Anti-Doping & Data Protection

An evaluation of the anti-doping laws and practices in the EU Member States in light of the General Data Protection Regulation

Executive Summary

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Study carried out by the Tilburg Institute for Law, Technology and Society (TILT) of the Tilburg University and Spark Legal

(Bart van der Sloot, Mara Paun, Ronald Leenes, Peter McNally & Patricia Ypma)

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1. This study regards the relationship between anti-doping laws and practices in the EU and the European data protection framework, in particular the General Data Protection Regulation. The main four objectives of this research project were: a) to prepare a complete list of all relevant legislation at national level in the 28 EU Member States, in particular provisions providing a legal basis for the processing of personal data in the context of anti-doping activities; b) to determine, on the basis of the results of the aforementioned exercise and other relevant factors, a representative sample of twelve EU Member States that would be studied in more detail; c) to perform research on the scope and nature of personal data processing for anti-doping purposes in these twelve EU Member States, on the basis of the anti-doping practice defined in the World Anti-Doping Code (WADC) and its associated standards and on the basis of interviews performed with the National Anti-Doping Organisations (NADOs) and the International Federations (IFs); d) to identify cases, on the basis of the research performed above, and in the light the fundamental rights to privacy and data protection, that would need to be addressed by national legislation in order to ensure lawful processing of personal data in the anti-doping context.

2. In order to reach the above-mentioned goals, three steps have been taken. First, during the Inception Phase, country correspondents from the 28 EU Member States reported on the national laws regarding anti-doping and data protection. From these country reports, fact sheets were distilled and a preliminary analysis was conducted. Second, a field study was conducted, where the study team interviewed the NADOs of 12 selected countries, a Data Protection Authority (DPA), WADA, EU Athletes, and one IF. The third and final step was the Synthesis and Reporting Phase, in which the results were analysed, compared and synthesised. During this phase, the cases were identified that need to be addressed in the national laws of the EU Member States (MSs).

3. The study was conducted taking into account the following background information. In 1999, the World Anti-Doping Agency (WADA) was founded to combat doping use in sport. WADA is a private international organisation, a foundation based in Switzerland, with its headquarters in Canada. WADA has adopted the World Anti-Doping Code and five international standards: (1) the list of prohibited substances and methods, (2) the International Standard on Testing and Investigations (ISTI), (3) the International Standard for Laboratories (ISL), (4) the International Standard for Therapeutic Use Exemptions (ISTUE) and (5) the International Standard for Privacy and Protection of Personal Information (ISPPPI). Each of these documents are extensive and detailed; signatories must abide to these six documents in order to be deemed compliant by WADA. In addition, WADA has issued dozens of technical documents, protocols, model rules and guidelines that further explain and develop the rules contained in the six mandatory instruments.

4. A substantive segment of the sport world is subjected to the WADC and the five standards. Admission is generally initiated by sport organisations or representative bodies themselves; sport federations of Olympic Sports have the obligation of signing up to the WADC. In addition, all sports that aspire to become an Olympic sport need to do so. Furthermore, a number of sports and activities have voluntarily subjected themselves to the WADC, including a number of amateur sport clubs. Consequently, practically all sports are subjected to the WADA instruments.

5. In principle, all persons practicing those sports are bound by WADA's rules, non-professional athletes and professional athletes alike. In addition, WADA makes clear that even if a person is not participating in competition, but merely engaging in recreational or fitness activities, the Anti-Doping Organisations (ADOs) that enforce the anti-doping rules have authority over the sportsperson. Next to athletes, staff members, doctors and coaches are also bound by WADA's instruments. This means that National Anti-Doping Organisations not uncommonly claim to have jurisdiction over 1/4 or even 1/3 of a country's population.

6. WADA has testing authority over athletes, but the most important ADOs in terms of testing athletes on doping are the National Anti-Doping Organisations, which essentially enforce the anti-doping rules on athletes practicing sports on a primarily national level, the International Sport Federations, that focus their efforts on athletes competing on an international level, and the organisers of big sport events, the Major Event Organisers (MEOs), who are principally engaged with testing athletes before, during and after a specific sport event. Additionally, laboratories that are accredited by WADA play an important role, as they conduct the actual analysis of the samples collected and send the results to the ADO.

7. Personal data is gathered from athletes through a variety of means. Athletes may be subjected to tests in-competition and out-of-competition. To facilitate the latter type of testing, a small number of athletes is obliged to provide daily whereabouts information. However, any athlete over which the anti-doping organisations have testing authority may be tested day and night, without advance notice. Testing is done primarily by taking urine or blood from the athletes. Personal details, such as name, home address and other identifying information of athletes are also recorded. Anti-doping organisations also claim authority to conduct private investigations, either through searching open sources, by interviewing people or collecting information about athletes through other means. Finally, a biological passport of an athlete may be developed, through which the athlete's blood or urine values are profiled longitudinally.

8. The data collected may be stored for significant periods of time, from 18 months for information about doping tests and whereabouts information to 10 years for Therapeutic Use Exemptions (TUEs) and the actual samples; terms may be extended when deemed necessary.

9. These data are shared internationally, for example by sending samples to foreign labs, by sharing data between NADOs and between a NADO, an IF and/or a MEO. Almost all countries in the world may be of relevance because most countries have a NADO, national athletes participating in sport events and/or host large sport events. Results of potential Anti-Doping Rule Violations (ADRVs) may be sent to the external members of a sanctioning body or ultimately, to the Court of Arbitration for Sports (CAS), based in Switzerland. Data may be sent to the police or customs, inter alia, when there are signs of drug-trafficking. And WADA may claim access to any of these data flows. To facilitate the cross-border data flows, WADA has designed an information clearinghouse called ADAMS, which is operated from Canada.

10. Athletes that have been found guilty of an ADRV can be suspended for a number of years or even a life-time from sport practice. In some instances, doping use or possession by athletes is criminalised, which means that the athlete in question may face imprisonment.

11. In the European Union (EU), a high level of privacy and data protection is guaranteed. The current Data Protection Directive (DPD) from 1995 is replaced by the General Data Protection Regulation (GDPR), which will become applicable in May 2018. In addition, the EU Charter of Fundamental Rights contains both the right to privacy (article 7) and the right to data protection (article 8). The Council of Europe's (CoE) European Convention on Human Rights (ECHR), contains the right to privacy in Article 8, which also applies in part to issues of data protection.

12. The EU Article 29 Working Party, the EU advisory body on data protection, has issued two opinions, one in 2008 and another in 2009, on the relationship between the data processing mandated in the anti-doping context and the EU data protection rules, in which it pointed to issues of concern. In another opinion, from 2014, it dealt with the level of protection for personal data afforded by the Canadian province of Quebec. WADA's International Standard for Privacy and Protection of Personal Information provides a lower level of protection than the DPD and the GDPR. When there is a conflict between WADA's instruments and the EU privacy and data protection principles, the latter shall prevail. WADA also indicates, both in its official communication and in an interview conducted for this report, that when its rules conflict with the national laws of a country, for example in relation to privacy and data protection, the national laws must be applied.

13. From the country studies conducted for this report, a mixed image appeared of anti-doping regulation and how data protection aspects are addressed. The WADC plays a prominent role in this domain and all Member States have, one way or another, adopted the Code in their legal system. In some cases, the Code itself is legally binding, while in others, its legal force comes through adherence to the UNESCO Anti-Doping Convention or the Council of Europe Anti-Doping Convention. In some Member States, the Code's provisions are implemented in national law. A number of Member States has a 'Sports Act' or specific anti-doping legislation. Usually this regulation originates at the highest legislative level in the state or as ministerial decrees and in all cases belongs to public law. In a few Member States, the regulation of doping in sport is currently entirely left to the NADOs (which tend to follow the WADC closely). The articulated reasons for addressing doping in sport vary, but a general urge to fight doping, promote fairness, integrity and honesty of sport are the most mentioned, next to the athletes' health protection.

14. NADOs in general are public bodies regulated by law directly, or under ministerial oversight. A few NADOs are private bodies with no apparent basis in public law and without direct governmental oversight. The testing conducted by the NADOs derives from the ISTI, which is referenced in the Sports Acts of most Member States or in separate instruments. With respect to athletes within the testing jurisdiction of the NADOs, clear differences can be observed. All the top-level athletes are covered, but at the lower levels there is variety in whether or not an athlete is part of a testing pool. Hence, there is inequality in eligibility for testing throughout the Member States.

15. Slightly over half of the Member States refer explicitly to the data protection rules as the framework within which anti-doping has to take place. Most Member States have transposed the core EU DPD provisions relevant for the processing of personal data in their national laws without significant deviations from the DPD phrasing. This in particular concerns the requirements regarding processing ground and its elements (e.g. consent, vital interest, public interest), sensitive personal data, and transfer of personal data to third countries. Member States' anti-doping regulations are mostly silent about the legal foundation for the processing of personal data in the context of anti-doping. The general provisions (based on/referring to art. 7 DPD and art. 6 IPPPI) are often mentioned, but which concrete processing ground is deemed appropriate or legitimate for the processing of personal data regarding athletes is lacking in most cases.

16. On the basis of the interviews conducted with the NADOs, a DPA, World Rugby (an IF), WADA and EU Athletes, the following conclusions can be drawn. There is variety in eligibility criteria for inclusion in testing pools. At the top-level, all athletes are part of the Registered Testing Pool and subjected to the whereabouts program and intensive testing. Still this results in significantly different numbers of athletes, which may be of importance when assessing the necessity and proportionality of measures and procedures.

17. The personal data processed in the context of anti-doping primarily concerns whereabouts information and information based on urine samples. Blood samples are more exceptional, certainly in-competition. There are no statistics available for the number of Therapeutic Use Exemptions. Another data source arose during the interviews: social media. Athletes are informed through various channels of the fact that they are part of a testing pool, in general terms of the data processing involved and their rights. Whether the information provided is adequate and actually understood by the athletes is unknown. Athletes are obliged to consent to the processing of various types of information (e.g. upon selection for RTP, using ADAMS, by signing doping control forms). If they do not consent, sanctions may follow.

18. With regards to the legal basis for the processing of athletes' personal data (processing ground), a blurry picture emerged. Most NADOs interviewed mentioned consent as a/the processing ground that legitimizes the processing of athletes' personal data in their view. In most cases, other grounds are also mentioned, including contract, legal obligation, public interest, and legitimate interests of the controller. Vital interest of the data subject is mostly absent from the list. In other words, there is no consensus on the basis of which processing ground personal data may/should be processed. With regards to the processing of sensitive personal data, the image is even blurrier.

19. Data are being shared between ADOs within Europe and in many cases, ADAMS is used as the platform for sharing data. With regards to sharing data with third countries, a diverse picture emerges from the interviews, with some NADOs noting that no difference is made between transmission of data within the EU and the transfer of personal data to third countries, or that there is limited disclosure of data (other than name and sample number) to countries that offer no adequate level of protection, or that contracts are used in all cases of sharing. Some noted reliance on comfort letters from WADA (in relation to ADAMS). Also with respect to sharing data with law enforcement agencies differences exist. These are largely based on differences in national legislation.

20. ADAMS is used as an information system by most NADOs and athletes. Generally, individual RTP athletes use ADAMS for registering their whereabouts. With respect to therapeutic use exemptions, which concern sensitive (medical) data, ADAMS only seems to play a secondary role. Information generally only seems to be entered in ADAMS after the NADO has decided on a particular case. This is due to a combination of factors, but the sensitivity of the data involved seems to play a role.

21. With regards to testing and deciding on cases of doping, all NADOs closely follow the WADA standards. The publication of sanctions imposed varies among Member States. Some NADOs publish results online, some only on closed lists, some only publish with the athlete's consent, and in some MS publication is done by the national sports federations rather than by the NADO. The differences are largely based on national legislation. Hardly any complaints regarding data protection issues are filed.

22. From the legal analysis, it appeared that the following cases would need to be addressed, although it is important to stress that that not all scenarios are in the hands of Member States. With respect to the legitimacy of processing personal data, the General Data Protection Regulation exhaustively lists six grounds which may be invoked: (a) the consent of the data subject (in this case the athlete), (b) when data processing is necessary for the performance of a contract with the athlete, (c) when data processing is necessary for the performance of a legal obligation, (d) when data processing is necessary for the protection of a vital interest of the data subject, (e) when data processing is necessary for the performance of a task carried out in the public interest and (f) when processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. Member States should ensure that data processing in the anti-doping context is based on one of these grounds. This study has identified grounds (c) (legal obligation) and (e) (public interest) as being the most appropriate to justify the processing of athlete’s data in the context of anti-doping activities.

23. Much of the data processed in the anti-doping context can be classified as sensitive personal data. Of the 10 grounds listed under Article 9 GDPR that permit the processing of such data, this study identifies the grounds set out in Article 9(2)(g) and (i) as the most appropriate grounds for the processing of sensitive personal data by NADOs in the context of anti-doping activities. These grounds should only be invoked where processing of sensitive personal data in the anti-doping context is necessary in the substantial public interest (art. 9(2)(g)) or for reasons of public interest in the area of public health (art. 9(2)(i)), and where this is defined in Union or Member State law, and measures are defined to safeguard the rights of athletes. Thus, Member States are advised to ensure that national legislative provisions concerning doping should include a provision specifying that the processing of sensitive personal data is only legitimate insofar as a substantial public interest or issue of public health is concerned. References to health in legal bases should recognise that methods and substances on WADAs prohibited list are not necessarily banned because of their health risk. Substances may just as well be banned by WADA because of a combination of concerns over performance enhancement and the “spirit of sport”.

24. In the anti-doping context, personal data can be transferred across the world. Transfer of personal data from the EU to a non-EU country is in principle only legitimate if one of three situations apply: (1) there is an adequacy decision, (2) there are appropriate safeguards or (3) a derogation applies. (1) With respect to Canada and Switzerland, the European Commission has adopted an adequacy decision, meaning that these countries are deemed to have adequate safeguards in place for the protection of personal data. Besides Canada and Switzerland, there are adequacy decisions for at least some data transfers to Andorra, Argentina, Faeroe Islands, Guernsey, State of Israel, Isle of Man, Jersey, New Zealand, United States of America and Eastern Republic of Uruguay, though the adequacy decision for the USA is not applicable to NADOs. It should also be recognised that recent jurisprudence of the European Court of Justice has made clear that adequacy decisions can be challenged before court. For data transfer to all other countries outside the EU and the European Economic Area, for which there is no adequacy decision, one of the other two grounds must apply. (3) A recital to the General Data Protection Regulation makes clear that a derogation is applicable to data transfers required and necessary for important reasons of public interest, for instance in order to reduce and/or eliminate doping in sport.. However, a derogation may only be invoked for specific situations, for example when there is a specific request from one NADO to another NADO to provide the whereabouts of an athlete in a certain time slot. In principle, the derogation does not apply to more structural forms of data transfer. (2) For the more structural forms of data transfers, appropriate safeguards should be in place. Appropriate safeguards can be specified in a number of ways, such as through data protection clauses in contracts or certification mechanisms. WADA has issued a standard agreement for the sharing of information between different parties within ADAMS and has set out its own privacy standards in the ISPPPI. However, it is unsure whether these would qualify as appropriate safeguards, because they provide a lower level of protection than the GDPR. The findings of the study suggest that MSs should ensure that the transfer of personal data (for fighting doping in sport) to countries outside the EU (for which there are no adequacy decisions) are based on appropriate safeguards established in contractual clauses or administrative arrangements, subject to authorization by the competent supervisory authority.

25. The General Data Protection Regulation lays down duties for the controller of personal data. Under the WADA's anti-doping regime, it is not always possible to determine precisely which organization (the NADO, IF, WADA, MEO, etc.) is a data controller. The Article 29 Working Party has indicated that more clarity should be provided on this point. Member States can specify in their national laws who is the primary norm addressee of the law, for example the National Anti-Doping Organization. Before implementing or amending the existing law, a Data Protection Impact Assessment could be conducted. In particular, it is recommended that the national law makes specific arrangements for two obligations of the primary data controller: the appointment of a Data Protection Officer and the data retention terms that must be respected. The Article 29 Working Party has stressed already in 2008 and 2009 that the terms used by WADA may conflict with the data minimalisation and storage limitation principles. After these art. 29 WP opinions, WADA has extended the retention periods. MSs are recommended to lay down in their national laws a granular system for data retention, taking account of specific contexts, types of data and goals for data processing.

26. The General Data Protection Regulation lays down rights for athletes as data subjects. Inter alia, they have the right to information about the data that are processed

about them in a clear and intelligible form. WADA has published about 200 relevant documents in this respect, consisting of over 4000 pages of rules, protocols, guidelines and other instruments. National laws or regulatory bodies are recommended to ensure that the athlete is provided with clear and comprehensible information, that are also understandable to a layman. At the same time, currently little concrete information is provided to athletes in terms of why he/she is subjected to whereabouts requirements, why a biological passport is developed, why he/she is included in a testing pool and/or why he/she is tested in a particular situation. In addition, little evidence was found during the field study of detailed information being provided to athletes about which (sensitive) personal data is gathered about him/her, why, by which means and to whom such data are disclosed. MSs are advised to ensure that the athlete's rights are respected on this point. WADA mandates that the anti-doping rule violations are published, including the identity of the athlete and the sanction imposed. During the Inception Phase and the Field Study Phase, a number of national laws and/or data protection authorities were found that already prohibit or limit such publication. With the introduction of the right to be forgotten by the GDPR, it seems that there are even more arguments to limit publication of violations, identifying information and sanctions. MSs are recommended to specify in their national laws in which cases and under which conditions, decisions on anti-doping rule violations and sanctions taken thereupon may be disclosed in a form through which the athlete may be identified, either directly or indirectly. Finally, under the current anti-doping regime as developed by WADA, the right of athletes to object to the processing of personal data can be limited. MSs are recommended to make arrangements in their national legislation to ensure that athletes can enjoy a real and effective right to object, especially where the public interest is used to legitimate the processing of personal data.

27. Member States are advised to take careful consideration of the principles of necessity and proportionality, as engrained in the fundamental rights framework, inter alia in terms of:

- The whereabouts requirements and out-of-competition testing
- The biological passports
- The gathering and analysing blood samples
- The focus on blood and urine samples, as opposed to less intrusive methods, such as relying on saliva or hair
- The testing authority claimed by NADOs
- The testing authority claimed over non-athletes and/or citizens practicing sports on a purely recreational level, including minors
- The testing authority claimed over almost all sports and sport activities
- The prohibition of recreational drugs, of placing substances that potentially conceal sport-enhancing drugs on the same line as sport-enhancing drugs and of banning drugs which are deemed sport-enhancing, but for which no conclusive scientific evidence exists
- The focus of ADOs on finding prohibited substances in human tissues, instead of focussing on other ADRVs
- The primary focus of ADOs on risk-based testing, instead of intelligence-based testing
- The sanctions applied to athletes found in violation of the anti-doping rules, as following from the World Anti-Doping Code

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