to others. Possession of “a not negligible quantity” (“*wer [...] in nicht geringer Menge [...] besitzt*”) (§ 95) is criminal, considering that quantities over a certain threshold cannot be consumed without exposing oneself to the risk of an overdose.⁵⁵ And on 3 July 2008, France followed with a law aimed at penalising those who trade doping substances.⁵⁶

6. Conclusion

Affirming that doping is a “recent” problem⁵⁷ is problematic as doping practices have been known in some form or another since Antiquity. But it is true that a coordinated response, including from public authorities, has taken time to emerge. Ever since France introduced its first doping law in 1965, the focus has shifted away from purely sportive aspects towards health aspects.⁵⁸ In recent years there has also been a slowly growing realisation of the public order problems linked to doping and even in Germany, where no law exists and no law is planned, a stronger role for state organs has become more acceptable.⁵⁹

The White Paper on Sport has allowed the EU to make an entry on the anti-doping scene. This move has been generally well received by stakeholders. Although the White Paper does not propose legislative action at EU level, it may have an informal impact on legislation nationally, and it certainly confirms the impression that a stronger role for governments is increasingly becoming acceptable. In the field of sport, this is more epochal than it might seem at first glance.

Returning again to Germany (a country where the autonomy of sport organisations has been almost sacrosanct, despite the absence of a provision like article 117 of the Italian Constitution), the governing bodies of sport have gradually developed a huge body of rules which fill entire compendia, available in loose leaf or bound editions. The legal zeal deployed may surpass that of state actors and the resulting mass of rules is only comprehensible to specialists.⁶⁰ But there may be signs of a sea-change as even ardent defenders of “autonomy” start advocating regulation, at least with regard to doping.⁶¹ Doping may in the end have been the one single problem that prompted the governing bodies of sport, as well as the general public, to change their minds about the distribution of tasks between government and sport. Although the EU does not have the ambition to step in and become a regulator of sport, the White Paper may later prove to have been part of a wider trend, and its doping section may have proven the point with particular clarity.

⁴⁸ House of Commons Culture, Media and Sport Committee (2008): European Commission White Paper on Sport. Seventh Report of Session 2007-08. HC 347. Published on 14 May 2008 by authority of the House of Commons. London: The Stationery Office Limited.

⁴⁹ European Parliament (2008): Session document A6-0149/2008 - 14.4.2008 - Report on the White Paper on Sport (2007/2261(INI)). Committee on Culture and Education. Rapporteur: Manolis Mavrommatis.

⁵⁰ European Parliament (2008): INI/2007/2261 - 08/05/2008 - EP: non-legislative resolution.

⁵¹ Daumann, F. (2003): Staatlicher Handlungsbedarf bei Doping im

Hochleistungssport. In: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 2003, Bd. 54, p. 243-268; Prokop, C. (2000): Die Grenzen der Dopingverbote. Baden-Baden: Nomos.

⁵² Bannenberg, B. & Rössner, D. (2006): Straftat gegen den Wettbewerb. Plädoyer für den Einsatz des Strafrechts bei Dopingverstößen. In: Weinreich, (2006), pp. 214-227.

⁵³ Spitzer, G. (2006): Doping and doping control in Europe: performance enhancing drugs, elite sports and leisure time sport in Denmark, Great Britain, East and West Germany, Poland, France, Italy. Aachen: Meyer & Meyer Sport (Edition Sport & Freizeit, vol. 15).

⁵⁴ Soek, J. (2006): The strict liability princi-

ple and the human rights of athletes in doping cases. The Hague: T.M.C. Asser Press.

⁵⁵ Arzneimittelgesetz [Germany] [1976] (2008): Gesetz über den Verkehr mit Arzneimitteln. (Arzneimittelgesetz - AMG).

⁵⁶ Loi n° 2008-650 du 3 juillet 2008 relative à la lutte contre le trafic de produits dopants. In: Journal Officiel de la République française, JORE, n° 0155 du 4 juillet 2008, page 10715.

⁵⁷ Lowenstein, W. & Siri, F. (2001): Le dopage : une drogue comme une autre ? In: Numéro hors-série de: Le Dalloz, vol. 2001, n. 20 du 24 mai 2001.

⁵⁸ Idem.

⁵⁹ Daumann, F. (2003): Staatlicher

Handlungsbedarf bei Doping im Hochleistungssport. In: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 2003, Bd. 54, p. 243-268; Prokop, C. (2000): Die Grenzen der Dopingverbote. Baden-Baden: Nomos; Lowenstein, W. & Siri, F. (2001): Le dopage : une drogue comme une autre ? In: Numéro hors-série de: Le Dalloz, vol. 2001, n. 20 du 24 mai 2001; Reinhardt, B. (2007): Sport und Strafrecht. In: Fritzweiler, et al. (2007), pp. 640-716. ⁶⁰ Pfister, B. (2007): Einführung. In: Fritzweiler, et al. (2007), pp. 1-27. ⁶¹ Reinhardt, B. (2007): Sport und Strafrecht. In: Fritzweiler, et al. (2007), pp. 640-716.