Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECtHR
Council of Europe
F-67075 Strasbourg Cedex
France
dgi-execution@coe.int

20 August 2025

Subject: Joint NGO communication under Rule 9(2) of the Rules of the Committee of Ministers concerning the execution of the judgment of the European Court of Human Rights in the case of *Semenya v. Switzerland [GC]* (Application no. 10934/21).

Dear Madam, Sir,

Non-governmental organisation, Humans of Sport, supported by South African Women and Sport Foundation, Lex Athleta, Athlete Rights Australia, Proud 2 Play, Athleten Deutschland, Pride Sports, European Gay & Lesbian Sport Federation, and Athlete Ally (hereafter: Athlete Rights' NGOs) and OII Europe, Fare Network, the Centre for Sport Policy Studies, the Sports and Rights Alliance, ILGA World, the Samyaa Foundation for Law and Justice, the International Commission of Jurists, Activ'Elles04, and Moving the Goalposts (hereafter: other NGOs) (collectively referred to as submitting NGOs, co-signing NGOs or the cohort of NGOs) respectfully submit their observations and recommendations under Rule 9(2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements" regarding the execution of the judgment of the ECtHR Grand Chamber in the case of *Semenya v. Switzerland* [GC] (Application no. 10934/21, Judgment of 10 July 2025), ahead of the Committee of Ministers' (CM) 1537th meeting (September 2025) (DH).

I. Introduction

1. The purpose of this submission is to support the CM's work in relation to the monitoring of the discharge of the respondent State's obligations under Article 46 of the European Convention on Human Rights (ECHR). In this context, we respectfully submit our preliminary assessment regarding the scope of implementation of this judgment and the nature of general measures required to ensure the non-repetition of the violation established by the ECtHR. We furthermore recommend that, due to the complex nature of the violation at issue, the execution of the present judgment be supervised by the Committee of Ministers under the enhanced supervision procedure.

About Humans of Sport

2. Humans of Sport (HoS) is an organisation dedicated to empowering athletes and transforming the world of sport by securing their livelihoods, remedying injustices, and strengthening their access to fundamental rights. The organisation works with athletes harmed by sex-testing policies in sport globally, with particular focus on athletes coming from Asia and Africa. The organisation has been in contact with more than 40 athletes harmed by such policies.

About Athlete Rights' NGOs

3. **Athlete Ally, Proud 2 Play, and Pride Sports** are US, Australian and UK based NGOs respectively that work to make sport inclusive, safe, and welcoming for LGBTQIA+ people by challenging discrimination and increasing

participation. They partner with athletes and sporting communities to promote allyship, foster engagement, and ensure equal access and opportunity for all. **The European Gay & Lesbian Sport Federation** (EGLSF) represents over 180 LGBTQI+ sport organisations with 28,000 members and fight discrimination in sport, support inclusion and athlete emancipation, and foster safe spaces for coming out. EGLSF holds participatory status at the Council of Europe, and is a member of the Consultative Committee of Enlarged Partial Agreement on Sport (EPAS).

Athlete Rights Australia, Lex Athleta, South African Women and Sport Foundation, and Athleten Deutschland all work to advance and protect the human rights of athletes. ARA is an independent, athlete-led movement that amplifies athlete voices, combats systemic abuse, and promotes fair power balances in sport in Australia, while Lex Athleta builds the capacity of legal professionals worldwide to advocate for and defend athletes' rights through legal representation, global networks, and direct advocacy. The South African Women and Sport Foundation champions the recognition, visibility, and opportunities of South African women in sport, as athletes, leaders, and advocates. Athleten Deutschland represents, protects and elevates the rights and interests of German elite level athletes by fighting for clean and safe sport, protection from abuse, violence and mismanagement.

About Other NGOs

4. The Fare Network unites individuals and organisations to fight inequality in football and harness the sport for social change. They combat all forms of discrimination, promoting football as a game that belongs to everyone. Fare holds participatory status at the Council of Europe and is a member of the Consultative Committee of EPAS. **OII Europe** is the umbrella body for intersex-led groups, working to protect and advance intersex human rights across Europe. The **Centre for Sport Policy Studies** is a Canadian-based NGO in the Faculty of Kinesiology and Physical Education at the University of Toronto. The Centre conducts and disseminates research in the areas of inclusive and equitable sport for all, healthy high-performance sport, and sport for development and peace.

   The **Sport and Rights Alliance (SRA)** is a worldwide coalition of leading rights organisations harnessing the power of sport to promote human rights and well-being, ensuring sport is a genuine force for good. **ILGA World,** the International Lesbian, Gay, Bisexual, Trans and Intersex Association – is a federation of over 2,000 organisations in 170+ countries advocating for the human rights of LGBTI people globally. The **Samyaa Foundation for Law and Justice** is dedicated to promoting gender equality through legal support, education, and advocacy, with a focus on empowering women and gender minorities to secure their rights in India. The **International Commission of Jurists (ICJ)** is a global NGO of judges and lawyers working to advance the rule of law, protect human rights, and ensure effective remedies when rights are violated. **Activ'Elles04** is a grassroots French association that advocates for and provides inclusive spaces for women in sport. Moving the Goalposts in a Kenyan organisation that creates safe spaces for girls and young women to understand and claim their rights, take up leadership roles, and have a voice in society.

II. Case summary

5. This case concerns an international-level, South African middle-distance runner, who challenged the 2018 "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" ("the DSD Regulations") issued by the International Association of Athletics Federations (IAAF – now called World Athletics), a Monegasque private-law association. The challenge had concerned the requirement imposed by the DSD Regulations on athletes with innate variations in sex characteristics to lower their natural testosterone

levels to compete in women's events. After the Court of Arbitration for Sport (CAS) rejected her claim, she appealed the CAS award to the Swiss Federal Supreme Court (FSC). The FSC reviewed the CAS award for compatibility with public policy under article 190(2)(e) of the Swiss Federal Act on Private International Law and dismissed the appeal, in a judgment rendered in August 2020.

6. The Grand Chamber of the ECtHR held that, while Semenya's other complaints under Articles 8, 13, and 14 were inadmissible because they fell outside Switzerland's jurisdiction, her appeal to the FSC created a jurisdictional link to Switzerland for Article 6 purposes. The Grand Chamber emphasised the structural imbalance between athletes and sport governing bodies, noting CAS's mandatory and exclusive jurisdiction (paras 200-201, 209, 216). Given that the dispute involved civil rights within the meaning of Article 6(1) of the ECHR (i.e., respect for human dignity, bodily and psychological integrity, social identity and gender) that correspond to fundamental rights under Swiss law (i.e., respect for personality rights), the Grand Chamber held that the FSC was required to conduct a "particularly rigorous examination" of Semenya's case, which includes a "proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant" (paras 215 to 217). Applying this standard to the FSC's judgment, the Grand Chamber identified the following shortcomings of the FSC's review:

(1) The lack of a Convention-compliant review of a specific question in the context of the overall issue of "proportionality" *vis a vis* the *prima facie* discriminatory DSD regulations, in particular the "potential difficulty for [athletes] to maintain their testosterone level below the maximum permitted" (paras 223 (iv) – 230). In doing so, the Court held in particular that, "although the CAS expressed very serious concerns, thereby rendering ambiguous its reasoning in relation to proportionality, the Federal Supreme Court conducted only a limited review of this aspect of the award" (para. 229);
(2) The lack of a Convention-compliant review of the question "whether the Restricted Events had been selected arbitrarily" (paras 231-233);
(3) The lack of a fully-fledged answer to the concern, not fully decided by the CAS award, that "confidential medical information could [...] be made public by inference," a risk that existed in cases "where an athlete who had qualified in national competitions in a Relevant Event was absent from subsequent international competitions in that same event in the female category" and with fundamental consequences to the applicant (para. 234);
(4) The lack of rigorous review of the CAS award's compatibility with other aspects of substantial public policy, notably:
    (a) The rejection by the FSC, "without thorough examination, [of] the applicant's argument comparing her case with the situation in which it had considered a CAS award to be incompatible with public policy" (para. 235);

    and

    (b)The lack of thorough review of whether "the conclusion reached by the CAS ... [was], per se, incompatible with human dignity" and "fundamental rights, – such compatibility being an essential element of public policy –…" (para. 236).

7. The Court thus held that "the review of the applicant's case by the Federal Supreme Court, **not least owing to its very restrictive interpretation of the notion of public policy, which it also applied to the review of arbitral awards by the CAS** [emphasis added], did not satisfy the requirement of particular rigour called for in the circumstances of the case" (para. 238). As a result of the above, the ECtHR found a violation of the applicant's right to a fair hearing (violation of Article 6(1) of the ECHR).

III. Preliminary assessment of the nature of the violation established by the ECtHR and of the general measures required for the purposes of effective implementation

8. The submitting NGOs recall that the ECtHR held that the applicant did not fall under the jurisdiction of the respondent State in respect of her complaints under Article 8, taken alone or in conjunction with Article 14, or Article 13 taken in conjunction with those provisions, thus declaring the relevant part of the submission inadmissible (paras. 151 and 154). After recalling the procedural nature of Article 6(1) concerning the right to a fair hearing (para. 144), the Court then went on to find a violation of that provision (para. 239).

9. In doing so, the ECtHR took direct issue with the quality of the FSC judgment on appeal, identifying concrete shortcomings in the reasoning of that court in respect of the parts of its review linked with the substantial elements featuring under part II.6. (1)-(4) above. Importantly, the Court alluded to the importance of the Swiss highest instance's failure to fulfill "the requirement of **particular rigour** [emphasis added] called for by the circumstances of the case and **given the nature of the mandatory and exclusive sports arbitration which had led to the award** [emphasis added]...." (para. 218, see also yet another reference to the particular rigour required in the context of the present case in para. 216).

10. Although the Court – regrettably, yet undeniably -- therefore left the possibility of a direct discussion on the content of the DSD Regulations *vis-a-vis* the applicant's substantive ECHR complaints out of the scope of the present judgment, it demonstrated in an equally undeniable manner that it did not lose sight either of the importance of the substantial policy matters that lie at the heart of this case, or of the fundamental pertinence thereof in the otherwise procedural violation it found. Indicatively, the Court emphasised (importantly, in the part of the judgment focusing on the Article 6 violation) "that the circumstances of the present case raise an issue with regard to the right to respect for dignity, since under the DSD Regulations the relevant athletes who wish to compete in international competitions have no other choice but to undergo an intrusive examination, and to take chemical substances or to undergo surgery" (para. 217). Most importantly, in finding flaws in the review of the applicant's case by the FSC, the Court underlined that these were "not least ow[ed] to [the FSC's] **very restrictive interpretation of the notion of public policy, which it also applied to the review of arbitral awards by the CAS**"(para. 238, emphasis added), an indirect yet unmistaken point of criticism concerning the substance of the FSC's approach.

11. Therefore, and without prejudice to the subsidiarity principle underpinning the implementation process or to any potential future, updated analysis by the submitting NGOs on the general measures required in the context of the present case, it *prima facie* follows from the above that, what would ultimately satisfy the general measures-related obligations imposed on the respondent State by Article 46 of the Convention would be the FSC's ability to carry out, in the future, a fully-fledged, Convention-compliant review of the fundamental questions it left unanswered as part of its impugned review of the compatibility of the CAS award with substantive public policy. It would be important that such independent, yet Convention-compliant review take due account of the importance undeniably attached by the ECtHR to the substantial policy matters that lie at the heart of the present case, and of the pertinence thereof in the otherwise procedural violation it found in the context of this case.

12. In this context, the co-signing NGOs respectfully submit that, without prejudice to the independence of the Swiss national courts (including the FSC), a potential adoption -- prior to any future examination of a case raising similar issues -- of internal guidelines by the FSC aiming at ensuring that Article 6-compliant reasoning standards

are applied in appeal cases reviewing the compatibility of CAS awards with substantive public policy would be a fundamental step forward towards the ultimate goal of effective implementation of the present judgment.

13. The cohort of NGOs respectfully submits that complex (for the reasons further elaborated on below under part IV.) capacity-building measures targeting the Swiss judiciary in general and the FSC judges in particular would be the minimum pre-requisite to help ensure that the ultimately required Convention-compliant review be achieved. Devising the package of capacity-building measures should take due account of fundamental, worrisome findings of the Court in the present judgment, including *inter alia* the FSC's self-admitted, principled hesitation to set aside international arbitral awards on grounds of public policy (para. 226); and the FSC's very restrictive interpretation of the notion of public policy, which it also applies to the review of arbitral awards by the CAS, as underlined by the ECtHR (para. 238). Such comprehensive judicial capacity-building measures could be taken not only in the absence of the internal guidelines referred to above, but also in support of the effective implementation of such guidelines, if adopted by the FSC.

IV. The submitting NGOs' assessment on the most appropriate supervision track for the present judgment

14. The cohort of NGOs is acutely aware of the fact that, as per the CM's practice, procedural, Article 6-related violations are susceptible of qualifying for examination under the enhanced supervision procedure in a more limited manner compared to cases disclosing substantial violations. We respectfully submit that a careful reading of concrete findings of the Court in *Semenya,* further complemented by evidence relying on our organisations' long-standing expertise on matters of policy analysis, policy advocacy and/or litigation/ representation of athletes in a similar situation as Caster Semenya disclose the existence of a **complex problem** at the very least, necessitating this case's examination under the **enhanced supervision procedure**.

(1) The *sui generis*, complex implementation environment created by the compulsory arbitration before the CAS for the resolution of international sports-related disputes and the exclusive jurisdiction of the FSC over appeals of CAS awards

15. It is recalled that the Court noted that the DSD Regulations left the applicant no choice other than to appeal to the CAS arbitration (para. 211). It was thus clear that arbitration (which generally occurs in the context of the structural imbalance which often characterises the relationship between sportspersons and the bodies which govern their respective sports, as the Court had already established under para. 200) was compulsory (para 214). Furthermore, it was imposed not by law but by the DSD Regulations (para. 214). These regulations where at the source of the breach of "civil" rights complained of by the applicant (para. 217), whereas their issuing entity was a private-law entity, which, moreover, was also a party to the relevant dispute (para. 214 in conjunction with 217).

16. This complex situation was one of the two aspects supporting the Court's conclusion that the case required a "particularly rigorous examination" of the applicant's case by the FSC (para. 217), which became competent to examine the dispute involving civil rights within the meaning of article 6(1) of the ECHR on appeal against the CAS arbitral award. The elements in respect of which the FSC failed to carry out this particularly rigorous examination are numerous (as listed under part II.6. (1)-(4) above) and weighty (as argued under part III. 9.-11. above). It is most worrying that, as it transpires from the Court's judgment, the complex jurisdictional *status quo* in cases of CAS arbitral awards coming for review before the FSC appears to be the main reason behind the non-Convention-compliant approach of the FSC, when the latter is called upon to review the compatibility of CAS awards with essential elements of public policy. It is quite telling, in this respect, that the FSC has

demonstrated a self-admitted, principled hesitation to set aside international arbitral awards on grounds of public policy (para. 226). This is corroborated by the fact that, "according to the material at the disposal of the Court, the Federal Supreme Court has only ever set aside one CAS award on grounds of public policy" (para. 227). This is notwithstanding the fact that the ECtHR reaffirmed the importance of the FSC at least taking a concrete stance when reviewing the compatibility of CAS awards with essential elements of public policy (paras. 223-238), in addition to the FSC's general "very restrictive interpretation of the notion of public policy" identified by the ECtHR in para. 238.

17. It derives from the above that, in the context of this case, it will be a significant challenge to assist the Swiss judiciary in general and the FSC judges in particular to successfully navigate (through internal guidelines and capacity-building measures, for example) the complex jurisdictional landscape created when CAS awards are challenged before the FSC on grounds of public policy, and effectively remedy their inability to review disputes raising issues of public policy in a Convention-compliant manner. The *Semenya* case is, therefore, much more complex than any other common ECtHR judgment requiring training/ capacity-building measures for judges. To respond in a Convention-compliant manner to the procedural shortcomings that left important questions touching upon substantial/ policy matters unanswered by the FSC, not only the rigor in the potential provision of internal guidelines and/or in the design of the capacity-building measures required, but also the standard applied by the CM in assessing the adequacy of such measures must be much higher than the average established by the CM's practice.

18. The co-signing organisations therefore respectfully submit that classifying this case under the enhanced procedure would have a double benefit. It would not only allow a much-needed, more rigorous scrutiny over the complex jurisprudential and/or capacity-building measures to be adopted; it would also facilitate the Swiss authorities in having access to the CoE competent bodies' technical expertise and cooperation activities when designing and carrying out these measures or others that this Committee might consider necessary.

(2) <u>The non-isolated nature of the violation found by the Court</u>

19. As per the Court's judgment, the second aspect supporting the conclusion that a particularly rigorous examination of the applicant's case by the FSC was needed was the fact that her privacy, bodily integrity and dignity were at stake. The Court emphasised, in particular, that the circumstances of the present case raised "an issue with regard to the right to respect for dignity, since under the DSD Regulations the relevant athletes who wish to compete in international competitions have no other choice but to undergo an intrusive examination, and to take chemical substances or to undergo surgery" (para 217). The FSC's failure to fully review in a Convention-complaint manner important questions touching upon substantial/ policy matters was at the heart of the procedural violation found in the present case (paras. 223-238, in particular paras. 235-238).

20. The co-signing organisations respectfully submit that, despite the ECtHR judgment's silence on this matter, the size of the group of athletes in the same or similar situation as the applicant, who can potentially be affected by the same shortcomings established by the Court in the present judgment, is considerable. There are at least 40 international sport federations (many of which are domiciled in Switzerland) that have sex-based eligibility regulations that engage athletes' fundamental civil rights, and international federations continue to regulate other aspects of sport in a manner that engages the fundamental civil rights of athletes. These regulations often provide for exclusive jurisdiction of the CAS to decide disputes raised by athletes. Challenges to these regulations have either already been heard by CAS and are pending a decision or will likely be brought to CAS soon (please note, in this respect: 1) that although concrete statistical data is not available, the submitting

NGOs have been collectively supporting several dozens of athletes negatively affected by sex-testing policies; and 2) that in the latter iteration of the DSD Regulations, World Athletics have re-introduced routine genetic sex-testing for all women, a policy that had been abolished in 1992. This means that the current regulations will affect all women wishing to compete in athletics, which is bound to increase the number of disputes submitted to arbitration raising similar complaints as the ones at the heart of the present judgment). These cases will not only continue being subject to arbitral awards of questionable compatibility with important aspects of substantial public policy (given the FSC's failure to review in a Convention-compliant manner the fundamental public policy-related questions at the heart of the present violation); they will also continue, in case of future appeals to the FSC against similar CAS awards, hitting against the non-Convention-compliant FSC case-law in relation to the issues at the very core of the violation at issue.

21. Until the respondent State implements effective general measures to execute the Grand Chamber's judgment, a considerable number of athletes will therefore be at a disadvantage when they litigate their cases at the CAS and the FSC and at risk of having their right to a fair hearing violated. The co-signing organisations therefore respectfully submit, that, in addition to the element of complexity of the implementation environment discussed above, the non-isolated nature of the violation at issue and the potential of the source of the violation identified in the present judgment to generate an important number of repetitive cases being litigated before the ECtHR also argues in favour of the classification of the present judgment under the enhanced supervision procedure.

V. Recommendations

22. For the reasons set out above, the submitting organisations respectfully recommend that:

(i) The execution of the Grand Chamber's judgment in *Semenya v. Switzerla*nd be classified by the CM under the enhanced supervision procedure;

(ii) The respondent State be urged to devise and effectively implement, as a bare minimum for the effective implementation of this case, a comprehensive package of capacity-building measures targeting the Swiss judiciary in general and the FSC judges in particular. The training modules should be capable of addressing all shortcomings identified by the Court in this judgment (as listed under part II.6. (1)-(4) above). They should also take due account of fundamental findings of the Court pertaining to the FSC's self-admitted, principled hesitation to set aside international arbitral awards on grounds of public policy; and the FSC's very restrictive interpretation of the notion of public policy, which it also applies to the review of arbitral awards by the CAS;

(iii) The Committee of Ministers note that a potential adoption -- prior to any future examination of a case raising similar issues -- of internal guidelines by the FSC aiming at ensuring that Article 6-compliant reasoning standards are applied in appeal cases reviewing the compatibility of CAS awards with substantive public policy would be a fundamental step forward towards the ultimate goal of effective implementation of the present judgment;

(iv) The respondent State be requested to provide regular information to the Committee of Ministers, not only on the progress in the adoption of the necessary general measures, but also on their impact on the FSC's ability to conduct future reviews of CAS arbitral awards in accordance with Convention standards; and

(v) The present judgment remain open and under the Committee's enhanced scrutiny until the respondent State has effectively demonstrated the FSC's ability to review CAS awards on appeal in a Convention-compliant manner, be it in

connection with potential reopened proceedings in the applicant's case or any in connection with any other new similar case coming for review before the FSC.

We thank you for your attention and we respectfully express our intention to make subsequent submissions to the CM.

Sincerely,

Payoshni Mitra
Executive Director, Humans of Sport
London, United Kingdom
Website: www.humansofsport.com
Email: humansofsportorg@gmail.com

And

Alison Quigley, Athlete Rights Australia
Andrea Florence, Sport and Rights Alliance
Christine Granger, Proud 2 Play
Dan Christian Ghattas , OII Europe
Dorcas Amakobe, Moving the Goalposts
Gurchaten Sandhu, ILGA World
Hudson Taylor, Athlete Ally
Hugh Torrance, European Gay & Lesbian Sport Federation
Jhuma Sen, Samyaa Foundation for Law and Justice
Kaajal Ramjathan-Keogh, International Court of Jurists
Lou Englefield, Pride Sports
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Simon Darnell, Centre for Sport Policy Studies
Tarek Elias, Athleten Deutschland