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

AN VERMEERSCH<sup>1</sup>  
ACADEMIC ASSISTANT,  
EUROPEAN INSTITUTE,  
GHENT UNIVERSITY

#### 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*

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*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.*

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## KEYWORDS

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

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## INTRODUCTION

Doping has a long history. Ever since sporting competition used a variety of methods to increase performance. Ancient combinations of plants and fungi. In the Roman era, feed given to horses to make them run faster and to gladiators a more spectacular way. However, Emperor Theodosius banned games in the fourth century and thereafter professional sport re-emerged only at the end of the nineteenth century, and modern chemistry induced a drastic change in doping (Epstein, 2003, p. 181). Although substances like steroids had been in use since the first half of the twentieth century, the cyclists Jensen (1960) and Simpson (1967) that sparked the use of drugs in sport. Since then, both the sporting public authorities developed actions against doping (Butcher, 2003, p. 27-39).

Traditionally, the fight against drugs use in sport was justified on the basis of public health and fair play concerns. Doping was seen as a threat to the physical condition of athletes. More recent examples illustrated the negative consequences of doping on the physical condition of athletes. More recently, 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 in 1999 illustrates the joint and reinforced commitment of the sporting world in the fight against doping (Constitution of the World Anti-Doping Agency, Notary Lausanne, 10 November 1999, 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 laws in the 1950s and 1960s (Law n° 1055 on the protection of athletes, December 1950; Loi n° 65-412 tendant à la répression des infractions commises à l'occasion des compétitions sportives, 1 June 1965; Loi n° 65-412 tendant à la répression des infractions commises à l'occasion des compétitions sportives, 2 April 1965. See Chaker, 1999, p. 1). The Council of Europe dedicated special attention to Europe in the field of anti-doping. Numerous meetings of experts and the resulting statements resulted in the adoption of the Anti-Doping Convention (<http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm>), which was also open to non-members of the Council of Europe.

the need for harmonisation of anti-doping efforts across this respect, the International Olympic Committee (IOC) recognised as a reference document. Articles 2 and 11 prescribe a mechanism of approval of the IOC list and the Convention's Monitoring Group. Moreover, the Convention central role of both the international federations and the use of the financial, administrative and legal resources (Houlihan, 1999). In practice however, states retained a large discretion in making the concrete commitments. Each country could define the role of its public authorities in accordance with its own 'constitutional tradition'. A 2002 Protocol provides for the mutual recognition and the acceptance of WADA's competence to conduct out of country and a binding monitoring mechanism (Strasbourg, 12 September 2002) [http://conventions.coe.int/Treaty/EN/Treaties/Html/188.](http://conventions.coe.int/Treaty/EN/Treaties/Html/188.htm)

Moreover, the worldwide commitment to the fight against doping has attracted attention from European to international fora. The establishment of WADA brought some changes in the relations between the different stakeholders in the fight against doping. First, the IOC's initiative to launch WADA was seen as an attempt to consolidate its own role. The mass media, together with the 1998 'Doping Tour' together with the powerful international authorities challenged the IOC to prove its commitment (Houlihan, 1999). Second, the creation of WADA illustrates the growing cooperation between public authorities. Although the European Commission was not involved in the creation of WADA, the chairmanship of the Commission together with the fact that Montreal won the permanent seat of WADA demonstrate the increasing power of Canada and other

The rather unbalanced allocation of seats in the WADA Executive Board led to a loss of influence by the Europeans in shaping policy on anti-doping. Whereas Europe pays 47,5% of the government's share of the budget (see < <http://www.wada-ama.org/en/dynamic.page?category.id=401>>, it is entitled to only 5 seats (Canada and the United States). The Anti-Doping in Sport, agreed in the framework of the International Intergovernmental Consultative Group on Anti-Doping in Sport (Cape Town, 2000) <

[http://www.dcita.gov.au/drugsinsport/cape\\_town/cape\\_town.htm](http://www.dcita.gov.au/drugsinsport/cape_town/cape_town.htm)>. Conversely, the Americas have to pay only 29% while they are entitled to 12 seats. During the second World Conference on Doping in Sport (Cape Town, 2000) representatives of the sports world and of governments agreed to adopt the World Anti-Doping Code (< [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf)>. Public authorities accepted the Code as the foundation in the world of anti-doping in the Copenhagen Declaration on Anti-Doping in Sport (Copenhagen, 2000) which governments have signed it: see < [http://www.wada-ama.org/rtecontent/document/copenhagen\\_en.pdf](http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf)>. However, they did not meet their commitment to implement all relevant provisions of the Code 'on the first day of the 2006 Turin Winter Olympic Games' (in the Copenhagen Declaration). As governments cannot be legally bound by a non-binding document like the Anti-Doping Code, it was agreed to create a legally binding Anti-Doping Convention under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). After two years of negotiations an International Convention against Doping in Sport was adopted at a session of UNESCO's General Conference, meeting in Paris (Paris, 19 October 2005) (< [http://www.wada-ama.org/rtecontent/document/UNESCO\\_Convention.pdf](http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf)>. However, at the 2006 Winter Games only nine states had ratified or accepted the Convention. The criteria for its entering into force had not been fulfilled. The Convention requires ratification, acceptance, approval or accession by a minimum of 12 states before the Convention can enter into force. On 11

Australia, Canada, Cook Islands, Denmark, Iceland, Morocco, Norway and Sweden had ratified or accepted the Convention. The ratification process should take more time than was expected. The International Convention will provide governments with a framework for an intensified harmonisation of the worldwide anti-doping policy (2005).

In the light of the foregoing, it can be questioned whether the EU (still) has a role to play in the worldwide fight against doping. The survey opinion seems to favour increased EU involvement. The survey shows a great level of public expectation (80%) in the fight against doping. The Eurobarometer reports even can even observe a certain criticism arising from interviewees in the European Union for not being active enough in this area (p. 38). At political level, the communication on the role of the EU in this respect is not always straightforward. Overall, the political action in this respect has been amplified during the last decade, whereas it has been difficult to carry out major actions. In 1999, Romano Prodi mentioned the fight against doping as an issue to be addressed by the Commission because 'it really matters to people's everyday lives'. Although he admitted that Europe cannot tackle the issue on its own, he pleaded for an action on European level because by its nature the fight against doping 'clearly goes beyond purely national boundaries'. In 2000, the Commission had taken a more moderate approach in its consultation document on the European Model of Sport Policy, stating that the Community has no powers to develop a policy in this area. Subsequently, it acknowledged the importance of the problem and expressed its willingness to act 'under different policies and in the context of actions in the fields of justice and home affairs'.

As the former Commission president correctly pointed out, the effectiveness of Community action in the field of doping lies in the transfer of powers to the issue. In the light of the subsidiarity principle, the Commission should act (in areas that are not within its exclusive powers) only if a better result can be attained by action at Community rather than at national level (Art. 17 EC Treaty). Even today, despite harmonisation efforts in various international fora, different approaches are apparent in the EU Member States. This is plainly demonstrated by the recent clash between the Italian Anti-Doping Commission and the Olympic Committee at the occasion of the 2006 Winter Olympic Games. Contrary to the IOC and WADA –and a large number of other international sports organisations– sports sanctions, the Italian Anti-Doping Law considers doping a criminal offence that can be punished by imprisonment for up to 5 years and a fine of between 5 and 100 million Lit (these amounts can be increased in certain circumstances, Art. 9 Law N. 376 of 2006 on the Regulation of health standards in sports activities and the fight against doping < [http://www.coe.int/t/e/cultural\\_cooperation/sport/Resources/ITLegislation.asp](http://www.coe.int/t/e/cultural_cooperation/sport/Resources/ITLegislation.asp) >. Only days before the start of the Games, Italy and the IOC reached a compromise. It would not jail any athletes and the IOC and WADA would continue with their doping controls, while the Italian ministry of health would set up a doping commission during the Games (NBC, 2006). Admittedly, this does not stop at the EU borders. Therefore, the outcome of this survey should be less convincing when taking into account the international context of the worldwide fight against doping. Moreover, because the competences of the Community/Union are based on the principle of conferral, it is necessary to examine whether the Community has legal competence in this area before carrying out the subsidiarity test. In this respect, it is clear that neither doping nor sport in general are mentioned in the Treaty. Consequently, when looking for a legal basis for a Community action in related policy domains such as health, research and the

into play.

From a pragmatic point of view, the forgoing seems less practice the European Union already plays a (limited) role in doping. Arguably, this can be seen as a *de facto* affirmation 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 following sections.

## THE EUROPEAN UNION'S ANTI-DOPING POLICY

During the second half of the 1980s, the issue of drug-testing in sport was brought to the attention of the European Commission by a series of parliamentary questions. While some of these questions (for example: Written question 1508/88 Anne André; Written question 1509/88 Anne André), others asked the Commission whether it had any policies or urged the Commission to initiate legislative measures. (Written Question 20 Mr Delorozoy (H-701/87); Written question 2511/87 Luc Beyer de Ryke; Written question 346/90 James Scott-Hopwood; Written question 1856/87 Peter Duetoft; Written question 1446/92 Anne André). The Commission rebuffed these suggestions by referring to the actions of the Council of Europe and the responsibilities of the Member States. The Commission even seemed to play down the issue as it stated that the actions to combat the use of drugs in sport were of absolute priority because the use of drugs in sport was a much more serious problem in comparison with the consumption of illegal drugs. (Written Question 20 Mr Delorozoy (H-701/87); Written question 1856/87). The first Commission step related to the drafting of the Code of Conduct in Sport (SEC (91) 2030 Final). The Council, who had adopted a resolution (OJ, 1990, C 329/4) to draft the text, adopted the Code in 1992 as an instrument to inform and educate the public. The Code emphasised the shared responsibility of parents, teachers, athletes, health professionals, sports entourage, sports clubs, laboratories and the media. It was widely disseminated through postcards (see Written question 1446/92 Anne André). Following the adoption of the 1992 Code of Conduct, the Commission did not undertake any ground-breaking actions in the fight against doping.

Again, it was the European Parliament that kept the issue alive in the face of the other institutions. In 1993, the Parliament's Committee on Education and Media organised a hearing that resulted in a resolution on sport and doping (OJ, 1994, C 205/484). The resolution emphasised the need for a cross-border approach and stated that the main responsibility in the fight against doping lies with the sports federations, the government has to support their activities and the Parliament, 'a more active policy on the part of the European Parliament, therefore necessary'. The Parliament called on the Commission to acknowledge expressly the EU's responsibility both from a public health standpoint. Subsequently, the Parliament suggested concrete action, such as a network of laboratories for doping research; a European databank for doping; a harmonisation of legislation on the possession and use of doping substances. Moreover, individual Members of the European Parliament suggested that the regulation of doping differed in the Member States and whether it envisaged Community legislation to tackle the issue. (Written question P-1514/95 Niels Sindal; Written question E-251/95 Written question E-471/96 Gian Boniperti and Antonio Turchetti). The Commission systematically replied that the use of drugs in sport might be covered by the provisions of Community Directives on the harmonisation of legislation concerning health and medicinal products (Directive 65/150/EEC).

75/319/EEC; Directive 92/28/EEC) but that it had no intention of legislating relating to the testing of sportsmen for the use of performance enhancing substances.

Be that as it may, the issue of doping provoked quite a reaction from the Community institutions. This was only an illustration of the growing awareness of the problem, without concrete actions being taken (Siekmann and Soek, 2004). The infamous 1998 Tour de France, in which a large quantity of prohibited substances was intercepted belonging to the Festina team, seemed to bring greater attention to the issue. Inspired by the reaction of the French government, a group of Member States emerged in favour of a more active role for the European Commission against doping (Tokarski et al, 2004, p. 72). In the aftermath of the 'Tour', not only the 15 EU sports ministers but also the Vice Presidents of the European Parliament and the Committee of the Regions urged the Commission to make proposals for a more harmonised policy and a new view to combating doping (see < [http://www.europa.eu/action\\_sports/dopage/dopage\\_overview\\_en.html](http://www.europa.eu/action_sports/dopage/dopage_overview_en.html)>). In its communication on the combat doping (COM (1999) 643 Final), the Commission proposed the following approach:

- o to assemble the experts' opinions on the ethical, legal and social dimensions of doping;
- o to contribute to preparing the creation of WADA; and
- o to mobilise Community instruments and competences in order to combat doping.

Apart from some reservations and remarks suggesting that some points were too timid, the Commission's plan was enthusiastically welcomed by the Committee of the Regions (OJ, 2000, C 32/14); the Economic and Social Committee (OJ, 2000, C 204/45); the Council of the European Parliament (OJ, 2001, C 135/270)). In practice, the Commission has not yet achieved a structured Community anti-doping policy. In fact, it has not yet achieved the three stipulated goals. The troublesome participation of the Commission perfectly illustrates the complex position of the Union in this field. The Commission was actively involved in the creation of WADA (together with a representative from the EU Presidency and a representative from the WADA Foundation Board (OJ, 2000, C 204/45)). In fact, that the Board was 'not prepared to take decisions which would reconcile the WADA budgetary rules with Community financial rules' (Commission, 2001), the Commission refused to present a proposal for structural funding of the Agency. Accordingly, Commission's contribution from the Board and the Member States had to look for a solution to the 'European' contribution to WADA. Today, the Member States of the European Union have three representatives in the Board of Directors of WADA (in principle, see < [http://www.wada-ama.org/en/dynamic\\_content/469](http://www.wada-ama.org/en/dynamic_content/469)>). The Council of Europe has two representatives from Member States of the European Union co-ordinate their efforts towards WADA within the framework of the Council of Europe's 'European' contribution to WADA ([http://www.coe.int/T/E/cultural\\_co-operation/Sport/Doping](http://www.coe.int/T/E/cultural_co-operation/Sport/Doping)). The fact that the permanent WADA headquarters in Montreal, a city not a Member State of the European Union, illustrates the lack of success of the Member States in this field. As a result, the European Commission has not yet established a permanent headquarters to the city of Montreal. Despite the promise made in the aftermath of the 'doping Tour', the participation of the Commission has been limited to an ad-hoc co-operation. Three concrete results were the Independent Observers Programme, the Athlete Biological Passport and the WADA E-Learning Tool, which were developed by WADA.

With regard to the third point of the Commission's plan, Community instruments and competences, the outcome Whereas the Commission had indicated it would focus e (intensification of research; mobilisation of education, v youth programmes; making the most of the police and ju programmes; reinforcement of information on medicines relevant to public health policy), it appears that the maj achievements relates to pilot projects and research stud research is unsurprising because one could build on exist field. Reference can be made to the 1999 HARDOP proje medical commission of the IOC identified the research n improving the way in which doping is combated (Final Pr 6530, 1999). In 2000, a budget of €3 million was award (Evaluation report on 16 pilot projects, Contract No 200 SPOAST, 2003) for campaigns to combat doping togethe studies. In 2001, the same amount was awarded for the projects. These projects covered two types of action: in doping and conferences on ways to harmonise the fight European level (Heading B-3-2020 of the European Comm addition, a number of research projects were develope programme (<

<http://www.europa.eu.int/comm/research/growth/gcc/p> Moreover, in the context of the Public Health Program on doping has been selected. The programme aims to h about biomedical side effects of doping.

With regard to police and judicial co-operation, it appea progress has been achieved. In answer to a parliament existence of organisations that supply illegal substance Commission referred to a seminar that was organised ir in co-operation with the Spanish presidency, bringing to ministries of sport and colleagues from the border police most of the Member States seemed to be aware of the p recorded that 'it did not prove possible to adopt conclus meeting' (Written question P-147/04 Bart Staes). Morec referred to an expert seminar organised by Interpol in J anabolic substances by criminal organisations (Written Mavrommatis). On the question of whether the punish those selling illegal substances, the Commission not a Community competence (Written question E-2257 Mavrommatis).

Moreover, the reinforcing of information on pharmaceuti prohibited substances seems to be partly in place. The ( issue of special labelling for doping products and the fee warning system at meetings of the EC Pharmaceutical C 2002. However, the implementation of such a system at appeared to be too difficult (Written question P-428/00 Written question E-700/03 Bart Staes). Conversely, the pointed at the Community code relating to medical prod (Directive 2001/83/EC). Following Article 59(1)(c) of this leaflets have to include a list of information which is nec medicinal product. This includes information on special v appropriate precautions for use. The Commission statec that the use of the product could have an effect on anti example of such special warnings and appropriate preca Commission, the package leaflet must state whether th could produce a positive analysis result in such a test (A

3830/02 Michl Ebner). Concerning the outer packaging, foreseen. As the information contained on the outer packaging to a minimum, the inclusion of any specific symbol on packaging product in anti-doping tests is not permitted (Written question Ebner). Moreover, the Commission referred to the Directive as an important development (Directive 2002/46/EC; Written Question Bart Staes). Finally, the Commission's intention to put forward a Council recommendation under Article 152 EC on the promotion of sport, especially in amateur sport, was not endorsed (Written Question 2052/04 Dimitrios Papadimoulis).

The foregoing illustrates that the realisation of the supply and development of a comprehensive EU anti-doping policy may be rather troublesome. Remarkably, the issue of doping did not become a high priority on the EU agenda. Quite the opposite; doping remained at the periphery of several Union fora but without any ground-breaking results. It was included in the sports rolling agenda, agreed in the aftermath of the Constitutional Treaty in order to ensure continuity of the approach on sport (Reding, 2004, p. 6). In 2005 the discussions at the level of the EU directors and ministers focused primarily on the implementation of the UNESCO anti-doping Convention and the functions of the Commission, the nomination of government representatives for WADA, and a review of the principles that underpin the WADA list of prohibited substances and methods (European Commission, 2006). The European Commission's role as promoter of a more intensified Union action in the field of sport was illustrated by a number of initiatives. Apart from several initiatives on the topic (especially at the occasion of the 2004 Olympic Games see < <http://www.europarl.eu.int/OP-WEB/home.jsp?la=el>), the Parliament's Committee on Culture and Education organised a series of meetings bringing together various stakeholders (Brussels, 29 November 2004). On this occasion it became apparent that the Commission envisaged a number of options for its future actions (Figel', 2004, pp. 7-8). Careful not to duplicate existing distribution of roles between relevant actors', the Commission identified the fields where it could intervene: information, education and research. A series of initiatives resulted in a Parliamentary resolution on combating doping that can be seen as a plea to all responsible parties, particularly the Commission, to combat doping in a more substantive and coordinated way (2006, C 33E/590). The Parliament called on the Commission to implement an integrated policy in all related fields, to support an information campaign and to propose further research in the area of doping control in the Seventh Framework Programme, but also to support the control of illegal substances, to ensure that the Union's external borders are controlled, and to encourage co-ordination between the Member States to develop common effective methods for controlling and detecting chemical substances in sports centres frequented by young people. In general, the Parliament called on the Commission to intensify its work concerning sport 'in order to effectively address the issue of doping and to protect a clean image of sports and physical exercise' and to intensify its work with the Member States, international collaboration 'in a way that enables the European Union to act effectively with regard to the prevention and control of doping'. The participants in the meeting on future EU anti-doping work confirmed the call for a greater role for the Commission. Next to the 'classic' or 'soft' activities concerning education and nutritional supplements, they also saw a role for the Commission in counteracting of illegal trafficking of doping substances and in cooperation with the European Sport Movement, 14&15 June 2005).

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



Despite the numerous discussions and documents dedicated to doping, the concrete results of the Union's action are rather disappointing. One explanation for this weak outcome appears to be complex. One of the main reasons stated is a lack of budgetary means. This was plainly illustrated in the Commission's account for the suspension of a Community anti-doping programme focusing on information and prevention (Written question E-700/03 Bart Staes). Lack of political will seems to be another factor. While the European Commission is considered as a loyal supporter of the Community action in the field of doping, the Commission openly blamed the Council for lack of budgetary resources (Written question 249/04 Athanasios Pafilis). The reason most frequently mentioned, among the aforementioned elements, relates to the lack of legal basis. One of the reasons – or at least the complexity – of a legal basis is often recalled in the Commission's report (2002, pp. 390-391). The aforementioned overview illustrates the lack of a legal basis for sport or anti-doping, the Union's actions in the field of doping. Public health (Art. 152 EC) provides a '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 of national laws, is not feasible on these grounds because Article 152, paragraph 1, provides the possibility of harmonisation open only for a set of strictly defined common safety concerns in public health matters. These provisions mean that harmonisation in the field of doping is complex. In this context, arguing for or against, it is useful to consider two ways in which a legal basis could be broached at EC level.

A first option relates to the common employment and safety (Art. 145 EC) which foresees minimum requirements concerning the safety and workers' health and safety. As professional sportsmen and women are considered as workers (Case 13/76 *Gaetano Donà v Mario Mantero* [1974] ECR I-1027; Case C-415/93 *Union Royale Belge des Sociétés de Football Association v Jean-Marc Bosman* [1995] ECR I-4921, paragraph 73), they are covered by Directive 89/391/EEC on the introduction of measures to improve the safety and health at work. Under Article 1 of the Directive, employers have a duty to ensure the safety and health of workers in every aspect related to the work and to take measures to protect workers' safety and health protection. Employers must take appropriate measures on the basis of general principles of prevention: identifying risks, evaluating the risks that cannot be avoided and controlling the risks. Moreover, Article 14 foresees health surveillance of workers. The use by (professional) sportsmen of pharmaceutical products to improve their physical fitness would have side-effects that could be harmful to their health, the employer should take measures to avoid these risks (Written question 2906/98 Gianni Tamino). Furthermore, it is not implausible that Directive 98/24/EC on the protection of workers related to chemical agents could provide a legal basis for the prohibition of prohibited doping substances. Indeed, it does seem that the definition of a chemical agent (Article 2: 'any chemical element or compound, whether or not admixed, as it occurs in the natural state or as produced by any process, including release as waste, by any work activity, whether intentional or not...') could cover substances prohibited as doping substances. Directive entails a list of chemical agents of which the prohibition of use at work and a number of activities is prohibited (to be consulted in the Annex). 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 International Union of Pure and Applied Chemistry (IUPAC) anti-doping legislation between Member States may cover the movement of professional and amateur sportspersons,

professional sports services and the free movement of capital. Accordingly, approximation of laws, regulations or provisions of the Member States directly affecting 'the establishment or functioning of the internal 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 excluded completely. However, it must be emphasised that a measure cannot be based on Article 95 EC 'must genuinely have as its object the approximation of conditions for the establishment and functioning of the internal market' (376/98 *Germany v European Parliament and Council of the European Union*, ECR I-8419, paragraph 84). The fact that anti-doping measures are taken on a triple basis of fair play, public health and ethics does not limit the possibility of invoking Article 95 EC as the legal basis for such measures in the field of doping. Additionally, the European Court of Justice stated that other Treaty Articles cannot be used as a legal basis to circumvent the express exclusion of harmonisation' laid down in Article 4(c) EC (*Germany v European Parliament*, paragraph 40). The Court of Justice also stated that once the conditions for Article 95 EC as a legal basis are fulfilled, 'the Community legislature is prevented from relying on that legal basis on the grounds that the protection of public health is a decisive factor in the choices to be made' (*Parliament*, paragraph 88). Therefore, the adoption of anti-doping measures on the basis of Article 95 EC appears not entirely implausible.

As regards the criminal aspects of the anti-doping policy, the Commission's proposal for trafficking of illegal substances or the penalisation of athletes should be made to Title VI of the EU Treaty. A police and judicial co-operation in preventing and combating drug trafficking is explicitly mentioned. Yet, as a significant number of prohibited substances or products are only banned in the context of doping – actions in this area can cover the issue only partially – specific actions could be developed relating to training, information, improved information pooling etc. (the Commission refers to the GROTIUS programmes). Finally, Article 32 EU enables the Commission to establish minimum rules relating to the constituent elements of the offence and to penalties in the fields of organised crime, terrorism and 'trafficking'. In this context, reference should be made to the Commission's proposal of September 2005 from the Court of Justice on the competence of the Commission – within the first pillar – to require the Member States to impose minimum penalties (Case C-176/03 *Commission of the European Communities v the European Union* not yet reported).

A final ground for a more comprehensive European Union sports policy could be in Article III-282 of the new Constitutional Treaty. Admittedly, the fate of this Treaty is still uncertain. But if it is adopted, the common agreement of the 25 Member States on the basis of the Commission's proposal in the field of sport. Article III-282 would provide the legal basis for the further development of a more coherent sports policy (see Vermeersch, forthcoming). This provision focuses mainly on the educational aspects of sport. It comprises general and specific provisions for the development of the European dimension in sport, the promotion of fairness and openness in sporting competitions and co-operation between Member States and the protection of the physical and moral integrity of athletes and sportswomen. The fight against doping could be covered by this provision on the basis of fairness and the protection of physical and moral integrity. The European Union is given only a limited set of instruments 'to contribute to the achievement of these objectives' as European laws or framework laws, recommendations, incentive measures. In addition, the Council can adopt recommendations. Moreover, harmonisation of the Member States' laws and regulations is prohibited. These restrictions illustrate that the role of the

doping and sport in general is deemed to provide limited support, co-ordinating or complementary action in the context would thus rest primarily with the Member State federations. While it is correct to bestow on the Union the domain of sport, the total exclusion of harmonisation against doping for instance, the Union could fulfil a providing a legal framework for the uniform implementation of arrangements agreed upon on the international WADA. Since harmonisation of relevant laws and regulations not be possible on the basis of Article III-282, and the Court does not strengthen alternative harmonisation grounds even if the Constitutional Treaty would to enter into force, intervention in the field of doping will continue to be limited to research and initiatives to raise public awareness and educate people. Accordingly, the insertion of sport in the Treaty has a character, for it would 'legitimise' initiatives already taken in 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 fight against doping, rather by chance the Union has also become involved in the development of doping policy (on the distinction between direct and indirect involvement, see Tokarski, et al, 2004, p. 61). This indirect involvement results from the application of European Community rules, especially the rules on free movement and competition law, to sporting activities. Whether the Community rules are applicable to anti-doping regulations was raised only in the case of *Meca-Medina & Majcen* (Case T-313/02 *David Meca-Medina & Majcen v Commission of the European Communities* 30 September 2006, not reported). In reality, this case was the first judgment from the Court of First Instance on the relationship between the Community competition rules and anti-doping regulations. All cases previously decided concerning sport addressed the free movement of workers and persons, with the case of *Meca-Medina & Majcen* as the most prominent example.

*Meca-Medina & Majcen* were two professional long distance swimmers who tested positive for nandrolone. The international swimming federation suspended both athletes for a period of four years, which was later confirmed by the Court of Arbitration for Sport (the CAS) after its experiments had showed that nandrolone's metabolites can be produced endogenously by the human body at a level which can be detected. *Meca-Medina & Majcen* filed a complaint with the European Commission challenging the compatibility of the IOC's anti-doping regulations with the Community competition rules. The Commission concluded that the regulations did not fall foul of the prohibition under Article 101 EC. The Commission rejected the complaint (COMP 38.158, *Meca-Medina et al v Commission of the European Communities*). *Meca-Medina & Majcen* brought an action before the Court of First Instance stipulating that 'the principles extracted from the Treaty regarding the application to sporting regulations of the Community competition rules in respect of the freedom of movement of persons and services are not compatible with the Treaty provisions relating to competition law' (paragraph 42). The Court of First Instance continued that 'the sporting legislation may have nothing to do with economic activity' (paragraph 43). The result, according to the Court, that it does not fall within the scope of Article 49 EC, means also that it has nothing to do with the free movement of persons, with the result that it also does not fall within the scope of Articles 81 and 82 EC' (*Meca-Medina*, paragraph 44). The Commission acknowledged that high-level sport has become, to a great extent, an economic activity, but pointed out that the fight against doping does not

economic objective. As the campaign against doping into health of athletes and to preserve the spirit of fair play, cardinal rule of sport' (*Meca-Medina*, paragraph 44). The court emphasised that 'sport is essentially a gratuitous and non-economic activity when the athlete performs it in the course of professional competition' (paragraph 45). Therefore, it concluded that the prohibition of anti-doping legislation concerns exclusively 'a non-economic sporting action, which constitutes its very essence' (*Meca-Medina*, paragraph 46). Consequently, the rules to combat doping 'are intimately connected with the economic nature of the activity and do not come within the scope of Articles 49, 81 and 82 EC' (paragraph 47). Remarkably, the Court of First Instance held that the prohibition of anti-doping legislation would be discriminatory in nature if it were to conflict with Treaty provisions (*Meca-Medina*, paragraph 49). The Court rejected the two arguments brought forward by Meca-Medina: the economic nature of the contested anti-doping regulation and the potential economic repercussions for the athletes and the sport. The court might possibly have had in mind the economic potential of the sport when adopting the anti-doping legislation 'is not sufficient to establish the sporting nature of that legislation' (*Meca-Medina*, paragraph 50). On these grounds, the Court of First Instance dismissed the action (2005).

Whereas the final outcome of this case can be defended, the reasoning of the Court of First Instance seems less convincing. Admittedly, the sporting nature of drug control rules has been recognised in English law. In *The British Athletic Federation and the International Amateur Athletic Federation v. British Olympic Association* [1998] 2 CMLR 363; Blackshaw, 2005, pp. 51-52). Conversely, the European Court of Justice has stated that the suspension from international sports of a player for a simple rule/sanction assuring the smooth progress of sport is a sporting rule (*Ligue Suisse de Hockey sur Glace contre Dubé* [1994] BGH I 1000, available at <<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inh-jurisdiction-recht/jurisdiction-recht-leitentscheide1954.html>>). In *Equipe Française de Hockey sur Glace contre Fédération Internationale et tribunal arbitral du Sport* [1993] BGH I 1000, available at <<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inh-jurisdiction-recht/jurisdiction-recht-leitentscheide1954.html>>. At stake, is the problematic attempt to make a clear distinction between sporting and economic rules (Weatherill, 2005). Arguably, rules such as the length of matches or the number of players can be qualified as purely sporting rules. For rules concerning the conduct of national teams (*Case 36/74 Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405); the conduct of anti-doping controls on athletes at international high-level sports events (*Joined Cases C-513/99 and C-519/99 Delière v Ligue Francophone de Judo et Disciplines ASBL a.s.* [2001] ECR I-2549) this seems less evident. Whereas these rules are primarily aimed at profit making, they clearly have economic repercussions and are regarded as both 'sporting' and 'economic' in nature (Weatherill, 2005). Moreover, by qualifying anti-doping rules as rules of a sporting nature, the Court of First Instance has granted too much room for sporting federations (Van den Bogaert and Vermeersch, 2005). 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 principle of proportionality (Case C-309/99 [2002] ECR I-1653). The Court of First Instance, in an analysis, 'for the sake of completeness' (*Meca-Medina*, paragraph 50) found that the anti-doping rules at issue are intimately connected with the conduct of sporting competition, that they are necessary to ensure the effective and efficient conduct of sport and that the limitation of an athlete's freedom is justified beyond what is necessary to attain that objective. Accordingly, the Court of First Instance concluded that these rules did not contravene the prohibition of discrimination on the basis of nationality.

COMP 38.158, *Meca-Medina et Majcen/CIO*, paragraph whether anti-doping regulation, or any other sporting rule or not, enables focus to be put 'on the key questions at necessary for the organisation of a particular sport and the impact of EC law' (Weatherill, 2005, p. 421). Nonetheless, the Court of First Instance departed from this reasoning. As the case is under review by the Court of Justice (Case C-519/04 P), the latter will also have to rule for the first time on the applicability of Community competition law issues. Moreover, it remains to be seen whether the Court will follow the reasoning of the Court of First Instance or whether it will choose an alternative.

Apart from its significance for the overall application of Community law in sporting cases, the ruling from the Court of First Instance in *Majcen* might also have some implications for the Commission's role in the fight against doping. By emphasising the purely sporting nature of doping legislation, the Court of First Instance, probably neglecting the involvement of public authorities such as the World Anti-Doping Agency, has downplayed the anti-doping campaign. Moreover, by ignoring all economic and social regulation, it is not excluded that the judgment from the Court of First Instance again probably unintentionally, takes away arguments for the applicability of Community legislation in the field of doping on the basis of Article 177 (see *supra*). Whereas it is very unlikely that the Court of Justice will take account of these considerations when ruling on this case, the Commission should not ignore them. The uncertainty on this issue was plainly illustrated when the Commission was questioned on its further action against doping, it referred to the *Meca-Medina & Majcen* ruling with explanation (Written question E-2052/04 Dimitrios Papadimitriou, question E-2075/04 José Ribiero).

## CONCLUSION

The fight against doping appeared on the European Union's agenda even though the legal basis for anti-doping in sport is a weak one. But still, due to this troublesome legal basis and the lack of political will, the EU has remained limited to the position of an entity shouting at the sidelines of the playing field.

It has nonetheless been revealed that – to a certain extent – the Commission can be found in order to strengthen the Union's action, the new Constitutional Treaty comes into force. Even if the Commission is not to be exploited extensively, it remains to be seen whether it will develop a comprehensive anti-doping policy given the importance of the issue as well as the Union's poor track record to date. The spirit of the new Constitutional Treaty seem to confirm the half-hearted approach of the Union. One may well question whether the European Union has the wider competence and greater problem-solving expectations to do better. Better regulation is a major concern of the EU of today. The Commission should avoid taking on new tasks or even avoid maintaining commitments it cannot perform them conclusively. Yet, in the struggle against doping, all forces should be mobilised? Subsidiarity and regulatory competence should be put to the average man on the street. Surely, citizens' expectations of the Union as the appropriate vehicle for countering doping should impart a democratic legitimacy for concerted action by the Commission, or nothing else, for the unconvinced, EU actions that are weak and ineffective should be embraced as positive means of raising the Union's profile. For this to be meaningful, the Member States would have to be prepared to follow through their commitments to counter doping, rather than promising words in the aftermath of the 1998 'doping Tribunal'. That whereas the role of the European Union is merely limited,

research projects and campaigns to raise public awareness and the implementation of the world wide anti-doping projects such as WADA, the Council of Europe, UNESCO and States. As the 'anti-doping team' already includes a lot of players, the question remains: is it not too late for the Law on the field?

## BIBLIOGRAPHY

Blackshaw I (2005) 'Doping Is a Sporting, Not an Economic Matter' 3-4 International Sports Law Journal 51.

Buti A and Fridman S (2001) Drugs, Sport and the Law (Queensland: Scribblers Publishing).

Chaker A-N (1999) Study on national sports legislation in Europe (Strasbourg: Council of Europe Publishing).

Council of Europe (1963) Doping of athletes, Reports of the Special Working Parties (Strasbourg).

Epstein A (2003) Sports Law (New York: Thomson).

European Commission (2006) 'Note to Sport Directors, Report from the Sport Directors meeting' (Brussels, 12 December 2005).

European Commission (2002) 'The fight against doping: Viviane Reding and the World Anti-Doping Agency propose and athlete's passport' IP/02/212, 7 February.

European Commission (2001) 'Community funding of the operating budget of the World Anti-Doping Agency has been ruled out' IP/01/1727, 3 December.

Figel' J (2004) 'Drug-taking in sport: obstacle to the ideal of athleticism?' 29 November.

Houlihan B (1999) Anti-doping political measures: the new approaches after the Lausanne meeting on doping ,

available at <

<http://www.blues.uab.es/olympic.studies/doping/houlih>

Ibáñez Colomo P (2005) 'The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases', 3 2 Entertainment and Sports Law Journal.

Lapouble J-C (2001-2002) 'L'Europe et le dopage' Revue des Affaires Européennes 390.

Prodi R (1999) 'Address delivered to Parliament' 7/8  
Bulletin EU 2.2.1.

Reding V (2004) 'Sport et Union européenne:  
ensemble pour relever de nouveaux challenges' 6  
October.

Siekmann R and Soek J (2004) "The ethology of a  
paper tiger": The European Union and doping in sport'  
in De Zwaan J, Jans J, Nelissen F and Blockmans S  
(Eds.) The European Union an ongoing process of  
integration – Liber Amicorum Alfred E. Kellermann  
(Den Haag: T.M.C. Asser Press).

Soek J (2003) 'The WADA World Anti-Doping Code:  
The Road to Harmonisation' 2 International Sports  
Law Journal 2.

Soek J (2002) 'The Legal Nature of Doping Law' 2  
International Sports Law Journal 2.

Special Eurobarometer (2004) The citizens of the  
European Union and Sport.

Tokarski W, Steinbach D, Petry K and Jesse B (2004)  
Two Players – One Goal? Sport in the European Union  
(Oxford: Meyer & Meyer).

Van den Bogaert S and Vermeersch A (forthcoming)  
'Sport and the European Treaty: A Tale of Uneasy  
Bedfellows?' European Law Review.

WADA (2005), WADA Welcomes Adoption of  
International Convention against Doping in Sport by  
UNESCO.

Weatherill S (2005), 'Anti-Doping Rules and EC Law',  
European Competition Law Review 416.

## LINKS

Anti-Doping projects under the Growth programme

<

<http://www.europa.eu.int/comm/research/growth/gcc/p>

Cape Town Declaration on Anti-Doping in Sport

<

[http://www.dcita.gov.au/drugsinsport/cape\\_town/cape](http://www.dcita.gov.au/drugsinsport/cape_town/cape)

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

< [http://www.wada-ama.org/rtecontent/document/copenhagen\\_en.pdf](http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf)>.

Council of Europe Anti-Doping Convention

<

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

Council of Europe Anti-Doping Convention,  
Explanatory Report

<

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

Council of Europe Anti-Doping Convention, Additional  
Protocol

<

<http://conventions.coe.int/Treaty/EN/Treaties/Html/188.>

Council of Europe Anti-Doping Policy

[http://www.coe.int/T/E/cultural\\_co-  
operation/Sport/Doping/](http://www.coe.int/T/E/cultural_co-operation/Sport/Doping/).

Government representation on WADA Foundation  
Board

< [http://www.wada-ama.org/en/dynamic.ch2?  
pageCategory.id=469](http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=469)>.

Italian Anti-Doping Law

< [http://www.coe.int/t/e/cultural\\_co-  
operation/sport/Resources/ITLegislation.asp](http://www.coe.int/t/e/cultural_co-operation/sport/Resources/ITLegislation.asp)>.

International Convention against Doping in Sport

< [http://www.wada-  
ama.org/rtecontent/document/UNESCO\\_Convention.pdf](http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf)>

NBC (2006) 'Italy solves doping dispute 10 days  
before Games' 30 January

<

<http://www.nbcolympics.com/olympiczone/5090367/det>

Parliamentary questions European Parliament

< [http://www.europarl.eu.int/OP-WEB/home.jsp?  
language=en&redirection](http://www.europarl.eu.int/OP-WEB/home.jsp?language=en&redirection)>.

WADA budget

< [http://www.wada-ama.org/en/dynamic.ch2?  
pageCategory.id=401](http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=401)>.

World Anti-Doping Code

< [http://www.wada-  
ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf)>.

<sup>1</sup> [An.Vermeersch@UGent.be](mailto:An.Vermeersch@UGent.be). The author would like to thank Kirstyn Inglis, the participants of the sports stream at the 2006 SLSA annual conference and the anonymous reviewers for their useful comments on an earlier version of this article. The usual disclaimer applies.



sidelines?", [Entertainment and Sports Law Journal](#), ISSN 1748-944X, April 2006,  
<<http://go.warwick.ac.uk/eslj/issues/volume4/number1/>