Summary of comments of WADA to the European Working Party advisory opinion on the International Standard on the Protection of Privacy and Personal Information.

On April 6, the European Union's Article 29 Working Party, an advisory body comprised of European data protection regulators, adopted its second opinion on the World Anti-Doping Agency's International Standard for the Protection of Privacy and Personal Information (the "Standard"). This summary expresses WADA's reactions and concerns in relation to the opinion. The full version can also be found on WADA's Web site. WADA also has made available multiple legal opinions prepared by European data protection experts that rebut many of the claims made in the Working Party opinion.

Although WADA is pleased to see that the Working Party now accepts that the current whereabouts regime for top athletes does not raise privacy concerns and that the Standard, as a minimum standard, can only serve to strengthen the application of EU law, WADA is concerned that the opinion also contains a number of serious flaws that could easily have been avoided.

Ultimately, WADA remains disappointed that its ability to participate in the process giving rise to the opinion was very limited, and involved only a single meeting with the Working Party sub-group that drafted the opinion and an opportunity to respond in a matter of days to a set of written questions. WADA's many efforts to participate in further meetings were rebuffed, which is deeply unfortunate given the significant impact this opinion could have on the global effort to fight against doping in sport.

WADA has prepared this paper in response to the Working Party opinion in an attempt to heighten awareness about its concerns. Although WADA notes that the opinion is not legally binding, and thus individual EU member states and their regulators are technically not bound by it as a matter of law, it undoubtedly will cause confusion and consternation among European anti-doping organizations, many of whom are already uncertain as to how they should proceed.

1. The Working Party Opinion Paper Improperly Focuses on Issues Beyond its Proper Scope and Remit

The Working Party goes well outside its proper remit – which was to examine the Standard in light of EU data protection law – by questioning well-established anti-doping practices and policies, matters the Working Party were not asked to consider and where its competence is plainly lacking. Rather, the Working Party now embark upon an ill-advised examination of more fundamental anti-doping rules and practices reflected in the WADA Anti-Doping Code, which were only agreed after detailed and lengthy discussions involving international and national sports bodies, governments, athlete representative bodies and other key stakeholders.

In fact, the Working Party spend as much, if not more, time considering topics *other than* the Standard, such as athlete whereabouts regimes, rules on the publication of doping violations, and WADA's proprietary database, ADAMS. We find this troubling, since many of the practices pre-date WADA's own creation, and all bear little or no relation to the Standard. Rather unpersuasively, the Working Party justifies its efforts to examine these other matters simply because the Standard contains passing "references" to them. We question whether this is sensible, particularly given the long history that preceded the creation of these rules and the fact that the Working Party played absolutely no role in their adoption.

2. The Opinion Contains Numerous Factual and Legal Errors that Undermine the Working Party's Analysis

The Working Party's opinion also appears to contain factual errors, as well as questionable interpretations of EU law, that undermine the analysis and many of the conclusions reached. For instance, WADA is alarmed by the fact that the Working Party may not have considered the correct version of the Standard, which was published and has been available since January 1, 2009. The Working Party's Secretariat, for example, amended the opinion after its approval by the Working Party to correct quotation taken from previous versions of the Standard. In fact, even now, the Opinion still contains such an error when it quotes Article 11.1 of the Standard. This may have colored the Working Party's analysis.

Elsewhere, the Working Party appear to mischaracterize modern anti-doping rules and practices, again almost always to WADA's prejudice. For example, when describing whereabouts regimes, the Working Party suggests that anti-doping organizations do not distinguish between top athletes and others when requesting whereabouts information. This is obviously wrong, as anyone familiar with anti-doping programs would know. Yet, it provides the Working Party with a convenient opportunity to raise unfounded concerns about the collection of whereabouts data on lower-level athletes.

The Working Party not only is guilty of factual errors, but it applies to the Standard restrictive interpretations of EU law that continue to be highly controversial. For example, the Working Party contends that consent cannot under any circumstances serve as a basis for processing athlete health data, or any other data for that matter, despite the fact it appears in EU law. This uncompromising position contradicts years of unchallenged practice in the anti-doping field, is not universally shared by many leading privacy experts and would effectively legislate by the back door. The Working Party also appear to conclude that anti-doping programs do not serve an important public interest, unless domestic laws say so explicitly. In doing so, the Working Party interpret into EU law provisions that simply are not there.

3. The Opinion Undermines Widely Accepted and Firmly Established Anti-Doping Practices

The Working Party, moreover, questions the validity and value of certain aspects of modern anti-doping regimes. The Working Party does so without having first

engaged in anything approaching an informed debate or discussion on the issues, or even properly informing themselves about the origins of the relevant practices. To illustrate, relying on the vague notion of proportionality, the Working Party apparently has no hesitation in challenging the eight-year statute of limitations period that exists for all anti-doping violations as disproportionate and suggesting that a shorter timeframe might be more appropriate. And yet, the eight-year statute of limitation, which the Working Party apparently would readily dispense with, was only arrived at following lengthy discussions, taking place over a number of years, involving representatives of sports bodies, national sports ministries and governments (including many in Europe), athletes and others.

Similarly, the Working Party questions whether existing rules relating to the publication of doping violations by anti-doping organizations, a vital component of anti-doping regimes, represents a proportionate measure. The Working Party evidently is happy to substitute its own judgment for that of the global sporting community by concluding that they are not. While the Working Party is of course free to express an opinion if it desires, it should only do so once armed with all the relevant facts and with a more complete understanding of the issue, particularly given the potentially harmful consequences their views will have on organized sport.

4. The Opinion Appears to Question the Existing Allocation of Responsibility for Regulating Anti-Doping in Sport

The Working Party, intentionally or not, interprets EU data protection law in a manner that would facilitate national governments and regulators playing a much greater role in regulating anti-doping in future, possibly to the exclusion of private and international sports bodies. For instance, where the Working Party considers the application of the EU Data Protection Directive's "public interest" provisions, it interprets those provisions restrictively (and controversially) to mean purely nationally-defined interests carried out by parties specifically designated by national law. We do not know whether or not this was deliberate, or even whether the Working Party is aware that it is engaging in one of the most virulent and political debates in sports policy over the last decade relating to the respective roles and responsibilities of governments and private sports bodies. To the extent this was a conscious or deliberate aim of the Working Party, which we hope is not the case, the Working Party should be transparent about its intentions. To the extent that this is merely a by-product of its reasoning, it is most unfortunate and a reflection of the Working Party's limited awareness of the different interests at stake in the anti-doping area.

5. The Opinion's Practical Effect Will Be to Paralyze European Anti-Doping Practices and Prevent European Athletes From Participating in Sport

Finally, the Working Party opinion, if released in its current form, will simply paralyze anti-doping efforts in Europe. Although the opinion technically is not binding, it would be highly influential with EU member states and among their national privacy

authorities. We set out some scenarios that we fear are all too likely following its release, if the Working Party's views are strictly adhered to by national regulators.

Scenario 1: An Italian skier wishes to participate in the Vancouver Olympic Games. The skier wishes to submit a TUE application to CONI.

WP29: No. CONI is a private organization, and as such CONI cannot collect sensitive health data, unless Italian law explicitly allows CONI to do so. Also, the athlete is not allowed to consent to the collection and use of that data by CONI.

Result: The athlete cannot be granted a TUE; his participation to the Games is jeopardized.

Scenario 2: A French rugby player travels to Australia for a month for training purposes. As an international player, he was included in the testing pool of the International Rugby Board (Dublin, Ireland). The IRB wishes to perform an out-of-competition test and therefore wants to share relevant whereabouts data with the Australian NADO.

WP29: No. The IRB cannot share the whereabouts data with the Australian NADO. Australia is not considered to offer an adequate level of privacy protection. Also, the player cannot consent to the transfer, and this anti-doping effort does not serve an important public interest reflected in Irish national law at present.

Result: Out-of-competition testing of players in the IRB's testing pool (European and others) that train or compete outside the EEA is no longer possible. The IRB can only transfer the data if the recipient party is prepared to sign an agreement.

Scenario 3: A rugby player from New Zealand has been included in the testing pool of the International Rugby Board (Dublin, Ireland). The player thus provides whereabouts information to the IRB. The IRB wishes to perform an out-of-competition test while the player trains in his own country, and therefore wants to share relevant whereabouts data with a service provider in New Zealand.

WP29: No. The IRB cannot share the whereabouts data with a service provider in New Zealand, the athlete's country of residence. New Zealand is not considered to offer an adequate level of protection. Also, the player cannot consent to the transfer, and this anti-doping effort does not serve an important public interest.

Result: Out-of-competition testing of players in the IRB's testing pool, including non-Europeans that train or compete outside the EEA is no longer possible. The IRB can only transfer the data if the recipient party is prepared to sign a data transfer agreement.

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Scenario 4: The International Association of Athletics Federations (IAAF) in Monaco sends testing samples to an accredited laboratory in France for testing. The samples are key-coded. The test results are thus personal data governed by the French Data Protection Law. The laboratory wants to send the results back to IAAF.

WP29: No. Monaco is not considered to offer an adequate level of protection. The results cannot be returned to the IAAF. Athletes cannot consent to this transfer either and the anti-doping effort does not serve a public interest.

Result: Laboratories in the EU can no longer be used as there is uncertainty if the results can be returned to the sender, in particular if the sender is outside the EEA.

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