

activity relating to the retrospective impact of revelations of doping impropriety by retired athletes such as in autobiographies<sup>52</sup> Such is the negative public profile of athletes involved in doping such an allegation is likely to lower them in the eyes of right-thinking people. Actions for defamation may well result on a more regular bases as athletes attempt to defend their reputation (and indeed their future commercial prospects)

51 Horvath P. & Lording P. WADA's International Standard for Testing: privacy issues W.S.L.R. 2009, 7(2), 14-16; Soek J. The athlete's right to respect for his private life and his home I.S.L.J. 2008, 3/4, 3-13; Nicholson G. Anti-doping and the World Anti-Doping Code: does one size fit all and is the whereabouts system fair, reasonable and efficient? S.L.A. & P. 2009, Apr, 8-11  
52 Grove S. & Parks J. Sanctioning ex-athletes for autobiographical revelations W.S.L.R. 2010, 8(1), 4-5  
53 See Reynolds v Times Newspapers Ltd [2001] 2 AC 127; Chapman v Lord

Ellesmere and Others [1932] 2 K.B. 431; Cooke J. Doping and free speech E. & S.L.J. 2007, 5(2)  
54 Lance Armstrong v Times Newspapers Ltd, David Walsh, Alan English [2005] EWCA Civ 1007  
55 See for example Halgreen L. The Danish Elite Sports Act I.S.L.R. 2005, 3(Aug), 74-75; Hufschmid D. & Giesser T. Switzerland: Stricter rules against doping abuse in Swiss legislation project I.S.L.R. 2010, 1, 25-27; Ndlovu P. Anti-doping law in South Africa - the challenges of the World Anti-Doping Code I.S.L.J. 2006, 1/2, 60-63

in the face of media allegations reported on the basis of public interest<sup>53</sup>. Such an action was brought successfully by Lance Armstrong in the Court of Appeal against the Times Newspaper following allegations that Armstrong had used doping substances<sup>54</sup>.

Perhaps the most significant anticipated development however is the continued politicisation of doping activities. Symbolised by the Helsinki Report on Sport, one might expect greater political engagement with anti-doping which will result in calls for greater criminalisation of doping. The result to date is that many nations have enacted laws which specifically criminalise doping in sport.<sup>55</sup> There are obvious difficulties in reconciling the WADA code with principles of criminal law at a national level not least the differing standards and burdens of proof and the notion of criminalising activities carried out in sport which would not necessarily be criminal in the non-sporting context. Nevertheless, the movement has already resulted in the increased involvement in anti-doping of international policing bodies such as Interpol and cross-border cooperation on anti-doping. This development, which on the face of it might seem to enhance the harmonisation of anti-doping policies might prove to be divisive in the long-term as countries with more liberal drug laws resist the establishment of global anti-doping crimes.

*The International Sports Law Journal*

# Criminalization of trade and trafficking in doping substances in the European Union

by **Magdalena Kedzior**

## Introduction

Although the answer to the question whether criminal or administrative sanctions shall be applied against trade and trafficking in doping substances, especially for personal use, remains a matter of political and personal approach<sup>1</sup>, there have been clear regulatory steps taken on European level towards criminalization.<sup>2</sup> In the White Book on Sport (2007), under point 2.2., the European Commission clearly called member states to treat trade and trafficking in doping substances as illegal, same like trade and trafficking in illicit drugs.<sup>3</sup> When holding EU presidency Slovenian sport Minister *Miran Zver* announced very clearly: "We need to develop one rule for the whole of the EU, so every country treats the issue the same. It cannot be illegal in one country and then not in another because the offenders are clever and exploit this". On the European Council summit in Athens in May 2009 the Commission once again called member states (which have not done it so far) to criminalize trade and trafficking in doping substances. What is more, the Commission urged member states to criminalize the possession of doping substances with the intention to spread them on the market.<sup>4</sup> Such intention raises crucial questions about EU competence in the field of harmonization and criminalization of trade and trafficking in doping as well as regards the possible legal grounds for common action of the European Union in this field.

These abstract attempts to deliver answers to the question whether

the process of criminalization of trade and trafficking in doping substances on the EU level is legally feasible and if so, to what extent. It depicts reasons for the EU involvement in the area of trade and trafficking in doping and analyses the position of the EU Commission on the problem of trade and trafficking in doping substances. Moreover, it shows the outline of legal situation in the different member states of the EU. Finally respective Treaty provisions will be shortly analyzed in order to find possible legal grounds for criminalization of trade and trafficking in doping on the EU level. It is argued that such a common approach is currently possible only in certain aspects of the aforementioned problem.

## Reasons for the EU interference

One may wonder why the EU shall interfere with the question of trade and trafficking in doping substances if some international organizations such as Council of Europe or UNESCO have already been involved. Numerous overlaps between the problem of drug trafficking for doping purposes and EU policies shall be mentioned in this context.

The general use and accessibility of drugs enhancing performance in recreational sports create a serious public health threat, especially to younger sportsmen (a subject of the EU policy laid down in article 168 of the Treaty on the Functioning of the EU - consolidated version). Anabolic steroids and other doping substances are relatively easy and

1 More on this subject Chr. McKenzie, The use of criminal justice mechanisms to combat doping in sport, *Bond University, Faculty of Law, Sports Law eJournal*, August 2007, available at <http://publications.bond.edu.au/slej/4>, [Accessed: 12.9.2011]; Further on the use of criminal law and approach to enforcement of anti-doping and anti-drug policy A. Ammos, *Anti-Doping Policy: Rationale or Rationalization? The development of Anti-Doping Policy since the 1920s*,

Lambert Academic Publishing 2009, pp. 124 et seq.

2 This happens after the years of denial of the EU competence in the field of anti-doping, see An Vermeersch, The European Union and the fight against doping in sport: on the field or on the sidelines?, *Entertainment and Sports Law Journal* [online], April 2006, available at <http://go.warwick.ac.uk/eslj/issues/volume4/numbers1/vermeersch/>, [Accessed: 13.10.2011].

3 In the area of general drug abuse the European Pact on international drug trafficking adopted by the Council on 3 June 2010, and the European Pact against synthetic drugs initiated by the Polish Presidency constitute the recent initiatives launched to clamp down on drug trafficking. European Commission, Brussels, COM(2011) 689/2, Communication from the Commission to the European Parliament and the Council, Towards a stronger European response to drugs

[http://ec.europa.eu/justice/anti-drugs/files/com2011-6892\\_en.pdf](http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf), [Accessed: 11.10.2011]

4 EU Conference on Anti-Doping, Organized by the European Commission, Athens, Greece, 13 - 15 May 2009 Conclusions of the Conference, available at [http://ec.europa.eu/sport/news/doc/athens\\_conf\\_conclusions\\_final\\_version\\_en.pdf](http://ec.europa.eu/sport/news/doc/athens_conf_conclusions_final_version_en.pdf), [Accessed: 11.10.2011].

cheap to obtain. In this context, the following figures are more than expressive: As much as 51% of Polish 17 years-olds claim that it is easy to purchase anabolic steroids (the most frequently used doping substance) and 39 % of them think, they could buy them if they only wished so. In France the same is claimed by 10% of teenagers and in Italy by 16 %. Once on the market, performance enhancing drugs are used in both professional and recreational sport.<sup>5</sup> The 2011 Eurobarometer shows that young people can easily obtain even most harmful drugs within 24 hours.<sup>6</sup>

Moreover, trade, production and trafficking of illicit drugs represent (in some countries) forms of organized crime (also a subject of EU policy - article 67 TFEU), which the international community doesn't seem to have under control. The past few years have brought significant changes: the rapid emergence of new drugs as well as innovative distribution channels. Interpol believes that the traffic in performance-enhancing drugs, such as anabolic steroids, is bigger than that of marijuana, heroin and cocaine combined.<sup>7</sup> Interestingly the routes doping substances are being trafficked from seem to follow these of "normal" drugs.<sup>8</sup> Already in its Hardop (*Harmonization of Methods and Measurements in the Fight against Doping*) research project, in 1999, the European Commission identified these challenges in the combat of doping; one of them explicitly, was the lack of cooperation between different bodies: e.g. medical/laboratorial and prosecutorial.<sup>9</sup> Such need for cooperation was confirmed, meanwhile, in the Commission's Communication to the European Parliament and the Council (2011).

Finally trade and trafficking in doping affects the common market of the European Union where the principle of free movement of goods and services is applied. Goods once placed on the market can circulate freely between all 27 member states of the EU. And in spite of the fact that the EU as a whole must be seen on a worldwide scale as an importer and consumer rather than as an exporter of doping substances it has apparently not developed - until now - a common strategy on the limitation of imports of substances that have a performance enhancing effect in sport.

The other overlaps between anti-doping policy and the EU law - like the fact that doping contravenes the principle of fairness in sport (another subject of the EU policy), will not be analyzed further here, as it goes beyond the scope of this abstract.

### Position of the EU Commission on trade and trafficking in doping substances

In the light of the described phenomena, the EC Commission, urged by the European Parliament, published on the 11th July, 2007 a White Book on Sport,<sup>10</sup> and its accompanying document, Pierre du Cubertin Action Plan,<sup>11</sup> setting more concrete goals in EU anti-doping policy.

The Commission proposed - under Sec. 2.2 - to join forces in the fight against doping, precisating the role of the EU itself in this process and the means to be undertaken on the EU level.

First of all it must be stressed that the European Commission is not striving for criminalization of the use of doping by an athlete himself/herself. Also the problem of possession for the personal use is not the subject of interest for the Commission. Therefore the Commission focuses on the criminalization of acts prevailing to the doping use, like production, distribution and the widely understood traffic.

What is more, the European Commission assumes that the problem of doping in sport must be treated in a way similar to regular drug abuse.<sup>12</sup> Limitation of supply in forbidden substances can be achieved through several means. One of them is, according to the White Book provisions, strengthening of collaboration between law enforcement agencies: border guards, customs, national and local police etc. on national and international level for the purpose of exchanging information on trade and trafficking in doping.<sup>13</sup> This kind of collaboration is legally regulated only in some countries, like Spain, Italy, and France but on international level there is a significant lack of any kind of such regulation. In the Communication published in October 2011 the European Commission pointed out that drug trafficking was one of the biggest cross-border law enforcement challenges in the EU.<sup>14</sup>

In order to fill this gap, the EC Commission proposed to involve Interpol for cross-border doping cases. Such involvement should rely on the collection and analysis of existing information on anabolic agents abuse and trafficking. Interpol, the oldest International Police Office, has signed, already 2006, an agreement of cooperation with WADA (World Anti Doping Agency) in this regard.<sup>15</sup> There is also an agreement signed between Europol and Interpol on November 5, 2001. The European Parliament in its Resolution on the White Paper on Sport of 14.4.2008 mentioned Europol's proposed involvement in the fight against illicit-drugs trafficking. The European Parliament stressed, quite rightly, that before developing new partnerships (between Interpol and the EU) in the fight against doping, already existing networks (EU - Europol) should be reinforced.<sup>16</sup> The legal possibilities of the Europol involvement will be depicted further in the abstract.

The demand for substances having enhancing effects in sport may be adequately diminished on the EU level by several means. One of them is better education and information for athletes, delivered in the form of special preventive programs, on the health risks connected with the use of doping (White Paper on Sport Accompanying Document to 2.2).<sup>17</sup> Not every athlete is conscious that the use of certain drugs may even lead to death. There is a need to increase the accessibility and effectiveness of such preventive campaigns. In particular special attention should be paid to young athletes who are most at risk. Also better train-

5 The EU and Sport - Matching expectations, Consultation Conference of the European Commission with the European Sport Movement, Workshop Reports, Brussels 14/15 June 2005 available at [http://ec.europa.eu/sport/library/doc/c5/doc322\\_en.pdf](http://ec.europa.eu/sport/library/doc/c5/doc322_en.pdf) [Accessed: 5.10.2011], O. Berezowski, Sterydy - u ywka grzeźnych chłopców, available at <http://pozn.naszemiasto.pl/wydarzenia/785923.html>, [Accessed: 12.10.2011].

6 European Commission, Flash Eurobarometer Nr. 330, Youth Attitudes on Drugs.

7 J. Goodbody, Drugs in sport: War against doping to be boosted by Interpol, The Times October 04, 2006, [online], available at [www.ergogenics.org/465.html](http://www.ergogenics.org/465.html), [Accessed: 18.10.2011].

8 A. Donati, *World traffic in doping substances* [online], available at [http://www.wada-ama.org/rtecontent/document/Donati\\_Report\\_Trafficking\\_2007-03\\_06.pdf](http://www.wada-ama.org/rtecontent/document/Donati_Report_Trafficking_2007-03_06.pdf), [Accessed: 5.10.2011], p. 98.

9 A. De Merode, P. Schamasch, European

Commission Directorate General XII, *Harmonization of Methods and Measurements in the Fight against Doping*, (Hardop) - Final Report [online], Project SME4-1998-65-30, available at <http://ec.europa.eu/research/smt/hardop-en.pdf>, [Accessed: 15.10.2011].

10 European Commission, Brussels, 11.7.2007, COM(2007) 391 final, White Paper on Sport, available at [http://ec.europa.eu/sport/white-paper/white-paper\\_en.htm](http://ec.europa.eu/sport/white-paper/white-paper_en.htm), [Accessed: 12.10.2011].

11 European Commission, Brussels, 11.7.2007, COM(2007) 934 Commission Staff Working Document, Action Plan "Pierre de Coubertin" Accompanying document to the White Paper on Sport SEC(2007) 934 [online], available at [http://ec.europa.eu/sport/white-paper/doc/sec934\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/sec934_en.pdf), [Accessed: 13.10.2011].

12 European Commission's new approach in anti-drug strategy available at [ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1236&type=HTML](http://ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1236&type=HTML), [Accessed, 3.11.2011]

13 World Anti-Doping Agency (WADA) indicates that The Australian Anti-Doping Agency (ASADA) - functioning since 2006 - is an example of a well-working network. This organization is authorized to be informed by other public agencies that seize illegal substances. With the delivery of relevant information - e.g. the details of the intended recipient - the ASADA is able to identify athletes suspected of doping and then can concentrate its resources on them (so called targeted testing). Australian Model, available at <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Investigation-Trafficking/Investigations/Australian-Model/>, [Accessed: 10.10.2011].

14 European Commission, Brussels, COM(2011) 689/2, Communication from the Commission to the European Parliament and the Council, Towards a stronger European response to drugs [http://ec.europa.eu/justice/anti-drugs/files/com2011-6892\\_en.pdf](http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf), [Accessed: 11.10.2011].

15 Andersen E.M., WADA and Interpol join

forces to combat doping, [online] available at [http://playthegame.org/News/Up\\_To\\_Date/WADA\\_and\\_Interpol\\_join\\_forces\\_to\\_combat\\_doping.aspx](http://playthegame.org/News/Up_To_Date/WADA_and_Interpol_join_forces_to_combat_doping.aspx) [Accessed: 11.10.2011]

16 European Parliament, Report on White Paper on Sport of 14.4.2008, 2007/2261(INI), [online] available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0149+0+DOC+XML+Vo//EN> [Accessed: 15.10.2011], in 2010 around a third of operational support provided by Europol to national law enforcement agencies was related to illicit drug trafficking. Europol, General Report on Europol Activities 2010.

17 European Commission, Brussels, 11.7.2007, COM(2007) 935 Commission Staff Working Document, The EU and Sport: Background and context, Accompanying document to the White Paper on Sport SEC(2007) 935 [online], available at [http://ec.europa.eu/sport/white-paper/staff-working-document\\_en.htm](http://ec.europa.eu/sport/white-paper/staff-working-document_en.htm), [Accessed: 11.10.2011].



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## **Sports Betting: Law and Policy**

*Edited by*

Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek

*With a Foreword by Tjeerd Veenstra, Director of the Dutch De Lotto and Second Vice-President of The European Lotteries.*

Betting and sport have been – to some extent – uneasy bedfellows probably since the dawn of time. After all, the essence of sport is *fair play* and illegal and unfair betting arrangements and the manipulation of the outcomes of sporting events are completely anathema and contrary to this fundamental concept and principle. Of course, with preventive measures in place, sport and betting can – and do, in fact – co-exist for their mutual benefit. National lotteries raise substantial sums of money for “good causes”, which include the funding of sports events and sports persons. In the last decade sports betting has changed quite fundamentally with the advent of modern technology – not least the omnipresence of the Internet and the rise of on-line sports betting.

This book looks at the law and the policy on betting and sport in more than forty countries around the world. Several chapters deal with the United States of America. In addition, several contributions deal with the way national legislation on sports betting is scrutinized in the jurisprudence of the European Court of Justice.

*Sports Betting: Law and Policy*, a publication in which a mine of useful information on an important subject of national and international sports law is assembled, is heartily commended to sports lawyers and all others with a particular professional, academic and policy interest in the subject, including those who are involved in the organisation and administration of national lottery schemes benefitting sport.

The editing team consisted of Prof. **Paul Anderson**, Associate Director, National Sports Law Institute, Marquette University Law School, Milwaukee, United States of America, Prof. **Ian Blackshaw**, Member of the Court of Arbitration for Sport, Prof. **Robert Siekmann** and Dr **Janwillem Soek**, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

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Prof. **Ian S. Blackshaw** is a Member of the Court of Arbitration for Sport in Lausanne, Switzerland.

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It fills a gap in the international sports law literature and provides an invaluable resource for all those involved in the legal aspects of the 'beautiful game', particularly extra-judicial dispute resolution, including administrators, regulators, football agents and their legal advisers. The book will also prove very useful to students and researchers in this particular field.

**Alexander Wild** is an Attorney-at-law at the Law Firm of Dr. Falkenstein & Partner, Stuttgart, Germany and a former research fellow of the ASSER international Sports Law Centre, The Hague, The Netherlands.

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ing for doctors on doping substances and methods is necessary, so that they may better understand the effects of doping on the human body. In this context the educational strategies of the EU may, and should be coordinated on the legal basis, which will be discussed later.

Other means the European Commission declares in the White Book on Sport that should be undertaken is support to the network of National Anti Doping Organizations (NADOs). Such support may surely have the form of financial and organizational help. It should be stressed that NADOs have been established in the EU member states after year 2000, as it turned out that the combat of doping within the private club system cannot succeed.<sup>18</sup> The declared goal of building up the network was, in particular, to improve information-sharing and the coordination of the NADOs regarding EU-related issues. Coordination measures shall concern activities such as EU-wide campaigns in the field of anti-doping during European championships, and other preventive measures, such as educational campaigns in the Member States, and research.

The building up of the network of National Anti Doping Organizations shall serve one more goal indicated in the White Book. It will enable to develop a more coordinated approach to anti-doping policy on the EU level and therefore strengthen the role of the EU within World Anti Doping Agency structures.

### The problem of trade and trafficking in doping in national legislations

Over the past two decades a number of West European countries have criminalized and penalized trade and traffic in doping substances and introduced - separate from narcotics and pharmaceutical laws - special legal acts which take into account the specificity of doping in sport.<sup>19</sup>

Already a superficial analysis of national legislations depicts that criminalization trends refer to actions such as: illegal production and distribution of doping substances (Sweden, Denmark) administration of doping substances to an athlete by athlete's related personnel (Spain), possession of doping substances in significant amounts (Germany, Spain). It must be stressed however, that there are remarkable regulatory differences within European national legal systems as far as the scope of criminalized acts and the severity of sanctions are concerned.

On the one hand there are Nordic countries with traditionally severe and detailed laws on trade and trafficking with doping. Legally forbidden acts are there i.a.: production (Denmark and Finland), import and export (Denmark), storage (Norway), offering for sale (Sweden), distribution, purchase and even simple possession of doping substances (Denmark and Sweden). In this aspect Danish and Swedish anti-doping laws have been since the 1990-ties comparable to antinarcotics law.

Traditionally strict criminal laws on trade and traffic in doping are in force in Italy and France as well. Both systems sanction the illegal trade and traffic with doping products with the imprisonment (Italy: from 3 months to 3 years, France: up to five years) or with a relevant penal fine, however for aggravating circumstances - as the participation in an organized crime group for the purpose of doping trade more severe sanctions are foreseen.

The tendency to criminalize trade and trafficking in doping sub-

stances has recently been confirmed e.g. though changes in Spanish and German legislations. Spanish law of 2005<sup>20</sup> prohibits e.g. the possession of doping substances in order to release them to the market. In 2006 article 361 bis of the Spanish Penal Code introduced the criminal liability of athlete's related personnel for facilitation to use, offering for use and administration of doping substance to an athlete. The time of imprisonment ranges from 6 months to 2 years.<sup>21</sup> German anti-doping law<sup>22</sup> prohibits, in article 2.3, the possession of *not small* amounts of doping substances with the purpose to apply it to humans. The doping offences are subject to sanctions ranging from one to three years of imprisonment.<sup>23</sup> Additionally, similarly to French and Italian systems, Spanish law introduced developed rules for the collaboration of different law enforcement agencies in doping cases.

The Polish Sports Law Act (2010)<sup>24</sup> does not set any special criminal rules on manufacturing of doping products.<sup>25</sup> According to art. 43 possession of a doping substance (art. 43 sec. 3) and administration of it to an athlete in the context of sporting competition (art. 43 sec. 4.) as well as placing a doping product on the market and participation in trafficking of prohibited doping substances (art. 43 sec. 6) constitute a doping offence subject to administrative sanction only. The Polish *liberal* legislator limited the criminalization of trade and trafficking in doping just to two cases: when doping is applied - in the context of a sporting competition or in the process of preparing to it - to minors (art. 50 sec. 1) and to those who are unconscious of the fact of being doped (art. 50 sec. 2). Sanctions to be imposed range from penal fine to limitation of freedom and imprisonment up to two years. Still in comparison to the other European countries the envisaged criminalization of trade and trafficking in doping in Poland must be evaluated as partial and limited.

### The application of Lisbon Treaty provisions on trade and trafficking in doping substances

Different areas of the EU law provide legal grounds for the Union's action in the area covered by the White Book on Sport in the field of anti-doping. The study should be started with the Lisbon Treaty provisions on Sport. Article 165 (ex article 149 EC Treaty) of the Treaty on the Functioning of the European Union (TFEU), precised the role of the EU in the fight against doping in sports.<sup>26</sup> In Section 2 it stipulates that "*Union action (in sport policy) shall be aimed at: (...) - 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...*". Notwithstanding the acknowledgement of EU competence as regards to anti-doping policy, art. 165 of the Treaty does not provide the EU with a mandate to act in any binding way towards the member states. In other words, the role of the EU stays clearly supportive and coordinative, completing measures taken on national or international level. Moreover, any harmonization of laws and regulations of a member state is explicitly excluded as the only legal instrument stipulated by art. 165 is the Council's recommendation. Consequently it cannot be treated as a possible legal basis for future criminalization of trade and trafficking with doping.

In spite of its general nature, art. 165 TFEU may have some practical

18 NADA Germany was founded in 2002; Spanish AEA (Agencia Estatal de Antidopaje) in 2006. NADOs are independent bodies, responsible in general for anti-doping preventive policies, out of competition controls, and representative functions on international level. Though in some countries - like Poland - there are still governmental authorities designated to perform these tasks.

19 K. Vieweg, R. Siekmann, Legal Comparison and Harmonization of Doping Rules, Pilot Study for the European Commission, Berlin 2007, pp. 108 et seq.

20 Public General Act on the protection of health and the fight against doping in sport 2006/7, of 21st November, available

at <http://www.boe.es/boe/dias/2006/11/22/pdfs/A40859-40879.pdf>, [Accessed: 30.10.2011] provides an area of criminal protection for public health in activities related to doping in sport. A new section 361 bis has also been introduced into the Spanish Penal Code, Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [available at: [http://noticias.juridicas.com/base\\_datos/Penal/1010-1995.1217.html](http://noticias.juridicas.com/base_datos/Penal/1010-1995.1217.html), Accessed: 30.10.2011] whose aim is to punish the environment of the sports person and preserve public health, seriously threatened by the uncontrolled selling and dispensing, without any guarantee, of products that are harmful to health.

21 Higher penalties are foreseen for the

application of doping to minors or to the sportsmen who are unconscious of the fact of being doped. Apart from criminal sanctions Spanish law provides professional bans for persons employed in a public health sector, in case of being accused of the doping use in sport.

22 Gesetz zur Verbesserung der Bekämpfung des Dopings im Sport of Oktober 24, 2007 is applied strictly to doping use in sport. Before the general provisions of medicines law were used in this context. See Bundesgesetzblatt 2007, Teil I, Nr 54, p. 2510.

23 Higher penalties may be imposed when trading activity is aimed at achieving a significant economic profit, creates threat to life/health of significant amount of peo-

ple, involves an action within an organized, criminal group etc.

24 Official Journal, DzU nr. 127, poz. 857.

25 In this aspect provisions of the Bill on the Combat of the Drugs Misuse (2005) and the Bill on Pharmaceuticals (2001) apply, however they do not refer explicitly to the drugs misused for doping purposes.

26 The Treaty establishing the European Community (TEC, Rome), has been renamed by the Treaty of Lisbon - signed 13.12.2007 - into Treaty on the Functioning of the European Union (TFEU). The European Union Treaty (EUT) stayed in force as the second legal basis for the functioning of the EU.

importance for the development of EU anti-doping policy. It constitutes a legal basis for the subsidiary role which the EU should play in this area. Accordingly, recommendations issued on the basis of art. 165 may suggest to law enforcement agencies operating in the member states a desired course of action in anti-doping policy. Programs aimed at networking, training courses for law enforcement officers, and EU-wide anti-doping preventive-measures campaigns, may coordinate efforts taken by the member states. It seems that the sharing of information, the exchange of resources and best practices between different bodies involved in anti-doping, may be achieved by legally non-binding acts like recommendations or resolutions. For instance, also in the field of general drug abuse, the cooperation between customs and police is regulated on EU level by the Council Resolution of 29 November 1996.<sup>27</sup>

Another legal basis which must be analyzed as regards criminalization of trade and trafficking in doping is article 168 TFEU (former article 152 EC Treaty), according to which Community action is directed towards improving public health and obviating sources of danger to health. According to article 168 TFEU a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. The Community complements member states' action in reducing drugs-related health damage, including information and prevention as well as by adopting incentive measures for cooperation between member states. It should be noted in this context that Union's legislative competence set out in art. 168 sec. 4 c excludes for now any harmonization of national laws in the member states. The legal measures introduced on this basis include mostly decisions aimed at establishing programs on protection and improvement of human health.<sup>28</sup> The establishment of liability for actions such as possession of doping substance or administration of it to an athlete, in a legally binding act (decision) issued on the basis of art. 168 cannot be excluded entirely, however, it remains questionable as no such action has been performed so far. Moreover, in the field of public health the Council may also adopt recommendations for the purposes set like the sharing of information between relevant law enforcement agencies and sports entities on doping. As doping in sport poses a threat to public health, special programs may also be included in the Union's Public Health protection policy.

As next, provisions which regulate the functioning of the internal market in the EU should be taken into account as future legal basis for the regulation on trade and trafficking in doping. According to article 114 TFEU (former Art. 95 EC Treaty) the Council adopts measures for the approximation of provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market. Like in the field of narcotics, trade and trafficking in doping substances affect the internal market. The harmonization of measures for controlling the manufacturing and placing on the market of certain chemical substances frequently used in the production of illicit doping drugs is therefore possible on the basis of article 114 of the Treaty. As for secondary EC law, relevant

questions are raised by the narcotics Council Regulation 273/2004 of 11.02.2004.<sup>29</sup> It contains rules on licensing, labelling and customer declaration on the use of the purchased substances which are listed in the annex. Similarly, external aspects of the imports of the drug precursors are covered by Council Regulation 111/2005 of 22.12.2004, laying down rules for the monitoring of trade between the Community and third countries.<sup>30</sup> The Regulation requires all importers of drug precursors to be licensed and to label and properly document the import of these substances. The member states have been committed to bring legal proceedings against anyone infringing rules laid down in the Councils regulation. Relevant legal action in relation to substances having a performance-enhancing effect in sport, which may conditionally be found in legal trade but do not belong to the group covered by the aforementioned regulations of the Council, seems possible and desired.

Regarding criminal aspects of drug trafficking, attention should be paid to art. 83 et seq. of the European Union Treaty. According to the Treaty (art. 29) one of the EU objectives is the combat of illicit drug trafficking through approximation, where necessary, of rules on criminal matters in the member states. The Lisbon Treaty defines drug trafficking as one of the "particularly serious crimes with a cross border dimension", which justify the adoption of directives establishing minimum rules.<sup>31</sup> The currently applicable secondary legal act is the Council Framework Decision 2004/757/JAI<sup>32</sup> of 25th October 2004, on the establishment of minimum rules relating to drug trafficking.<sup>33</sup> The purpose of this Framework Decision was to combat drug trafficking so as to limit the supply and consumption of drugs. It laid down minimum rules to be observed by member states. The text begins with a list of punishable acts relating to drug trafficking. It obliged member states to take measures against natural persons involved in such trafficking. Finally, it laid down minimum penalties for acts linked to drug trafficking, including production, manufacture, extraction, sale, transport, importation and exportation. Possession and purchase with a view to engage in activities linked with drug trafficking were also taken into account. Nevertheless the Commission's assessment of the implementation of the Framework Decision has shown that this instrument has scarcely led to any approximation of national measures in the fight against drug trafficking.<sup>34</sup>

With regard to the subject of this paper it should be noted that the Commission's Communication proposing the Framework Decision 2004/757/JAI made a clear distinction between the transfer of drugs for profit which would constitute drug trafficking, and the transfer of drugs other than for profit, which would be treated in the same way as action deemed to constitute personal consumption.<sup>35</sup> The scope of the framework decision should exclude (i) simple users who illegally produce, acquire and/or possess narcotics for personal use and (ii) users who sell narcotics without the intention of making a profit (for example, someone who passes on narcotics to their friends without making a profit). It can be assumed that the new EU legislation on this subject shall maintain the aforementioned principles.

Coming back to the question of fighting doping in sport, the next step is to decide whether legally binding action in this field - similar to the action taken by the EU in relation to narcotics - is possible on the basis of the reformed TFEU. Trade with substances having a doping effect is, however, not mentioned in article 83 TFEU - just general illicit drugs trafficking. In order to include trafficking in doping substances into the scope of EU legal responsibility, the Council would apparently have to adopt a decision identifying those areas of crime. It shall, according to art. 83, act unanimously after obtaining the consent of the European Parliament. If so, on a European level, the trading and trafficking in forbidden doping substances might be combated by issuing binding acts harmonizing criminal sanctions.

The changes introduced by the TFEU (new Title V - Article 67) may facilitate the combat of trade and trafficking of doping substances by giving the European police greater competence in this area. According to Art. 88 TFEU Europol's mission has been to facilitate the cooperation between police forces from different member states in combating particular serious crime. For now however, as we may assume, trade and trafficking in doping is explicitly not included in the list of serious crimes

27 Official Journal C 375 of 12.12.1996.

28 P. Saganek, *Ochrona zdrowia* (in:) J. Barcz (edit.), *Prawo Unii Europejskiej. Zagadnienia systemowe, prawo materialne i polityki*, Warszawa 2005, pp. 292 et seq.; M. Kondrat, *Zdrowie Publiczne* (in:) K. Kowalik-Banczyk i M. Szwarc-Kuczer (edit.), *Traktat ustanawiający Wspólnoty Europejskie*, Warszawa 2009, pp. 1130 et seq.

29 Official Journal L 074 of 18.02.2004.

30 Official Journal L 22 of 26.01.2005.

31 According to art. 83 TFEU "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime.

32 Council's Framework decision laying

down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking OJ L 335 of 11.11.04.

33 Already in the Resolution 97/C 10/02 of 20 December 1996 on sentencing for serious drug-trafficking the Council called member states to ensure that their national laws provide for the possibility of custodial sentences for serious illicit trafficking in drugs that are within the range of the most severe custodial penalties imposed by their respective criminal law for crimes of comparable gravity.

34 COM (2009), 669 and SEC (2009) 1661.

35 Commission's Proposal for the Framework Decision 2004/757/JAI Com/2001/0259 final - CNS2001/0114, Official Journal C 304E of 30 October 2001, pp. 0172-0175.

falling into the competence of Europol. Only trade with narcotics is mentioned. So only if the Council adopts unanimously an appropriate regulation extending the competence of Europol relevant action would be possible.

#### Conclusions

As shown, the increased problem of trade and trafficking in doping substances has entailed the criminalization trends in some member states of the EU and lead to emergence of the political will to tackle this phenomenon on a common basis within the EU. The commitments laid down in the White Book on Sport by European Commission; seem to show the direction taken by the EU. However, as the already cited Slovenian Minister of Sport stated: "a lot more work had to be done". The approximation of laws in the member states can be, in the context of the trade and trafficking in doping substances, achieved in several aspects. Bearing in mind that there are no legal instruments in European Union law enabling criminalization of doping act as such, what exactly, on the basis of the commitments made by the European Commission, and within the available legal framework of the treaty, can be expected?

In the areas concerning internal market - like production, trade and trafficking with doping substances and its precursors which can be available in controlled trade - member states can be obliged by a EU legal act to provide internal administrative provisions regulating the market (e.g. by licensing) and to adequately establish sanctions for infringe-

ment of the domestic law, as it has been done in relation to narcotics.

Furthermore the EU may take advantage of its competences in the field of protection of public health and issue legally binding act obligating its member states to prohibit and sanction trafficking offences and acts preparatory to the illicit drug use in sport. If countries are allowed to determine the type of penalty the approximation of laws has only a partial character, so that the prohibition to issue harmonization measures on the basis of article 168 TFEU could be avoided.

Establishment of minimum rules (sanctions) relating to offences in trafficking of doping substances on EU level within the Chapter VI of the European Union Treaty (art. 83 TFEU) seems to be much more complex, as it would require the legal acknowledgement of trafficking in doping as criminal offence on EU level. This would further enable the criminalization and harmonization of laws proposed by the European Commission and cause the existing differences between member states to diminish.

Much more likely for the time being is that the European Commission, using the opportunities provided by the Lisbon Treaty, will present stronger and more effective legislative proposals referring to general illicit drug trafficking. This would apply to significant amount of illicit drugs which are in the same time banned as substances having performance enhancing effect in sport.

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