

2016

## The First Competitive Video Gaming Anti-Doping Policy and Its Deficiencies Under European Union Law

Colby Stivers

Follow this and additional works at: <http://digital.sandiego.edu/ilj>

 Part of the [International Law Commons](#)

---

### Recommended Citation

Colby Stivers, *The First Competitive Video Gaming Anti-Doping Policy and Its Deficiencies Under European Union Law*, 18 San Diego International Law Journal. (2016)

Available at: <http://digital.sandiego.edu/ilj/vol18/iss2/4>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego International Law Journal by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# The First Competitive Video Gaming Anti-Doping Policy and Its Deficiencies Under European Union Law

COLBY STIVERS\*

## TABLE OF CONTENTS

I.	INTRODUCTION TO ESPORTS: HOW AND WHY THE FIRST ANTI-DOPING POLICY FOR COMPETITIVE VIDEO GAME TOURNAMENTS WAS ESTABLISHED.....	264
II.	OBJECTIVES OF ANTI-DOPING POLICY IN ESPORTS: STAKEHOLDERS AND VALUES .....	266
	A. <i>Stakeholders</i> .....	266
	B. <i>Values</i> .....	269
III.	POTENTIAL PROBLEMS WITH THE ESL POLICY ARISING UNDER TREATY-BASED EUROPEAN UNION LAW .....	272
	A. <i>The Mechanics of Positive Obligations Under the European Convention on Human Rights</i> .....	272
	B. <i>Possible Noncompliance Under the Convention and the Positive Obligation Doctrine</i> .....	273
	C. <i>Other Potential Problems Arising Under Treaty-Based Law</i> .....	279
	1. <i>The 1995 Data Protection Directive</i> .....	279
	2. <i>The Proposed General Data Protection Regulation</i> .....	283
IV.	CUSTOMARY TRADITIONAL SPORTS ANTI-DOPING PRACTICES AND POLICY CONSIDERATIONS .....	286
	A. <i>Dispute Resolution Procedures</i> .....	286
	B. <i>Additional Protections for the Rights of Minors</i> .....	288
	C. <i>Security of Data</i> .....	289
	D. <i>Procedures for Disclosure of Sensitive Medical Data by Players to Leagues</i> .....	289

\* © 2017 Colby Stivers. J.D. 2017, University of San Diego School of Law.

E.	<i>Procedures for the Disclosure of Confidential Information by Leagues to Third Parties</i> .....	290
F.	<i>Choice of Proscribed Substances</i> .....	290
G.	<i>Therapeutic Use Exemptions</i> .....	291
H.	<i>Choice of Test</i> .....	292
V.	CONCLUSION .....	292

## I. INTRODUCTION TO ESPORTS: HOW AND WHY THE FIRST ANTI-DOPING POLICY FOR COMPETITIVE VIDEO GAME TOURNAMENTS WAS ESTABLISHED

On a weekend in October 2013, tens of thousands of fans took to their seats in Los Angeles’s Staples Center.<sup>1</sup> While the stadium is best known as the home of the LA Lakers, that weekend fans instead came to see the World Championships of *League of Legends*, a competitive video game.<sup>2</sup> Although the enthusiasm of the fans was undoubtedly high—tickets sold out online in less than an hour<sup>3</sup>—the pressure on the players perhaps ran even higher: the winning team was to take home a one million dollar grand prize.<sup>4</sup>

Since 2013, these high-stakes competitions for video games, also known as eSports,<sup>5</sup> have become a recurring phenomenon around the globe.<sup>6</sup> The money at stake has also risen steadily. For example, Valve Software’s “The International,” a tournament for *Dota 2*, offered a prize pool of over eleven million dollars in 2015.<sup>7</sup> As a result, venture capitalists are flocking to fledgling eSports teams in hopes of securing stakes in their brands.<sup>8</sup>

---

1. See Derrik Lang, ‘*League of Legends*’ Champs Win in Legendary Venue, NBC NEWS (Oct. 5, 2013, 6:02 PM), <http://www.nbcnews.com/technology/league-legends-champs-win-legendary-venue-8c11339365> [https://perma.cc/7W29-JH8C].

2. See *id.*

3. Paul Tassi, *League of Legends Finals Sells Out LA’s Staples Center In An Hour*, FORBES (Aug. 24, 2013, 9:28 PM), <http://www.forbes.com/sites/insertcoin/2013/08/24/league-of-legends-finals-sells-out-las-staples-center-in-an-hour/> [https://perma.cc/LE7V-TYTV].

4. See Lang, *supra* note 1.

5. See Tassi, *supra* note 3.

6. Joshua Nino De Guzman, *The World’s Biggest and Best eSports Arenas*, RED BULL (Feb. 26, 2015), <http://www.redbull.com/uk/en/esports/stories/1331708454458/the-biggest-and-best-esports-stadiums-in-the-world> [https://perma.cc/U4DF-APP5].

7. See Alex Hinds, *You’d Be Surprised Just How Big ‘e-sports’ is Getting*, THE GUARDIAN (June 6, 2015, 4:59 AM), <http://www.theguardian.com/technology/2015/jun/06/dota-2-prize-pool-record-e-sports> [https://perma.cc/9NHV-NN3L].

8. Samuel Lingle, *Meet the Immortals, The Venture Capital-Funded eSports Franchise that Bought Team 8’s LCS Spot*, DAILY DOT (Oct. 7, 2015, 12:59am), <http://www.dailydot.com/esports/immortals-team-8-noah-whinston-venture-capital/> [https://perma.cc/8D3H-LAFU].

Such high stakes have attracted to the industry individuals who employ dishonest or outright illegal means for monetary gain. In competitive gaming's short lifespan, the primary manifestations of legal controversy were grey-market gambling services and match-fixing.<sup>9</sup> In 2015, however, a new potential threat was revealed: the use of performance-enhancing drugs (PEDs). The story broke when professional gamer Kory "Semphis" Friesen admitted in an interview that he and his teammates had taken the psychostimulant Adderall during a \$250,000 *Counter-Strike* tournament in Poland earlier that year.<sup>10</sup> The Electronic Sports League (ESL), the organizer of that tournament and other tournaments throughout Europe and around the globe, owned by Germany-based Turtle Entertainment,<sup>11</sup> was quick to respond. ESL announced its plans to work with the German anti-doping agency, Nationale Anti Doping Agentur (NADA), as well as internationally with the World Anti Doping Agency (WADA), in the hopes of creating "an anti-PED policy that is fair, feasible and conclusive while also respecting the privacy of players."<sup>12</sup>

ESL's ultimate course of action failed to live up to that ambitious promise. In an online post to the *Counter-Strike* community Reddit page titled "ESL announces details of the anti-doping policy," ESL's Head of Communications, Anna "ESLAnna" Rozwandowicz, detailed the barebones policy the league chose to implement.<sup>13</sup> The policy calls for random skin

9. See, e.g., *South Korea Starcraft Gamers Accused of Match Rigging*, BBC (Apr. 2015), <http://news.bbc.co.uk/2/hi/technology/8623514.stm> [<https://perma.cc/2N6N-BA6K>]; Nathan Grayson, *Pro Teams Implicated in Huge Counter-Strike Match Fixing Scandal*, KOTAKU (Jan. 19, 2015, 8:45 PM), <http://kotaku.com/pro-teams-implicated-in-huge-counter-strike-match-fixin-1680514379> [<https://perma.cc/AU4K-2CPM>].

10. Matt Kamen, *Pro-gamer Admits to Doping in eSports*, WIRED (July 16, 2015), <http://www.wired.co.uk/news/archive/2015-07/16/esports-doping-admission> [<https://perma.cc/G9QE-FL2K>].

11. See TURTLE ENTERTAINMENT, [http://www.gamesindustry.biz/resources/directory/company/turtle\\_entertainment](http://www.gamesindustry.biz/resources/directory/company/turtle_entertainment) [<https://perma.cc/G4XE-GL3T>] (last visited Oct. 19, 2015).

12. Ella McConnell, *ESL Leads Anti-PED Initiative for eSports with the Support of NADA*, ESLGAMING (July 23, 2015), <http://www.eslgaming.com/news/esl-leads-anti-ped-initiative-esports-support-nada-2170> [<https://perma.cc/S26H-N9HA>] [hereinafter *ESL Announcement*].

13. See ESL, *ESL announces details of the anti-doping policy*, REDDIT (Aug. 11, 2015), [https://www.reddit.com/r/GlobalOffensive/comments/3gmog8/esl\\_announces\\_details\\_of\\_the\\_antidoping\\_policy/](https://www.reddit.com/r/GlobalOffensive/comments/3gmog8/esl_announces_details_of_the_antidoping_policy/) [<https://perma.cc/A38A-L748>] [hereinafter *ESL Policy Details*]; Adam Rosenberg, *The ESL Details its Anti-Drug Policy*, MASHABLE (Aug. 12, 2015), <http://mashable.com/2015/08/12/esl-esports-anti-drug-policy/#mc1IlnGrnZqo> [<https://perma.cc/NPU8-DHV6>].

tests to check for the WADA model list of prohibited substances.<sup>14</sup> This policy will be in place for the foreseeable future at ESL events.<sup>15</sup> However, the minimalistic policy seems to focus only on the testing itself, not procedural safeguards for fairness and player privacy or contingency plans for edge-cases.<sup>16</sup> Because of this, the ESL policy falls out of line with customary EU and international anti-doping law, and is arguably illegal under EU treaty-based law.

This Comment identifies the deficiencies of the ESL anti-doping regime and proposes solutions for compliance with international law. In addition to achieving compliance, the proposed solutions analyzed are selected to serve the values of eSports stakeholders, as well as the philosophical values of sports competition as a whole. Section II will identify those stakeholders and values. Section III will identify and attempt to solve potential noncompliance with EU treaty-based law under the European Convention on Human Rights and resolutions of the Council of Europe. Section IV will identify and propose solutions transposed from traditional sports anti-doping policies that address discrepancies with EU law and serve the identified policy objectives that are unique to eSports.

## II. OBJECTIVES OF ANTI-DOPING POLICY IN ESPORTS: STAKEHOLDERS AND VALUES

The crafting of anti-doping policy necessarily entails identification of the values to be promoted and the stakeholders of those values. The fledgling eSports ecosystem differs in several key ways from that of traditional sports, including the lack of player agents or unions; the unique pressures on players; and the skewed power dynamics between players, teams, leagues, and developers.<sup>17</sup> Anti-doping policies should consider those differences.

In order to identify the problems with the ESL policy and craft effective solutions, we must identify whom those problems affect and what philosophical objectives be served by proposed solutions.

### A. Stakeholders

Players, team organizations, leagues, and developers all have an interest in crafting eSports anti-doping policies, but the players are the stakeholders

---

14. See *ESL Policy Details*, *supra* note 13.

15. *Id.*

16. *Id.*

17. Bryce Blum, *Power Dynamics in eSports-The Role of the Publisher*, ESPN (May 18, 2016), [http://www.espn.com/esports/story/\\_id/15577117/power-dynamics-esports-role-publisher](http://www.espn.com/esports/story/_id/15577117/power-dynamics-esports-role-publisher) [https://perma.cc/Q272-93ZT].

that are most affected by PED policies.<sup>18</sup> Although playing video games for a living may seem like a dream job, fierce competition for those jobs at the highest level can lead to a grueling lifestyle. For example, 14-hour-long practice sessions, or longer, are not uncommon for top eSports professionals.<sup>19</sup> In April 2014, 22-year-old American professional gamer Hai Du Lam was hospitalized with a collapsed lung, but the pressure he felt to perform was so high that he voluntarily continued five-hour practice sessions even in the hospital.<sup>20</sup> Another player, 17-year-old Cheon Min-Ki, attempted suicide by jumping from a 12-story building after allegations of match-fixing.<sup>21</sup> Many players, like Cheon, are subjected to these pressures as minors.<sup>22</sup> Job security for players is practically nonexistent, and they tend to retire by their mid-twenties.<sup>23</sup> Often, retirement is brought on by injuries to players' hands or wrists from prolonged practice.<sup>24</sup>

In addition to these hardships, players lack advocates for their interests. There are no eSports player unions.<sup>25</sup> Due to the short careers and replaceability of players, it is unlikely that a group of players would be able to refrain from playing long enough to compel leagues to meet their demands.<sup>26</sup> Legal representation for players, although rising,<sup>27</sup> is still rare, with players often signing questionable contracts without legal representation.<sup>28</sup>

18. See Brett Molina, *Key eSports Group to Create Policy*, USA TODAY (July 23, 2015, 11:13 AM), <http://www.usatoday.com/story/tech/gaming/2015/07/23/esports-drug-testing/30560219/>.

19. Katherine E. Hollist, Comment, *Time to be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 833 (2015).

20. *Id.* at 833–34.

21. *Id.* at 834.

22. *Id.* at 835.

23. *Id.* at 831, 834.

24. See Luke Plunkett, *The Injuries that are Ending eSports Careers*, KOTAKU (July 16, 2015, 7:00 PM) <http://kotaku.com/the-injuries-that-are-ending-esports-careers-1718373200> [<https://perma.cc/XUZ7-WBJ4>].

25. Hollist, *supra* note 19, at 834.

26. *Id.* at 837.

27. STEVEN D. FISHER, *PLAYER CONTRACTS: DEFINING EXPECTATIONS TO AVOID CONFLICT 1*, (2014), [http://www.foster.com/documents/foster-pepper-white-paper/playercontracts\\_definingexpectationstoavoidconflict.aspx](http://www.foster.com/documents/foster-pepper-white-paper/playercontracts_definingexpectationstoavoidconflict.aspx) [<https://perma.cc/5Z4Z-6SNX>]; Joss Wood, *The Player Resource Center Connects Players with the Professionals they Need*, ESPORTS BETTING REPORT (Apr. 26, 2016, 11:45 AM), <http://www.esportsbettingreport.com/new-resource-center-for-esports-pro-players/> [<https://perma.cc/V2A6-4VEK>].

28. Richard Lewis, *How fair is an LCS contract? We asked a Lawyer*, THE DAILY DOT (Sept. 22, 2014, 12:51 PM), <http://www.dailydot.com/esports/lcs-contract-analysis-league-of-legends-riot-games/> [<https://perma.cc/3RPQ-QVSG>].

If players are not able to get professional legal advice in basic contractual negotiations, it seems unlikely that they are prepared to negotiate or litigate with leagues on an international scale over performance-enhancing drug rules. Because of the hardships on players and the lack of recourse available to them under the current policy, the primary goal when constructing PED policy should be to protect the rights of players.

Teams, a second stakeholder, also have an interest in the crafting of PED policy. Teams (also known as “organizations” or “orgs” in eSports parlance) are comprised of players, coaches, managerial and support staff, and executives who secure funding from sponsors. Because teams are, in part, comprised of players, the two groups’ interests align to some extent. However, in many cases, players do not have decision-making power in the team and may be replaced at will.<sup>29</sup> eSports organizations are businesses, so ultimately their main stake in crafting PED policy is their bottom line, perhaps even at the expense of their own players.<sup>30</sup> Furthermore, some teams have begun to seek collective bargaining rights against the leagues—although there is little reason to suggest that those rights will be employed for the benefit of the players.<sup>31</sup> The mere existence of an anti-doping policy is probably enough to meet sufficient interests on the part of the teams, who are able to avoid public relations blow-ups by showing that players are being disciplined by the leagues.<sup>32</sup>

Similar reasoning applies to the interests of a third stakeholder, the leagues.<sup>33</sup> Although the prohibition of performance-enhancing drugs in eSports may coincidentally serve altruistic goals, it is also undoubtedly in the financial interest of the leagues to avoid scandals like the Friesen leak. Leagues have perhaps even more power over the players than teams. For example, a player that has been removed from a team at least has the opportunity to sign with another team as a free agent, but a player banned

---

29. Hollist, *supra* note 19, at 837–38.

30. For insight into the operations of an eSports organization, see Travis Gafford & Rod “Slasher” Breslau, *Curse eSports Activity Goes Independent Including Teams, Ownership*, ONGAMERS (Apr. 15, 2014), <http://web.archive.org/web/20150503104222/http://www.ongamers.com/articles/curse-esports-activity-goes-independent-including-teams-ownership/1100-1154> [https://perma.cc/L3VH-2EP2].

31. Bryce Blum, *An eSports Lawyer Explains How the New Team ‘Union’ Will Push Esports Forward*, THE DAILY DOT (Oct. 4, 2015, 6:54 PM), <http://www.dailydot.com/esports/esports-lawyer-bryce-blum-team-union/> [https://perma.cc/Y3YZ-CJGZ].

32. Hugh Langley, *Sex, Drugs and Counter-Strike: eSports is fighting its demons*, TECHRADAR (Apr. 1, 2016), <http://www.techradar.com/news/gaming/sex-drugs-and-counter-strike-esports-is-fighting-its-demons-1318109> [https://perma.cc/36TE-E3WD].

33. See Jack Moore, *Will E-Sports Drug Testing Protect Players, or Deflect Blame?*, VICE SPORTS (Aug. 21, 2015), [https://sports.vice.com/en\\_uk/article/will-e-sports-drug-testing-protect-players-or-deflect-blame](https://sports.vice.com/en_uk/article/will-e-sports-drug-testing-protect-players-or-deflect-blame) [https://perma.cc/T4NB-ATX4] (suggesting the ESL polity was a mere public-relations ploy).

from a league would be deprived of a significant portion of his or her livelihood (prize money), as well as a having earned a tarnished reputation.

The developers, the creators of the games, a fourth stakeholder group, have the most power in the eSport ecosystem.<sup>34</sup> Because developers own the intellectual property rights to the games, they have almost total control over the eSports ecosystem due to minimal government regulation in the industry.<sup>35</sup> Riot Games, the developer of League of Legends, has used that power to consolidate a near-monopoly on League of Legends eSports and allows them to subject players to bans even in the few remaining third-party leagues. Similarly, Valve Software has flexed this power by extrapolating an indefinite, title-wide ban to a team that threw a single match in an insignificant, third-party online league.<sup>36</sup>

### B. Values

The value of creating a policy that effectively stops PED use is undoubtedly high, but privacy and fairness for players, and the financial interests of all of the stakeholders, should also be considered.

Commentators have generally agreed that the prohibition of PEDs in sports is philosophically desirable.<sup>37</sup> The hazardous nature of PEDs, including amphetamine-based stimulants like Adderall, puts the players' health at risk.<sup>38</sup> The tolerance of biochemical enhancement would, effectively, make PED required by all players in order to be competitive in sports, which would result in a tragedy of commons where society must bear the costs of increasingly competitive research for biological enhancement when financial and medical resources could be used elsewhere.<sup>39</sup> Leagues, sponsors, and athletes (or players) have a public-relations interest in making

---

34. See Hollist, *supra* note 19, at 835.

35. *Id.* at 835–37.

36. *Id.* at 836; Richard Lewis, *New Evidence Points To Match-Fixing At Highest Level of American Counter-Strike*, THE DAILY DOT (Jan. 16, 2015, 2:03 PM), <http://www.dailydot.com/esports/match-fixing-counter-strike-ibuypower-netcode-guides>.

37. See, e.g., Eoin Carolan, *The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules*, 16 SETON HALL J. SPORTS & ENT. L. 1, 41 (2006); Robyn R. Goldstein, Note, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athlete*, 7 VA. SPORTS & ENT. L.J. 149, 152 (2007); Nikki Dryden, *For Power and Glory: State-Sponsored Doping and Athletes' Human Rights*, 13 SPORTS LAW. J. 1, 5 (2006).

38. See Carolan, *supra* note 37, at 42.

39. *Id.*



games fair because fans do not like cheaters.<sup>40</sup> Finally, the right to fair play is a fundamental concept in sports that PED use undermines.<sup>41</sup> Therefore, the wholesale dismantling of the ESL policy should be a solution of last resort as, generally, any policy that curbs the use of PEDs is at least a small step in the right direction.

On the other hand, the protection of individual privacy rights, derived from both customary and treaty-based international law, should be a major concern of any drug-testing policy.<sup>42</sup> The European concept of privacy is considerably broader than that of the United States. While the U.S. Constitution protects privacy rights solely in terms of “liberty,” European notions of privacy rights focus on general “dignity,” the right to one’s image, name, and reputation.<sup>43</sup> American “liberty” protections are protections against privacy intrusions by the state, while European “dignity” protections safeguard against intrusions by society as a whole.<sup>44</sup> The European Court of Human rights have affirmed this distinction. Justice Thomassen, in a concurring opinion in *Chauvy and Others v. France* (2008), stated that an allegedly defamatory book offended “the concept of private life” such that it “constitutes a direct assault on the integrity and identity of [the plaintiffs] that robs them of their dignity.”<sup>45</sup> A practical effect of European law’s dignity-based approach to privacy rights is the creation of positive obligations under the privacy mandate of the European Convention on Human Rights. Under the Convention, it is not sufficient for governments to merely refrain from infringing on privacy rights, instead, they must affirmatively protect those rights.<sup>46</sup> The procedural mechanisms of positive obligations as well as examples of ESL’s possible problems arising under the doctrine are detailed in section III.

---

40. See Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 MICH. ST. L. REV. 1135, 1148 (describing the tragedy of commons in terms of biological enhancement generally).

41. See Dryden, *supra* note 37, at 7–8 (noting the Olympic Charter’s “right to fair play”).

42. ESL itself has declared that that privacy rights should be a primary concern in crafting anti-PED policy. Whether intentionally or unintentionally, their current policy falls short in serving that end. See *ESL Announcement*, *supra* note 12.

43. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

44. *Id.* at 1161, 1171.

45. *Chauvy and Others v. France*, 2004-VI Eur. Ct. H.R. 207, 233 (Thomassen, J., concurring).

46. Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights*, COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS SERIES, Jan. 2007, at 36, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d> [<https://perma.cc/V8WG-NU7Y>].

Fairness should also be an objective in crafting drug-testing policy.<sup>47</sup> The lack of a coherent appeals process is a primary fairness concern.<sup>48</sup> False positives for the skin-patch test are estimated to occur between 7 and 40 percent of tests.<sup>49</sup> Commentators have therefore suggested the need for recourse for players who are wrongly flagged.<sup>50</sup> Additionally, contingency plans for when a player tests positively must be put in place in order to secure fairness for both the individual player and the competition as a whole.<sup>51</sup> Instances of legitimate prescription use also implicate fairness concerns, for example, many traditional sports institutions allow for a therapeutic use exemption.<sup>52</sup> Finally, the reasoning behind the proposed policies should be logically clarified when necessary. This is particularly important as ESL's policy, being the first of its kind in the eSports space, has the potential to become a model policy for other leagues.<sup>53</sup>

Lastly, there is the financial interest of the players, teams, leagues, and developers. Because each stakeholder is interested in maximizing profit from eSports, this interest will largely be optimized by market forces regardless of the outcome of the PED policy debate. However, in crafting

---

47. Fairness concerns are also identified as a key factor by ESL itself. *See ESL Announcement*, *supra* note 12.

48. Thiemo Bräutigam, *Sports Can't Handle Drug Tests, How Can eSports?*, ESPORTS OBSERVER (Sept. 18 2015), <http://esportsobserver.com/sports-cant-handle-drug-tests-how-can-esports/> [<https://perma.cc/YJR9-CWZY>].

49. *Comments of National Federation of Federal Employees, Drug Policy Alliance, and DKT Liberty Project regarding Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs*, Appendix A, DRUG POLICY Alliance (July 12, 2004), [http://www.drugpolicy.org/docUploads/samhsa\\_dpa\\_dt\\_comments\\_appendixa.pdf](http://www.drugpolicy.org/docUploads/samhsa_dpa_dt_comments_appendixa.pdf) [<https://perma.cc/ZM36-2LYC>] [hereinafter *Patch Test Study*]. ESL is reportedly employing oral fluid tests as well. *See* G League, *Darshan On Getting Randomly Drug Tested At Iem San Jose And Clg's Second Place Finish* (Nov. 28, 2015), <https://www.youtube.com/watch?v=znqshrzflay>. Scientific research for oral fluid tests has not been fully fleshed out, with several studies calling for the need for further research. *See, e.g.*, L. Lo Muzio, et al., *Saliva as a Diagnostic Matrix for Drug Abuse*, 2005 INT. J. IMMUNOPATHOL PHARMACOLOGY 567 (2005). Therefore, many of the criticisms leveled at the inaccurate skin test may also apply to the oral fluid test because that test's accuracy has not been established.

50. Bräutigam, *supra* note 48.

51. *Id.*

52. ESL's policy hand waving on this deeply complex issue is insufficient. *See ESL Policy Details*, *supra* note 13. *See also* INTERNATIONAL CRICKET COUNCIL, *Therapeutic Use Exemption (TUE) Application Process* (2015) [hereinafter *ICC TUE Policy*].

53. For an example that the current ESL policy lacks this necessary clarity in its justification, see Rosenberg, *supra* note 13 (explaining how Rozwandowicz provides a poorly-reasoned rationale underlying the policy's prohibition on recreational marijuana use).

policy, financial efficiency and sustainability will necessarily be considered. Protecting players or prohibiting PEDs is not worth undoing the entire eSports ecosystem, but neglecting players or ignoring PEDs to maximize profits is also undesirable, so a middle ground must be carved out.

### III. POTENTIAL PROBLEMS WITH THE ESL POLICY ARISING UNDER TREATY-BASED EUROPEAN UNION LAW

The European Convention on Human Rights (“the Convention”) protects the broad dignity-based conception of privacy rights. In order to protect those rights, it has crafted the “positive obligations” doctrine to ensure member governments uphold human rights. Several instances of case law applying positive obligations may be applicable to the ESL policy. Additionally, the Council of Europe has passed general data protection directives with resolutions that are even more protective on the horizon.

#### A. *The Mechanics of Positive Obligations Under the European Convention on Human Rights*

Legal instruments employed to protect human rights are often couched in terms of prohibitions imposed on governments on offending a right. For example, the Fourth Amendment to the United States Constitution prohibits only *the government* from carrying out unreasonable searches and seizures, not individuals acting in a private capacity.<sup>54</sup> On the other hand, Article I of the Convention declares, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”<sup>55</sup> The European Court of Human Rights (ECHR) has repeatedly interpreted this article as imposing positive obligations on the part of signatory governments.<sup>56</sup> In *Assanidzé v. Georgia*, the ECHR explained the practical effects of positive obligations stating, “the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their ‘jurisdiction’—or competence—at the time of the violation.”<sup>57</sup> Section 1, Article 8 of the Convention protects “Right to respect for private and family life.”<sup>58</sup> The ECHR has identified numerous positive obligations under Article 8.<sup>59</sup>

---

54. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

55. *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. I., Apr. 11, 1950, C.E.T.S. 005 [hereinafter *Convention*].

56. *See, e.g., Assenov v. Bulgaria*, 28 Eur. Ct. H.R. 652 (1998) (creating positive obligation on the part of member states to uphold the rights of the accused under Articles 3 and 13 of the *Convention*).

57. *Assanidzé v. Georgia*, 2004-II Eur. Ct. H.R. 221.

58. *See Convention*, *supra* note 55, art. 8, § 1.

59. *Akandji-Kombe*, *supra* note 46.

Under the ECHR's positive obligations doctrine, a potential challenge to the ESL policy would look like the following. First, a player or another party with standing, perhaps an organization, would sue ESL in domestic court either in Germany or where the tournament employing the drug testing policy takes place. If the player is unable to get a remedy there, he would then be able to sue the government of that country in the ECHR for not upholding its positive obligation to protect his rights that were violated by ESL.<sup>60</sup> Therefore, although ESL is a private company and there is no right to compete in ESL competitions specifically, whatever barriers to entry ESL chooses to impose on players must still be tempered by signatory governments under the positive obligation doctrine.<sup>61</sup> The Council of Europe's Committee of Ministers under Article 46 of the Convention enforces judgments of the ECHR.<sup>62</sup> Although precedent discussing states' refusals to comply with the ECHR's judgments in positive obligations cases is limited,<sup>63</sup> a Council of Europe report on the issue suggested daily fines of the noncompliant state imposed by the Council of Europe as a possible remedy.<sup>64</sup>

*B. Possible Noncompliance Under the Convention and the Positive Obligation Doctrine*

The ESL policy may violate several positive obligations imposed by the Convention, including the right against extensive inquiry into the medical necessity of a drug, the right to destruction of personal biological data, the right to protection of one's reputation, and the unmitigated privacy rights of public figures.

The procedure for proving the medical necessity of a proscribed substance is one area in which positive obligation doctrine may apply. In detailing the ESL anti-doping policy, Rozwandowicz stated that "if a player has a legitimate prescription for medication" that was prohibited

---

60. Mosley v. United Kingdom, 53 Eur. Ct. H. R. 30 (2011) (illustrating this process).

61. See Chris Higgins, *Drugs are a Problem, But not Just for eSports' Integrity and Image*, SIFTD (Aug. 19 2015, 3:14 PM), <http://siftd.net/#!/content/9580/drugs-are-a-problem-but-not-just-for-esports-integrity-and-image> [https://perma.cc/4KT7-AF4K].

62. Convention, *supra* note 55, art. 46.

63. ELISABETH LAMBERT-ABDELGAWAD, THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS 43 (Council of Europe Publishing 2002), available at [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2002\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2002).pdf) [https://perma.cc/GW7W-Q97Q].

64. *Id.* at 46-47.

by the policy, “that player will be required to provide proof (a letter from a physician, for example) that they need this specific medication.”<sup>65</sup> Rozwandowicz and ESL did not elaborate further on ESL’s policy for validating “proof” of legitimate medical need.

In crafting that policy, ESL should take heed of the ECHR’s ruling in *Van Kuck v. Germany* (2003).<sup>66</sup> In *Van Kuck*, the plaintiff was a transsexual who sought gender reassignment surgery from her private medical insurance provider, but was denied coverage for the treatment.<sup>67</sup> In the domestic proceedings, the plaintiff provided the insurance company with a letter from her psychotherapist certifying that she was a male-to-female transsexual.<sup>68</sup> The Court, disputing the “medical necessity” of the treatment, brought in its own doctor, who testified that further psychotherapy sessions would be sufficient treatment.<sup>69</sup> The domestic courts ruled in favor of the insurance company.<sup>70</sup> The plaintiff sought recourse in the EHCR.<sup>71</sup>

The EHCR ruled that Germany had violated its positive obligation under Article 8 of the Convention.<sup>72</sup> The court noted the right to private life under Article 8 “covers the physical and psychological integrity of a person,” and emphasized “the particular importance of matters relating to a most intimate part of an individual’s life.”<sup>73</sup> The court concluded that “the burden placed on a person in such a situation to prove the medical necessity of treatment . . . appears disproportionate.”<sup>74</sup>

Like the insurance company in *Van Kuck*, if ESL continues to allow the use of legitimately prescribed substances, it cannot subject players to an extensive inquiry as to their legitimate medical needs.<sup>75</sup> The potential existence of mental-health disorders such as ADHD, for which a player might be prescribed Adderall,<sup>76</sup> or disabling diseases such as epilepsy, for which a player might be prescribed medical Marijuana,<sup>77</sup> plausibly fall into the realm “physical and psychological integrity of a person,” and “matters

---

65. *ESL Policy Details*, *supra* note 13.

66. *See* *Van Kuck v. Germany*, 2003-VII Eur. Ct. H.R. 3.

67. *Id.* at 8.

68. *Id.*

69. *Id.* at 9–10.

70. *Id.* at 10, 12.

71. *Id.* at 7.

72. *Id.* at 24–25.

73. *Id.* at 22–23.

74. *Id.* at 25.

75. *Id.*

76. *See* *Adult attention-deficit/hyperactivity disorder (ADHD)*, MAYO CLINIC (Mar. 31, 2016), <http://www.mayoclinic.org/diseases-conditions/adult-adhd/basics/treatment/con-20034552> [https://perma.cc/9CKM-CY2S].

77. Koppel et al., *Systematic Review: Efficacy and Safety of Medical Marijuana in Selected Neurologic Disorders*, 82 *NEUROLOGY* 1556, 1560–61 (2014).

relating to a most intimate part of an individual's life."<sup>78</sup> Like the gender dysphoria experienced by the plaintiff in *Van Kuck*, medical conditions such as ADHD or epilepsy ostensibly affect almost every facet of an individual's life, and thus an extensive inquiry into those details is likely to violate Article 8 of the Convention.

Therefore, in crafting its policy for verifying legitimately prescribed use, ESL should be cautious in drafting the inquiry procedure. The *Van Kuck* court somewhat considered the interests of the insurance company, although it ultimately concluded the company's interests were outweighed by the privacy concerns of the plaintiff.<sup>79</sup> This suggests that ESL's policy should only involve a significant medical inquiry in cases where its interests are heavily favored, such as cases in which there is a reasonable suspicion of fraud. Certainly, ESL's policy should not place the burden of proving medical necessity on the player, as the *Van Kuck* court declared that was explicitly a violation of the state's positive obligation.<sup>80</sup>

ESL has also not created a procedure for the destruction of drug-test samples taken from players.<sup>81</sup> This may be an infringement of Article 8 rights.<sup>82</sup> In *S. and Marper*, the plaintiffs were arrested and charged with various crimes.<sup>83</sup> In accordance with UK statute, the authorities obtained biological samples from both plaintiffs, from which it constructed DNA profiles that were contained in a database.<sup>84</sup> One plaintiff was acquitted and the charges against the other were dropped.<sup>85</sup> The plaintiffs petitioned the government for the destruction of cellular samples and DNA profiles and the government refused; the domestic courts sided with the government and the plaintiffs sought recourse in the ECHR.<sup>86</sup>

The ECHR concluded that retaining cellular samples and DNA profiles violated Article 8.<sup>87</sup> The court ruled cellular samples and DNA profiles contain "sensitive personal data," such as ethnic origins and family genealogies, and therefore receive a "heightened sense of protection" under Article 8.<sup>88</sup>

- 
78. See *Van Kuck v. Germany*, 2003-VII Eur. Ct. H.R. 3, 22–23.  
79. *Id.* at 25.  
80. *Id.*  
81. *ESL Policy Details*, *supra* note 13.  
82. *S. and Marper v. United Kingdom*, 2008-V Eur. Ct. H.R. 169.  
83. *Id.* at 175.  
84. *Id.*  
85. *Id.*  
86. *Id.* at 175–79.  
87. *Id.* at 209.  
88. *Id.* at 195–96.

ESL's lack of protocol for the destruction of drug-test data may constitute a violation of Article 8 under *S. and Marper*. The skin-test method that ESL has selected, while admittedly an un-intrusive one, still can result in the collection of DNA because the sweat that carries trace indicators of the prohibited substances to the patch also can carry skin cells, which are human tissue from which a DNA profile may be gathered.<sup>89</sup> Therefore, the heightened sense of protection afforded to the DNA profiles in *S. and Marper* should also be afforded to the drug-test samples taken by ESL.<sup>90</sup>

The data collectors in *S. and Marper* were the police, so the exact holding of that case is not binding on ESL.<sup>91</sup> However, the ECHR's reasoning suggests that the court meant to, or would be willing to, extend this protection to data collection carried out by private entities. First, in outlining the remedy for the plaintiffs pursuant to Article 46, the court employed the standard procedure for remedying a positive obligation violation<sup>92</sup> and employed language suggesting the imposition of a positive obligation stating, "[I]t will be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to *fulfil its obligations* to secure the right of the applicants and other persons in their position to respect for their private life."<sup>93</sup>

Additionally, the court based, in part, its argument on the obligations of "data controllers" under the 1995 Data Protection Directive ("the Directive").<sup>94</sup> As defined by the Directive, "Controller" means a natural or legal person, public authority, agency or any other body that alone, or jointly with others, determines the purposes and means of the processing of "personal data."<sup>95</sup> Under this definition, the Directive imposes data protections on private persons' and entities' retention of personal data.<sup>96</sup> The Directive has notably been relevant in the anti-doping context for traditional sports as the advisory committee to the Council of Europe on data protection and privacy, created by the Directive itself, noted WADA as a potential source of difficulty in the international data protection context.<sup>97</sup>

---

89. See C. Claiborne Ray, *The Telltale Part*, N.Y. TIMES (Nov. 1, 2010), [http://www.nytimes.com/2010/11/02/science/02qna.html?\\_r=0](http://www.nytimes.com/2010/11/02/science/02qna.html?_r=0) [<https://perma.cc/B6PB-YQQR>].

90. See *S. and Marper*, *supra* note 82, at 196.

91. See *id.* at 175.

92. Akandji-Kombe, *supra* note 46, at 58–59.

93. See *S. and Marper*, *supra* note 82, at 210 (emphasis added).

94. *Id.* at 180–81.

95. Council Directive 95/46/EC, art. 2, 1995 O.J. (L 281) 31 (EU) [hereinafter Directive].

96. *Opinion 1/2010 on the concepts of "controller" and "processor,"* at 10, Article 29 Data Protection Working Party (Feb. 16, 2010), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf) [<https://perma.cc/HGT2-N3GQ>].

97. *Id.* at 6–7.

In *S. and Marper*, the court drew an explicit link to the data protections in the Directive and the privacy rights guaranteed by Article 8 of the convention.<sup>98</sup> By incorporating the Directive into its opinion, including the Directive's term "data controller," the court arguably endorsed the Directive's view that data safeguards could be applied to private entities in binding opinion on the signatory states of the European Convention of Human rights. Therefore, ESL should be wary of processing data without a definite procedure for the destruction of sensitive biological data that is protected by Article 8 and the Directive.

The ECHR has established a "right to one's reputation" under Article 8, under which signatories may choose to protect that right even in the face of freedom of expression concerns.<sup>99</sup> In *Chauvy*, a pair of French authors and their publisher sought to show a violation of Article 10 of the Convention by a French domestic court's ruling that their historical exposé was defamatory.<sup>100</sup> The Court ruled that the French government fulfilled its obligation under Article 8 to uphold the right to protect one's reputation.<sup>101</sup> In particular, the court relied on the domestic court's finding that insufficient historical rigor was employed in determining the veracity of the allegedly defamatory statements, while not reaching a conclusion on the truthfulness of the statements themselves.<sup>102</sup> Thus, the privacy rights were protected over the right to freedom of expression.<sup>103</sup>

If merely "suspect" methods in ascertaining the veracity of potentially defamatory public statements is enough to implicate right-to-reputation concerns, then ESL should tread carefully in airing the details of any investigations into PED violations without first subjecting the findings to sufficient scientific rigor.<sup>104</sup> The false positive rate of the non-intrusive skin test to be employed at ESL competitions has been estimated by a peer-reviewed study to be as high as 40%.<sup>105</sup> That degree of uncertainty of the drug tests is comparable to the degree of uncertainty of veracity of statements made without sufficient historical rigor.<sup>106</sup>

---

98. *S. and Marper*, *supra* note 82, at 180–81.

99. *See generally Chauvy*, *supra* note 45, at 207–32.

100. *Id.* at 212–16, 220.

101. *Id.* at 229–32.

102. *Id.* at 231.

103. *Id.*

104. *See id.*

105. *Patch Test Study*, *supra* note 49.

106. *See Chauvy*, *supra* note 45, at 231.



In order to avoid liability from France's and other countries' analogous defamation policies, ESL should include a more rigorous investigative method for potential violations while maintaining confidentiality during the investigation. Traditional sports in Europe and globally have crafted much safer policies regarding investigation and disclosure that could be employed.<sup>107</sup> Failure to protect players' confidential data in a manner that is potentially tortious could lead to further claims against ESL under an intentional interference with contract theory, because player contracts, in both the eSports and traditional sports contexts, often contain "morals clauses" that allow a team or league to discharge its contractual obligations if a player violates the clause's prescribed code of conduct.<sup>108</sup>

The Convention maintains a high level of privacy interest protection even in cases concerning public figures, who might have a lesser expectation of privacy in other jurisdictions; however, the Court will weigh the interest of freedom of expression and of the interest of the public in obtaining the confidential information.<sup>109</sup> In *Von Hannover*, the ECHR considered the Princess of Monaco's complaint that German courts did not uphold its positive obligation under Article 8 when it failed to enjoin tabloids to stop printing paparazzi photos of her and her family.<sup>110</sup> The court held that Germany failed to fulfil its positive obligation.<sup>111</sup> The court rejected the argument that, as a public figure, the Princess should receive a lower standard of privacy protection, suggesting that popular eSports competitors would still be entitled to broad privacy protections.<sup>112</sup> On the other hand, part of the court's analysis rested on the fact that the content of the photos contained no information relevant to the public interest or public debate—that factor would probably cut against an alleged violating eSports player because players make their living entertaining the public.<sup>113</sup>

---

107. See The International Cricket Council Anti-Doping Code (Int'l Cricket Council 2016).

108. William H. Baaki, "Morals Clauses" in *Sports Contracts—More Important Now Than Ever Before?*, SPORTS LAW INSIDER (Sept. 16, 2014), <http://sportslawinsider.com/morals-clauses-in-sports-contracts-more-important-now-than-ever-before/> [https://perma.cc/GK5C-MPYR]; Richard Lewis, *How fair is an LCS contract? We asked a Lawyer*, THE DAILY DOT (Sept. 22, 2014, 5:51 AM), <http://www.dailydot.com/esports/lcs-contract-analysis-league-of-legends-riot-games/> (The "Summoner's Code" referenced therein is a set of rules that players agree to abide by that contains prescriptive moral commands, violations of which can result in suspension from tournament games. *The Summoner's Code*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/summoners-code/> [https://perma.cc/LC3E-Q82G] (last visited Jan. 26, 2017).).

109. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41.

110. *Id.* at 48–59.

111. *Id.* at 67–69, 72–73.

112. See *id.* at 69–72.

113. See *id.*

The court also remarked, in dicta, that personal information relating solely to the private life of a hypothetical politician would still be protected, suggesting that even private conduct that some might consider relevant to the politician's character, but nonetheless solely related to private life, would be protected.<sup>114</sup> By the same token, it is possible that that argument could be applied to the disclosure of non-performance enhancing drugs violations (i.e. violations for purely recreational uses of drugs like alcohol or marijuana) that are prohibited by anti-doping regimens, including the list copied from WADA by ESL, because athletes are role models to children. Both sides in *Von Hannover* agreed that private activities inside the home were protected under Article 8, and partaking in purely recreational, non-performance-enhancing drugs inside the home would seem to fall into that protected category.<sup>115</sup>

### C. Other Potential Problems Arising Under Treaty-Based Law

Other European treaties and European Community legislation—binding to various degrees on EU members states—contain privacy protections. In particular, ESL's policy potentially conflicts with the 1995 EU Data Protection Directive and the proposed General Data Protection Regulation currently being considered by the European Commission.

#### 1. The 1995 Data Protection Directive

In 1995, the European Parliament and Council passed Council Directive 95/46/EC, a Directive regarding the processing of personal data.<sup>116</sup> A “directive” is a legislative instrument employed by the European Union that specifies a goal that all member states must achieve, but does not specify exactly how those member states must do so.<sup>117</sup> As a result of this framework, each member state has specific legislation purporting to implement Council Directive 95/46/EC.<sup>118</sup> Of course, ESL should be wary

---

114. *Id.* at 71–72; *see also id.* at 75–77 (Barreto, J., concurring).

115. *See id.* at 51–57.

116. Directive, *supra* note 95, preamble.

117. *Regulations, Directives and Other Acts*, EUROPA.EU, [http://europa.eu/eu-law/decision-making/legal-acts/index\\_en.htm](http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm) [<https://perma.cc/UXB2-XJQB>] (last visited Jan. 13, 2017).

118. That legislation is collected on the European Commission's website. *Status of Implementation of Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data*, EUROPA.EU, [http://ec.europa.eu/justice/data-protection/law/status-implementation/index\\_en.htm](http://ec.europa.eu/justice/data-protection/law/status-implementation/index_en.htm) [<https://perma.cc/G8Z3-2264>] (last updated Nov. 24, 2016).

of specific domestic legislation in any nation in which it plans to collect and process personal data via PED testing, but there are several reasons to suggest ESL and/or players subject to PED testing should also consider the text of the Directive itself.

First, (as discussed in Section III.B above) there is reason to believe the ECHR has incorporated the Directive into its European Convention on Human Rights jurisprudence based on the court's analysis in *S. and Marper*.<sup>119</sup> Second, there is a dearth of case law challenging domestic implementation of the Directive in the significant time since its codification, suggesting that member states' legislation reasonably tracks the required goals. These two reasons support ESL could be exposed to liability under the plain text of the Directive alone.

A third reason to consider the text of the Directive itself is the European Court of Justice's "doctrine of direct effect," which creates for individuals a cause of action in that Court for the failure of a member state to transpose a directive into national legislation when the directive facially mandates the protection of individual rights unconditionally and precisely.<sup>120</sup>

For example, in *Francovich*, the plaintiff, an employee whose wages were slashed due to his employer's insolvency, argued that Italy failed to sufficiently transpose Directive 80/987, which provided for member state assistance for employees of insolvent employers, and sought recovery on the basis of the Directive itself.<sup>121</sup> The court held that a provision of a directive (rather than state legislation or the absence thereof) may be relied upon when the "subject-matter" of "the rights which individuals are able to assert against the state" are "unconditional and sufficiently precise."<sup>122</sup> The court concluded that the rights asserted by the plaintiff were unconditional and sufficiently precise, and therefore he could recover.<sup>123</sup>

Although some aspects of the directive in *Francovich* are admittedly more concrete (e.g., dates of employment and insolvency) than the privacy safeguards contained in the Data Protection Directive (e.g., the seemingly malleable "data quality" requirement), other aspects of the *Francovich* directive seem quite imprecise in spite of the court's holding.<sup>124</sup> For example, the court ruled that the directive imposed a "minimum guarantee" of assistance based on purposivist analysis, despite that phrase or—even that idea—being

---

This paper does not attempt to exhaustively analyze instances of domestic legislation, for reasons explained throughout this section.

119. See *S. and Marper*, *supra* note 82; Directive, *supra* note 95, preamble; *Working Party Opinion 1/2010 on the Concepts of "Controller" and "Processor"*, *supra* note 96.

120. Joined Cases C-6/90 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357.

121. See *id.* ¶¶ 1–10.

122. *Id.* ¶ 11.

123. See *id.* ¶ 22.

124. See *id.*; Council Directive 80/987/EEC 1980 O.J. (L 283) 23.

contained in the directive itself. In addition, the court was also unconcerned with the insolvency directive's failure to legally define "employee," and found that it was sufficient to leave that question to domestic courts.<sup>125</sup> This analysis suggests the "unconditional and sufficiently precise" test is a lenient one.<sup>126</sup>

Therefore, ESL should strongly consider the Data Protection Directive's requirements themselves, particularly the transparency requirements, requirement of reporting to a supervisory authority, requirements for data quality, and requirements of explicit guidelines for data processing.

The transparency requirements in Article 10 and 12 of the Directive pose problems for the current ESL policy.<sup>127</sup> Article 10 requires a data controller to provide a data subject with the identity of the collector and his or her representative, as well as the recipients or category of recipients of the data.<sup>128</sup> This information must be provided no later than at the time of collection.<sup>129</sup> Article 12 requires that a data subject have the right to obtain access to the collected data and information regarding that data's processing from the data controller.<sup>130</sup> All of this information is ostensibly useful to have prior to embarking upon possible litigation or arbitration that arises out of the collected data.

Article 10 also poses a problem for ESL in the context of individual-league infractions being expanded to multi-league or title-wide punishments imposed by other leagues or developers.<sup>131</sup> If ESL fails to specify beforehand that the information collected will not be sent to other leagues or developers, then providing the information itself—the smoking gun in the case of a PED violation—would violate the Directive.<sup>132</sup> Alternatively, if ESL chooses not to disclose at all, then other leagues or the developers wishing to expand punishment to players violating ESL's policy would have to do so merely on the basis ESL's word, rather than their own investigation of the data.<sup>133</sup> Although this may be legally permissible (leagues can chose to contract

---

125. See *Francovich*, *supra* note 120, ¶ 18.

126. *Id.* ¶ 20.

127. See Directive, *supra* note 95, art. 10, 12.

128. *Id.*

129. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 97, (Publications Office of the European Union 2014), [http://www.echr.coe.int/Documents/Handbook\\_data\\_protection\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf) [<https://perma.cc/2TZR-WV7J>] [hereinafter *Handbook*].

130. Directive, *supra* note 95, art. 12.

131. *E.g.*, the situation proposed by Richard Lewis, *supra* note 36.

132. See Directive, *supra* note 95, art. 10.

133. See *id.*

or not contract with whomever they want),<sup>134</sup> if the public were to find out that punishments were extended to players on hearsay alone the backlash against leagues and developers would probably be considerable.

ESL should also consider the Article 18 requirements regarding the reporting to a supervisory authority.<sup>135</sup> Article 18 mandates that a data controller must notify the supervisory body set up by the member state in which it plans to collect personal data.<sup>136</sup> Article 19 specifies what must be communicated to the supervisory authority.<sup>137</sup> Of particular note is Article 19(1)(f), which states that the measures taken to collect the data must be disclosed and that information must in turn be publicized by the supervisory authority pursuant to Article 21(1).<sup>138</sup> Because the data-collection process must be publicized, ESL must consider public-relations as well as legal consequences in choosing its PED policy.<sup>139</sup> The ESL policy itself suggests no cooperation with local authorities beyond those in Germany (i.e. NADA, although NADA itself does not seem to be in compliance due to its failure to disclose any details of the policy, beyond those which were announced by ESL to the general public). If ESL wishes to continue to hold tournaments in other EU member state jurisdictions, and therefore collect personal data for PED testing there, it should be wary of this requirement.

The requirements contained in Article 6 of the Directive provide broad protections for ensuring data quality, again implicating accuracy and use concerns similar to those raised in *Chauvy* and *S. and Marper*. The provision requires personal data must be “processed fairly and lawfully,” “collected for the explicit and legitimate purposes and not further processed in a way incompatible with those purposes,” “adequate, relevant and not excessive in relation to the purposes for which they are collected,” “accurate,” and “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.”<sup>140</sup> Article 6(2) provides that the data controller itself (rather than a supervisory authority) ensures compliance

---

134. See Higgins, *supra* note 61 (noting “there is no right to compete” in a given eSports event).

135. See Directive, *supra* note 95, arts. 18–21.

136. See *id.* art. 18.

137. See *id.* art. 19.

138. See *id.* art. 21.

139. See *id.* Generally, this paper assumes that the details of the policy will reach the public one way or another and thus implicate PR concerns; this is merely one way it is likely to happen. Traditional sports institutions’ full transparency of all PED-related processes, detailed in Section IV of this paper, seems to be the correct choice for this reason.

140. See *id.* art. 6.

with these requirements, so ESL, rather than a member-state government, would be accountable for any violation of this Article.<sup>141</sup>

Article 16 of the Directive requires that any individual processor of personal data must not process except on the explicit instruction of the data controller.<sup>142</sup> “Process,” under the Directive, includes the use or disclosure of personal data, so this Article protects confidentiality even after the data has been “processed” in terms of testing alone.<sup>143</sup> As detailed in Section IV, PED policies in traditional sports extensively lay out the procedures and rules to be followed by individual data processors. ESL should follow that practice or risk running afoul of Article 16.

## 2. *The Proposed General Data Protection Regulation*

The European Commission began the process of a comprehensive update of the 1995 Directive with the proposal of the General Data Protection Regulation (“the Regulation”).<sup>144</sup> The Regulation will repeal the former Directive framework,<sup>145</sup> but there is a strong degree of continuity between the two regulatory frameworks such that the basic concepts and principles from the Directive will continue to exist, subject to some minor tweaks.<sup>146</sup> However, the Regulation does incorporate some further protections not contained in the current Directive that will potentially impact PED policy. The final text of the Regulation was submitted to the European Parliament and Council in December 2015, pending formal approval.<sup>147</sup> Commentators have already begun urging data processors to plan for compliance.<sup>148</sup> It is

---

141. *Id.*; *Handbook*, *supra* note 129, at 75–76.

142. Directive, *supra* note 95, art. 16.

143. *See id.* art. 7.

144. *Reform of EU Data Protection Rules*, EUROPEAN COMMISSION, [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm) [<https://perma.cc/7NTY-F87P>].

145. *Commission Proposal For A Regulation Of The European Parliament And Of The Council On The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data*, §134, COM (2012) final (Dec. 15 2015) [hereinafter *Regulation*].

146. Peter Hustinx, *EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation*, at 28, [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15\\_Article\\_EUI\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EUI_EN.pdf) [<https://perma.cc/9UL2-CMKA>].

147. *See id.*

148. Ben Rossi, *New EU Data Law’s Go-Live Date Finally Revealed—And Why Its Costs Will Run Into The Billions*, INFORMATION AGE (Aug. 12 2015), <http://www.information-age.com/technology/information-management/123459991/new-eu-data-laws-go-live->

therefore highly relevant for ESL to consider the new individual protections mandated by the Regulation.

As a regulation, rather than a directive, this proposed legislation has significantly different legal ramifications for ESL. A regulation is binding for all EU member states: there is no latitude for member states to choose their own implementation methods.<sup>149</sup> For data controllers, this means there is no longer a need to satisfy doctrine-of-direct-effect analysis: the Regulation's requirements must be facially met at the time the Regulation is implemented.<sup>150</sup>

Implementation of the Regulation will bring three important changes that would affect the ESL policy: the codification of the right to be forgotten, the mandate for freezing of data processing, and the increased protection for the privacy of children.

The emergent "right to be forgotten" that has recently gained traction in European privacy case law,<sup>151</sup> is codified in Article 17 of the Regulation.<sup>152</sup> Article 17 requires the erasure of personal data under two sets of circumstances. First, when the data subject no longer wishes the data to be processed,<sup>153</sup> and, second, when the processing of the data does not comply with the Regulation generally.<sup>154</sup> However, the erasure of data is not required when the personal data is necessary for exercising the right of freedom of expression, or necessary for reasons of public interest in the area of public health.<sup>155</sup> The erasure of personal data required for purposes of accuracy or proof is also not required, but the processor of that data instead must restrict processing only for those purposes or for the protection of the rights of another, for an objective in the public interest, or for compliance with a legal obligation to a Member State or to the Union.<sup>156</sup>

These requirements and exceptions play out in various scenarios in the PED context.<sup>157</sup> A player found to violate the anti-doping policy most likely could not force a data controller to erase the evidence of his or her violation

---

date-finally-revealed-and-why-its-costs-will-run-billions#sthash.SDzqnEtS.dpuf [https://perma.cc/G7EA-MHL4].

149. *Regulations, Directives and Other Acts*, [https://europa.eu/european-union/eu-law/legal-acts\\_en](https://europa.eu/european-union/eu-law/legal-acts_en) [https://perma.cc/RS8S-HLPC].

150. *See Francovich*, *supra* note 120.

151. *See e.g.*, Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (2014) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [https://perma.cc/73HN-6NHY] (announcing a right to be forgotten in limited circumstances under the Directive's framework, and the adoption of the Regulation will greatly expand those circumstances).

152. *Regulation*, *supra* note 145, art. 17.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Again, almost all of these scenarios are accounted for already in various traditional sports PED testing regimes. *See discussion infra* Section IV.

because that would substantially weigh against freedom of expression and public health interests. The public has a strong interest in both the knowledge of a PED violation and the non-proliferation of PED usage for health reasons.<sup>158</sup> In cases where a player requests erasure prior to a violation, these arguments become much weaker, because there is, at that point, no reason to believe PED usage has occurred other than the fact of the erasure request itself.<sup>159</sup> Aside from theoretically needing to comply with that procedure under the Regulation, this requirement could become relevant in practice in a situation where support staff provide a player with a performance-enhancing substance unbeknownst to the player himself, and the player later realizes what has happened and develops a guilty conscience.

A second new requirement is the mandate for freezing the processing of data, subject to accuracy or validity questions. This requirement is a standard in traditional sports, and serves to protect player reputation during an ongoing PED investigation (“processing” still includes the use or disclosure by transmission of the personal information, as it did under the Directive). Likewise, the requirement to freeze data processing for compliance with a legal obligation of a Member State or Union suggests that players’ data would also be protected in the event of a legal challenge to the collection policy even post-investigation (although, as discussed in Section III.B above, other stakeholders could still act on the data collector’s word alone, but doing so could cause public relations backlash).<sup>160</sup>

The requirement for portability of data is another area of significantly increased privacy protection.<sup>161</sup> Article 18 of the Regulation requires that, when personal data are processed electronically and structured in a commonly-used format, a copy of the data is to be provided to the data subject.<sup>162</sup> Although the biological samples themselves do not fall under this category, printable or electronic test results of those samples seemingly do.<sup>163</sup> This requirement puts even more information that would ordinarily be controlled by the data processor into the hands of the data subject in advance of any dispute, thereby allowing the data subject to begin soliciting his or her own experts’ analyses of the data very early on in a dispute.<sup>164</sup>

---

158. See *Regulation*, *supra* note 145, art. 17(3); see discussion *supra* Section II.

159. See *Regulation*, *supra* note 145, arts. 17(3), 53(2).

160. *Id.* arts. 17(1), 17(3), 17(4).

161. *Id.* art. 18.

162. *Id.* art. 18(1).

163. See *id.* art. 18; see also *id.* pmb. (26).

164. See *id.* art. 18.



A third change, contained in Article 8 of the Regulation, is also notable. Article 8 provides that the processing of personal data of a child below the age of 13 shall be lawful only if the data controller obtains consent from the child's parent or custodian, which declares a heightened privacy interest for children.<sup>165</sup> This protection and other protections for the processing of the data of minors are standard in traditional sports PED testing<sup>166</sup> and should be implemented in any eSports PED policy.<sup>167</sup>

#### IV. CUSTOMARY TRADITIONAL SPORTS ANTI-DOPING PRACTICES AND POLICY CONSIDERATIONS

Traditional sports organizations have regulated the use of performance-enhancing drugs on an international level for nearly 100 years.<sup>168</sup> Although these practices probably do not rise to the level of customary international law, as the organizations tend to be self-regulating within existing national legal frameworks, not regulated directly by state practice; however, ESL would still be taking a risk to completely disregard traditional sports procedure.

The anti-doping manuals of modern sports organizations are exhaustive in nature. For example, the Fédération Internationale de Football Association ("FIFA") anti-doping manual consists of over 70 pages of text.<sup>169</sup> Not coincidentally, many of the procedures contained within the anti-doping manuals track closely with legal requirements for the protection of players' privacy rights.<sup>170</sup> In addition to addressing compliance with privacy rules, these practices also address varying policy benefits and drawbacks relevant to ESL.

##### A. Dispute Resolution Procedures

Commentators have criticized ESL's dispute resolution process at length.<sup>171</sup> In particular, ESL has failed to outline a detailed process for investigating

---

165. See *id.* art. 8.

166. See *infra* Section IV.C.

167. A significant number of players begin their careers as minors. See *supra* Section II.A.

168. *A Piece Of Anti-Doping History: IAAF Handbook 1927-1928*, INT'L ASS'N OF ATHLETICS FED'NS (May 15, 2006), <http://www.iaaf.org/news/news/a-piece-of-anti-doping-history-iaaf-handbook> [https://perma.cc/4UN7-KCPG].

169. FIFA ANTI-DOPING REGS. (2014), [http://www.fifa.com/mm/document/affederation/administration/02/49/28/61/circularno.1458-fifaanti-dopingregulations\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/administration/02/49/28/61/circularno.1458-fifaanti-dopingregulations_neutral.pdf) [https://perma.cc/WE8Z-4KE3] [hereinafter FIFA CODE].

170. *The Story of Anti-Doping*, UNITED KINGDOM ANTI-DOPING, <http://www.ukad.org.uk/new-to-anti-doping/story-of-anti-doping/> [https://perma.cc/7XN3-SDAZ] (last visited Jan. 30, 2016).

171. See Bräutigam, *supra* note 48.

or appealing violations.<sup>172</sup> Informal reports of dialogue between players and ESL suggests that ESL may internally have plans for handling these situations, but, in the absence of a contractual agreement to the contrary, disputes will have to be resolved through litigation.<sup>173</sup>

Contractual agreements for arbitration are common in traditional sports anti-doping disputes.<sup>174</sup> The International Olympic Committee (“IOC”) contracts with all competitors to resolve anti-doping disputes in the Court of Arbitration for Sport (“CAS”).<sup>175</sup> As a result, the CAS has developed an expertise in handling these types of cases such that it may be the ideal dispute resolution forum.<sup>176</sup> On the other hand, the CAS purports to take up only cases involving “sports,” and may not be willing to consider a case involving competitive video games.<sup>177</sup>

Dispute resolution practices must also address the procedural safeguards for accused players. One such safeguard is an increased burden of proof imposed on anti-doping authorities. The WADA Code specifies that the burden of proving a violation shall be based on the relevant governing body, and that burden must be overcome by more than a mere balance of probability, but less than beyond a reasonable doubt.<sup>178</sup> The International Cricket Council (the “ICC”),<sup>179</sup> English Football Association (the “FA”),<sup>180</sup> and FIFA<sup>181</sup> have adopted this provision in their respective anti-doping codes wholesale, and American Major League Baseball (the “MLB”) has opted for similar “clear and convincing evidence” standard in its code.<sup>182</sup> Commentators

172. *Id.*

173. Complex international civil procedure questions would undoubtedly be raised in such litigation. *See* FISHER, *supra* note 27, at 1–2.

174. AM. ARBITRATION ASS’N, SPORTS ARBITRATION INCLUDING OLYMPIC ATHLETE DISPUTES 1, 4–5 (2006), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004199](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004199) [<https://perma.cc/KH79-6XH7>].

175. INT’L OLYMPIC COMM., OLYMPIC CHARTER 83 (2015).

176. *See Court of Arbitration for Sport*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/court-of-arbitration-for-sport> [<https://perma.cc/59CS-KBXQ>] (last visited Jan. 25, 2017).

177. *See id.*

178. WORLD ANTI-DOPING CODE, art. 3.1, WORLD ANTI-DOPING AGENCY (2009) [hereinafter WADA CODE].

179. THE INTERNATIONAL CRICKET COUNCIL ANTI-DOPING CODE, art. 3.1 (2016) [hereinafter ICC CODE].

180. THE FOOTBALL ASSOCIATION ANTI-DOPING PROGRAMME, art. 20 (2014) [hereinafter FA CODE].

181. FIFA CODE, *supra* note 169, art. 66.

182. MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, art. 7(k)(3) (2015) [hereinafter MLB CODE].

have praised the move towards more difficult burdens of proof, as previous Codes afforded too great a margin of error for accusing parties, especially when considering the inaccuracy of testing methods.<sup>183</sup> Selecting a more stringent burden of proof would also alleviate accuracy-of-methods concerns such as those raised by *Chauvy*.<sup>184</sup>

A second potential procedural safeguard is an enumerated right to a fair hearing. Article 8 of the WADA proposes the right to a fair hearing, including timely consideration by an impartial panel with the opportunity for legal representation for the accused, where the rights of all parties are impartially defined at the outset of the investigation.<sup>185</sup> Various international sports leagues have incorporated this right, in some cases even expanding it.<sup>186</sup> This right protects traditional due process rights for players, but also provides efficiency for leagues, as seemingly-illegitimate investigations are much more likely to be disputed (and at greater length) in other forums that are more costly.

### *B. Additional Protections for the Rights of Minors*

International sporting organizations have customarily protected the rights of minors, including privacy rights, to a greater degree with regard to anti-doping procedures. The IOC's anti-doping code allows minors to have a representative present before the collection of specimens, and allows organizers to make special accommodations for minors.<sup>187</sup> The WADA English FA codes allow for special burden-shifting mechanisms when a minor tests positive for a proscribed substance, but offers an affirmative defense, like second-hand smoke inhalation, or being unknowingly dosed by support staff.<sup>188</sup> In cases of support staff providing the substance to a minor, the FA code further allows for more severe punishment of the support staff.<sup>189</sup> The ICC code allows for more stringent disclosure requirements in cases involving minors, even allowing the neutral investigating panel discretion to maintain the anonymity of a confirmed-offender minor.<sup>190</sup> Implementing these kinds of protections for the rights of minors into the ESL code would not only put the ESL code in harmony with traditional

---

183. MIKE MCNAMEE & VERNER MØLLER, *DOPING AND ANTI-DOPING POLICY IN SPORT: ETHICAL, LEGAL AND SOCIAL PERSPECTIVES* 3–4 (Routledge 2011).

184. *Supra* Section III.B.

185. WADA CODE, *supra* note 178, art. 8.

186. *See* ICC CODE, *supra* note 179, art. 8 (requiring, *inter alia*, neutral panel to be independent from the league, and include at least one lawyer).

187. THE INTERNATIONAL OLYMPIC COMMITTEE ANTI-DOPING RULES APPLICABLE TO THE XXII OLYMPIC WINTER GAMES IN SOCHI, annex C (2014) [hereinafter IOC CODE].

188. WADA CODE, *supra* note 178, art. 7.3.

189. FA CODE, *supra* note 180, at 242.

190. ICC CODE, *supra* note 179, art. 14.

sports customs, but would also alleviate concerns under Article 8 of the proposed Regulation.<sup>191</sup>

### C. Security of Data

Traditional sports anti-doping regimes strongly emphasize the security of data collected from athletes. The ICC,<sup>192</sup> the IOC,<sup>193</sup> and FIFA<sup>194</sup> codes mandate that samples must be securely stored and processed by third party labs. The FIFA code allows players to observe the procedures in order to verify accuracy.<sup>195</sup> The IOC code requires a chain-of-custody style documentation process to ensure that integrity and identity of the sample.<sup>196</sup> Various organizations appoint Doping Control Officers (“DCOs”) in order to oversee all aspects of the anti-doping process for each individual player.<sup>197</sup> Sports organizations also commonly require that samples remain under lock and key whenever the sample is not being actively processed.<sup>198</sup> These kinds of measures would help satisfy the data integrity and quality requirements under Article 6 of the Directive.<sup>199</sup>

### D. Procedures for Disclosure of Sensitive Medical Data by Players to Leagues

The current ESL policy requires players to provide sensitive medical data up front to the league in order to claim legitimately-prescribed use.<sup>200</sup> FIFA takes a different approach, allowing players to confidentially submit their medical information to an independent third party—the data is then accessed only in the case of a violation.<sup>201</sup> On the other hand, the ICC’s Therapeutic Use Exemption (“TUE”) process is similar to ESL’s, so this extra layer of protection is not necessarily an established custom.<sup>202</sup> Still, ESL should consider FIFA’s more protective policy as it adds an extra

---

191. See *Regulation*, *supra* note 145, art. 8.

192. ICC CODE, *supra* note 179, at 57–58.

193. IOC CODE, *supra* note 187, at 31–32.

194. FIFA CODE, *supra* note 169, art. 8.

195. *Id.*

196. IOC CODE, *supra* note 187, at 32.

197. *Id.*; ICC CODE, *supra* note 179, art. 8.

198. *E.g.*, IOC CODE, *supra* note 187, at 31.

199. See Directive, *supra* note 95, art. 6.

200. *ESL Policy Details*, *supra* note 13.

201. FIFA CODE, *supra* note 169, Annex B.

202. *ICC TUE Policy*, *supra* note 52.

layer of protection at relatively low cost, and medical data has been singled out by the ECHR as possessing a heightened degree of privacy implications.<sup>203</sup>

*E. Procedures for the Disclosure of Confidential Information by Leagues to Third Parties*

Traditional sports anti-doping codes carefully address the disclosure of confidential player information to third parties, or even the public at large. The ICC and MLB explicitly prohibit disclosure during the investigation period, with the ICC going as far as to restrict publication of confidential information until after the appeals process has begun.<sup>204</sup> The ICC Code also details processes for maintaining confidentiality among third parties integral to the investigation process, such as laboratories or players' agents and attorneys, and includes special disclosure considerations for cases involving minors.<sup>205</sup> These kinds of protections would weigh in favor of the league in the case any potential dispute arising under Article 8 of the Convention,<sup>206</sup> but would also provide leagues with a plausible excuse to point to when developers attempt to use their influence to commandeer investigations.<sup>207</sup>

*F. Choice of Proscribed Substances*

The choice to use the WADA list of prohibited substances is common among traditional sports anti-doping codes.<sup>208</sup> However, numerous commentators have criticized the WADA list.<sup>209</sup> A particular point of contention is the prohibition on recreational drugs like alcohol and marijuana, which would seemingly have a negative effect on a player or athlete.<sup>210</sup> WADA has defended against such accusations by stating that these kinds of substances are against "the spirit of sport."<sup>211</sup> Though some commentators have examined that defense with approval,<sup>212</sup> others are more skeptical, highlighting WADA's inconsistency in allowing the use of tobacco,

---

203. See *S. and Marper*, *supra* note 82, at 196.

204. ICC CODE, *supra* note 179, art. 14; MLB CODE, *supra* note 182, § 5.

205. ICC CODE, *supra* note 179, art. 14; see *supra* Section IV.C.

206. See *supra* Section III.B.

207. See *Lewis*, *supra* note 36, and accompanying text.

208. See ICC CODE, *supra* note 179; FIFA CODE, *supra* note 169.

209. *Anti-Doping Agency Defends Stance On Cannabis*, REUTERS (Oct. 3, 2006), [http://www.nzherald.co.nz/sport/news/article.cfm?c\\_id=4&objectid=10404018](http://www.nzherald.co.nz/sport/news/article.cfm?c_id=4&objectid=10404018) [<https://perma.cc/JKF4-9FAR>].

210. See *id.*

211. *Id.*

212. Carolan, *supra* note 37 (interpreting WADA's argument as promoting a "self-improvement ethos" in sports).

hyperbaric chambers, and creatine, while prohibiting similar classes of drug.<sup>213</sup> Another frequently-cited argument is the conception of athletes as role models who have a strong influence on children who look up to them, but the true influence athletes have on their younger fans is also hotly debated by scholars.<sup>214</sup> Although this paper takes no stance on these unresolved debates, ESL should be aware of the various perspectives and make an informed choice as to what substances are prohibited, rather than resorting to argumentum ad WADA.<sup>215</sup>

### G. Therapeutic Use Exemptions

Therapeutic use exemptions similar to that contained in the ESL policy are not unheard of in traditional sports, but traditional sports anti-doping codes approach the issue more rigorously.<sup>216</sup> The WADA template for TUE's, as adopted by the ICC, only allows a TUE if a player would suffer "a significant impairment to health" as the result of the withholding of the drug, if a doctor has established that there is no viable alternative treatment, and if the use of the drug would grant no additional enhancement other than the return to a normal health-state.<sup>217</sup> The ICC code offers little guidance to terms like "significant impairment to health," but on its face the TUE process seems to be a heavily fact-based inquiry and the code has established a neutral panel of doctors to adjudicate those inquiries.<sup>218</sup> In the case of medical marijuana (or other drugs banned more on the "spirit of sport" basis rather than "clearly documented performance-enhancer" basis), the "return to normal" requirement is seemingly much less difficult to meet than cases involving amphetamines. On the other hand, the MLB code is less stringent, imposing only a "documented medical condition" requirement relatively similar to that in the ESL policy.<sup>219</sup> Still, the MLB code contains

---

213. BERNAT LÓPEZ, *Doping as Technology: A Re-Reading of the History of Performance Enhancing Substance Use*, 1 INST. FOR CULTURE SOC'Y UNIV. W. SYDNEY (2010) (further suggesting that the prohibition on these kinds of substances is a "moral panic" tinged with "pseudo-Christian" ideology that often "references crusades, heretics, sinners, repentants, cleanliness and purification").

214. Carolan, *supra* note 32, at 28–30 ("For every writer who accepts the enormous influence of sporting idols, there is another equally eminent author who challenges the notion of athlete as role model.").

215. See Rosenberg, *supra* note 13.

216. *Id.*

217. ICC CODE, *supra* note 179, art. 4.4; WADA CODE, *supra* note 178, art. 4.1.

218. ICC CODE, *supra* note 179, art. 4.4.

219. MLB CODE, *supra* note 182, at 20.

detailed procedures for investigations into TUE's other contingencies, including liaison with the prescribing doctor, leaving the parties much more informed of their rights and how to proceed at any given stage in a potential TUE dispute.<sup>220</sup>

#### H. Choice of Test

ESL chosen method of testing, the skin-patch test, is not typical of traditional sports anti-doping procedures. In light of the skin-patch test's extremely high false positive rate, one can understand why.<sup>221</sup> ESL has apparently selected this type of test in order to address "intrusiveness" concerns,<sup>222</sup> however "intrusiveness," isn't truly a factor under EU privacy law, rather, courts tend to look to the type of data obtained and the procedures for processing that data.<sup>223</sup> For example, the *Von Hannover* case turned on the content of the photographs, not the methods used to obtain them.<sup>224</sup> The types of provisions that would mostly closely align with "intrusiveness" are those dealing with "fairness" of processing.<sup>225</sup>

A "fairness" requirement would probably be satisfied by urine tests, the accepted, dominant mode of traditional sports drug testing. The ICC, IOC, and WADA codes employ urine testing.<sup>226</sup> Urine testing has a significantly lower false positive rate, estimated to be less than five percent.<sup>227</sup> Players would be unlikely to reject a more accurate and proven testing method that is slightly more intrusive if given the choice.

#### V. CONCLUSION

The first eSports anti-doping policy raises a significant number of legal issues, most which would be addressed through adherence to traditional sport anti-doping practice, but some of the more theoretical issues might not. In those cases, it might be still be advantageous for ESL to fall in line with the traditional sports industry, which is historically considered "self-regulating."<sup>228</sup> Courts might be more easily persuaded by adherence to

---

220. *Id.*

221. *See Patch Test Study, supra* note 49.

222. *See ESL Announcement, supra* note 12.

223. *See Von Hannover v. Germany* (No. 1), 40 Eur. Ct. H. R. 1 (2005).

224. *Id.*

225. *See, e.g., Regulation, supra* note 145, art. 38(1)(a).

226. ICC CODE, *supra* note 179; IOC CODE, *supra* note 187; FIFA CODE, *supra* note 169.

227. *Frequently Asked Questions*, ARUP LABORATORIES, <http://www.aruplab.com/pain-management/resources/faq> [<https://perma.cc/D2PW-55B2>] (last visited Jan. 30, 2015).

228. KATARINA PIJETLOVIC, *EU SPORTS LAW AND BREAKAWAY LEAGUES IN FOOTBALL* 12 (Asser Press 2015).

customary practice in the instance of self-regulated industries. However, the more concrete issues, including the Directive's transparency requirements, requirement of reporting to a supervisory authority, requirements for data quality, and requirements of explicit guidelines for data processing, should be directly addressed in the ESL policy. Adopting the disclosure guidelines and testing procedures employed by traditional sports' anti-doping codes could easily remedy some of these problems.

Aside from the various legal issues looming over the first eSports anti-doping policy, there is one further wrinkle: timing. Although the creation of the policy did follow the infamous Friesen leak, one of the more notable mainstream media blow-ups in the history of computer games, many commentators still questioned the necessity of an anti-doping regimen in eSports.<sup>229</sup> Friesen's claims aside, the actual prevalence of performance-enhancing drugs in eSports competitions has never been truly established. In an interview with ESPN, industry-insider Rod "Slasher" Breslau stated that PED use was "an issue with amateur players and semi-pro players . . . trying to aspire to be professionals."<sup>230</sup> Indeed, at the event where Friesen's team, "Cloud9," had taken Adderall, they finished in ninth place,<sup>231</sup> and were not considered an elite-level team on the unofficial world rankings published closely after the event.<sup>232</sup> As of January 2016, no players have tested positive at ESL events, in part corroborating Breslau's assertion that PED use is not a factor at the highest levels of eSports competition.<sup>233</sup>

On the other hand, the lack of violations might just mean the current, minimalistic policy is working to an extent. Although commentators, including attorneys and legal academics in the European Union,<sup>234</sup> made much ado about the policy upon its announcement, the discussion has mostly quieted down. Legally unsophisticated players (who have enough to worry

---

229. Richard Lewis, *Why You Should Take Esports' New Drug Tests With a Pinch of Bath Salts*, DAILY DOT (July 28, 2015), <http://www.dailydot.com/esports/esports-drug-testing-perspective/> [<https://perma.cc/VB9Z-R4G4>]; *Outside The Lines*, ESPN (Jan. 15, 2016), <http://espn.go.com/video/clip?id=14577015>.

230. *Id.*

231. *ESL One Katowice*, LIQUIPEDIA, <http://wiki.teamliquid.net/counterstrike/ESL/One/2015/Katowice> [<https://perma.cc/A7CH-QAD5>].

232. Although they flirted with the bottom part of the most prestigious Counter-Strike rankings series earlier in the year, Cloud9 was not ranked following the event. Duncan "Thorin" Shields, *Thorin's CS:GO Top 10 World Rankings - 18th March 2015*, GOLDPER10 (Mar. 18, 2015 6:26 PM), <http://www.goldper10.com/article/1149-thorins-csgo-top-10-world-rankings-18th-march-2015.html> [<https://perma.cc/998S-TK5U>].

233. *See id.*

234. *See* Bräutigam, *supra* note 48.



about given grueling practice schedules) are unlikely to question procedures that are likely violating their rights; therefore, it might be some time before an impetus to change the current regime arises. However, if the amount of money at stake in these tournaments continues to grow, and if the drug-testing science continues to produce high-levels of false positives, then the likelihood of a major dispute will only increase as time goes on. In the event of such a major dispute, ESL may find itself wishing that it had covered its bases earlier on in the game.