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Criminalisation of Trade in Doping Substances

Ladies and Gentlemen,

I will present a topic which has been high on the agenda of our EU Working Group on Anti-Doping at its first two meetings. The criminalisation of trade in doping substances is a key issue and currently represents a major trend in the Member States. This is an area where the Commission can play a facilitating role by collecting and relaying information and moderating the debate. However, let me state clearly that the real work has to be done by the Member States, because the real work consists in passing new laws and in enforcing and policing them.

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

The immediate reason why we are working on criminalisation is that it was mentioned in the White Paper on Sport. And the reason why the issue was included in the White Paper is that we are convinced that this is the way forward. Of course, classic anti-doping work will continue, but it is questionable whether efforts targeting athletes can be intensified and reinforced perpetually. When you look at such issues as data protection and whereabouts, it is obvious that we are starting to reach certain limits. For democratic States characterised by the rule of law, the end does not always justify the means.

One solution to this dilemma is to focus the fight against doping not only on the end-users of doping substances, in other words the athletes, but also on those who facilitate their access to the substances that they abuse.

The White Paper develops this philosophy and points out that doping has become a societal problem. The presence of illegal structures should never be tolerated as they are a problem in themselves. And I know that WADA shares this philosophy, as is illustrated by WADA's recent Memorandum of Understanding with INTERPOL. In February 2009, at WADA's media seminar in the Lausanne Olympic Museum, WADA Chairman John Fahey pointed out that [quote] "without governments [...] we cannot effectively curtail the multiplication of networks of underground Internet marketing and trafficking of doping substances."

Mr Fahey made the point that during the first ten years of its existence, WADA had been diversifying its approach to anti-doping. He pointed out that the fight against doping is not only for sports organisations but also for governments, including law enforcement agencies. Mr Fahey noted that not all countries have the regulatory framework that allow law enforcement agencies to stem the rise of these illegal schemes, and he went on with an exhortation similar to that of the Commission: [quote] "All governments need to ensure they have laws in place that allow combating manufacturing, supply and possession of doping substances on their territories."

As regards this last sentence, different philosophies can be identified. The majority of our Member States seem to think at present that it should be possible to criminalise trade in doping substances, but not their possession, as the latter risks putting considerable additional strain on athletes. I will return to this issue in more detail later.

Section 2.2 of our White Paper includes two concrete proposals for anti-doping issues to be addressed by the Commission. One is concerned with support for partnerships between Member States' border guards, national and local police, customs, WADA-accredited laboratories and INTERPOL. This is action no. 4 of the "PdC" Action Plan which accompanies the White Paper. The other is about networking between national anti-doping organisations, contained in action no. 5 of the Action Plan. We have not been able to launch comprehensive actions in relation to action 4 so far, but our EU Working Group is certainly a contribution in this direction. And as regards networking between NADOs and laboratories, one of the aims of this conference is to do just that.

There is one other central message in section 2.2 of the White Paper. It is just one sentence and its reads as follows: "*The Commission recommends that trade in illicit doping substances be treated in the same manner as trade in illicit drugs throughout the EU.*"

There is, of course, no legal obligation for Member States to follow what is a political statement in the White Paper. Nevertheless, the Commission has the satisfaction to observe that this sentence has helped spark a debate in many Member States. Through the discussions in our Working Group on Anti-Doping, we have been able to follow legislative developments in our Member States, including recent changes in, among others, France, Germany and Denmark.

The present status is that approx. half of the EU's Member States now criminally sanction trade in doping substances in one way or another. Evidence seems to suggest that the fight against doping on the supply side is indeed facilitated when trade in illicit doping substances has been criminalised. For this reason, the trend among Member States is clearly toward criminalisation. Based on these developments, it would seem appropriate to call upon the other half of the Member States to join the trend and criminalise also.

However, in addition to the passing of new laws, other measures may also be needed in order to allow for effective enforcement and policing of the laws. At the latest Working Group meeting, on 14 January, we heard a presentation by a Finnish customs officer who reported on an EU project which had been led by a Council of Ministers working party. The ensuing discussion focussed on the need to have a list of prohibited substances that is specifically valid for police work, so that enforcement officers can feel confident that they are empowered to intervene. Some Member States have such a list in addition to the UNESCO list, and it certainly seems to make a difference in practice. After all, the rule of law would forbid that police or customs officers go after citizens for trading substances that are not banned. This would amount to an abuse of power.

You may be wondering why it should make any sense for the EU or its Member States to add their own lists to the UNESCO list. If they merely duplicated the UNESCO list, where would the added value be? And if the EU list were to be different, which legal basis, procedure and administrative resources would be needed to take decisions about such an EU list, presumably as often as the UNESCO list was revised? The answer seems to be that law enforcement officers need a legally binding list. In the absence of legislation, there is little that enforcement authorities can do.

Allow me to return in some more detail to the issue of criminalisation. As I have said before, laws were changed recently in some countries. For example, in Germany the Medicaments Act (the so-called *Arzneimittelgesetz*) now includes a provision entitled "Ban on Medicaments for the Purpose of Doping in Sport". The law includes criminal provisions

providing for prison sentences up to three years for those who trade substances or administer them to others. Possession of “a not negligible quantity” is criminal, considering that quantities over a certain threshold cannot be consumed without exposing oneself to the risk of an overdose.

Similarly, on 3 July 2008, France followed with a law aimed at penalising those who trade doping substances.

Against the backdrop of such developments, the German Government wished to know more about realities and changes in other Member States and therefore undertook a study which has been discussed in our Working Group. It is a mapping exercise and has provided valuable new insights which represent the situation in 2008.

The German study, which is entitled “Survey among EU Member States on the criminal liability of athletes for the possession of doping agents”, showed that consumption and self-harm were legal in most Member States, but otherwise differences from one country to the other were substantial. It is important to note that the study had a very high return rate, with only 5 out of 27 Member States not taking part.

The point of departure of the German study – from a legal point of view – was Article 8(2) of the UNESCO Convention, which foresees that State Parties should take appropriate measures to police the trade. The study points out that almost all Member States already have adopted anti-doping legislation or are currently preparing it. But as we all know, the devil tends to be in the detail, and even if countries criminalise, they do not always criminalise in the same way. The German study points out that Member States have very different opinions in particular on the penalties under sport and criminal law.

This has led to variation in relation to what is actually punishable and what not. In many countries the possession of substances listed in Annex 1 of the UNESCO Convention is not punishable under specific anti-doping provisions. Many substances are, however, subject to general provisions, e.g. laws on medicinal products, which also ban the possession of these substances. Other countries impose bans on the possession of doping substances only if it can be established that the accused intended to pass them on or sell them, e.g. in Denmark, Finland and the Netherlands. In some countries it is not criminal to possess doping substances, but athletes may be required to pay fines and lose their licence, e.g. in Spain.

Differences are not limited to the actions covered by the scope of the laws. There is also considerable variation as regards the substances themselves.

While some countries ban all prohibited substances listed in Annex 1 of the UNESCO Convention, others only refer to certain substances or groups of substances. The German study points out that there is no general trend in this field.

The absence of a general trend regarding which substances are banned seems worrying in a highly internationalised sector such as sport. And it could well be – in a longer-term perspective, looking into a future after the possible entry into force of the Treaty of Lisbon – that some sort of soft monitoring mechanism at EU level might be helpful. The purpose of an EU-level mechanism might be to compare such differences and to look for ways to get a bit closer to each other.

Criminal liability for the consumption of prohibited substances is of course not an easy issue. Jailing people for self-harm is not an obvious thing to do, and it is only natural that many national legislators have not wanted to introduce such rules. And yet, consumption is not only a matter of self-harm but also, as many people have pointed out, a fraudulent practice aimed at jeopardising fair competition and drawing for oneself an illicit advantage which, in many cases, can be expressed in euros or dollars.

The German study points out that in most Member States the consumption of doping substances is not punishable. In some countries only the possession of certain substances is subject to criminal liability. In practice, the boundary between possession and consumption can be quite problematic. Moreover, some countries distinguish between possession or consumption by minors and possession or consumption by adults.

The interplay between sanctions under sport law and criminal liability for the possession of prohibited substances needs to be better understood. One reason is that there is a need to ensure smooth cooperation between sports organisations, on the one hand, and the police and judiciary of a country, on the other. Another reason is that the prospect of double sanctions inevitably poses a problem under the rule of law, with a potential breach of the *ne bis in idem* principle. It may be of interest, in this context, that Article 50 of the Charter of Fundamental Rights of the European Union protects against so-called *double jeopardy*. The German study illustrates that different Member States have different ideas about this interplay between sport law and criminal law.

Finally, the German study takes a great interest in issues termed as "harmonization at EU or international level". From a Commission perspective, I think that I would have preferred another term than "harmonisation". For the EU Institutions, this is a very specific term and

refers to common rules that are binding upon Member States. I don't think that Member States would welcome this type of harmonisation in this particular field. Moreover, even if the sport provisions of the Treaty of Lisbon enter into force, the EU will not be in a position to harmonise laws in the sport sector. Nevertheless, most Member States have expressed the wish that anti-doping rules should be brought more in line at EU level or, if possible, at international level.

The lessons from the German study seem clear enough. The study has brought substantial evidence to a discussion which the Commission launched two years ago without having comparable data at its disposal. It is thus gratifying to see our understanding of the need for criminalisation of trade in doping substances substantiated by such robust empirical evidence.

To sum up, we have seen that there is a clear trend in the EU towards criminalisation of trade in doping substances. It would seem beneficial for those countries which have not yet followed this trend to do so. However, there are important differences among Member States in terms of the exact modalities of criminalisation, and also in terms of enforcement mechanisms. In these areas, there is a great need to exchange information and experiences. The European Commission will be happy to contribute to this exchange of information and best practices, for instance through our WG on Anti-Doping, and in the future hopefully also through financial support for transnational doping-related projects.

Thank you for your attention.