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WP 156

**Opinion 3/2008
on the World Anti-Doping Code Draft International Standard
for the Protection of Privacy**

Adopted on 1 August 2008

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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The Working Party on the protection of individuals with regard to the processing of personal data

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995,
having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive, and Article 15 paragraph 3 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002,
having regard to Article 255 of the EC Treaty and to Regulation (EC) no 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents,
having regard to its rules of procedure,

has adopted the present document.

Introduction

The European Commission's Directorate for Education and Culture (DG EAC) requested an opinion from the Article 29 Working Party (Working Party) on the draft international standard on the protection of privacy prepared by the World Anti-Doping Agency (WADA).

The draft Standard should be read in conjunction with the World Anti-Doping Code (the Code) of WADA, and Article 14 in particular.

The Code requires that athletes regularly communicate specific data to anti-doping organisations. These data will be later stored together with other data (including sensitive data), in a database called ADAMS, located in Canada.

Data relating to their support staff – as defined under the Code – and other categories of people are also processed under the obligations envisaged by the Code. For the purposes of the Code, "Participant" includes the athlete as well as their support staff.

Part I – Introduction, Code provisions and definitions

Point 2 – Code provisions

Although the opinion of the Working Party is confined to the draft International Standard as submitted to the Working Party on the 7 July 2008, rather than to the World Anti-Doping Code, it would point out (where reference to Code provisions has been made in the draft Standard) that certain provisions of the Code raise questions about their compatibility with European data protection standards.

Any person involved in anti-doping activities is entitled to the respect of their privacy and personal data protection, and so Article 14 of the Code could be modified to read as follows: *"The Signatories agree to the principles of co-ordination of anti-doping results, public transparency and accountability and respect for the privacy interests **of all individuals, including those alleged to have violated anti-doping rules**".*

Article 14.2 - public disclosure

The Working Party recalls that the disclosure and the communication of data are data processing subject to the data protection regime. The Working Party welcomes the fact that disclosure of decisions where an athlete did not commit an anti-doping offence will only occur with the consent of the athlete. However, it recommends that the international standard is clarified so that anti-doping organisations are clear that "reasonable efforts to obtain this consent" cannot validly replace this consent in relation to disclosure (see Article 14.2.3).

The Working Party also questions the proportionality of processing which consists in disclosing publicly, by posting on the internet for at least one year, the judgment and other information relating to the athletes or any other "Person" (14.2.4 – see also Part II, Point 10 below). In this respect, the Working Party suggests that these "persons", unless they are the athletes themselves or their support staff, should be subject to this Standard. There is no reason to exclude them from the benefit of the protection in this case.

Article 14.5 (ADAMS database)

Except for the few lines in Article 14.4 of the Code, the draft Standard does not provide with any precision any rules relating to data processing connected with the ADAMS database. The draft Standard is addressed only to anti-doping organisations. The data protection provisions within the framework of the anti-doping fight must however be guaranteed both for the data processing carried out by the anti-doping organisations and also for the use of the ADAMS database. The Working Party notes the competence of the Canadian Data Protection authorities on this database. However, the Article 29 Working Party cannot be satisfied by the scant reference in the Standard to this database.

The Working Party therefore recommends that either the international Standard is amended to provide further detail on the ADAMS database, or that WADA develop procedural policies for those using the ADAMS database. It should also be noted that, as regards transfers of data from the EU to Canada, care should be exercised to ensure that this should take place in accordance with EU laws about proper safeguards for onward transfers.

Article 14.6

The term "third party" is not defined.

In a general way, the specific purposes of the data processing carried out under the Code should be defined. The only reference to the data processing by the anti-doping organisations "in the context of their anti-doping activities" is not sufficient.

Point 3 – terms and definitions

Participant

The Working Party considers that the concept of "Participant" - as defined by the Code - is too restrictive to guarantee protection to any person about whom data can be processed within the framework of the implementation of the Code (see the remarks made above with regard to 14.2.4 concept of "Person" and to 14.6 "third parties"). While the Working Party recognises that only athletes and their support personnel will be required to provide personal data to WADA, it would help to avoid confusion if the use of terms was consistent across the international Standard and the Code.

Three new definitions are introduced in Article 3.2 of the draft Standard:

Personal information

The definition which is given includes that of "personal data" in Article 2 (a) of the Directive. The Working Party observes that except for Article 9 (Maintaining the Security of Personal Information) the draft Standard does not offer additional guarantees for the protection of health data and judicial data processed within the framework of the anti-doping activities.

Sensitive personal information

The personal information regarded as sensitive corresponds to that in Article 8 of the Directive. The Working Party refers here to its comment relating to Article 6 of the Standard regarding the processing of such data (see below).

Processing

Even if the definition does not correspond literally to the definition of Article 2 (b) of the Directive, it is nevertheless acceptable.

Part II – Standards for Handling Personal Information

Point 4 –Processing personal information in accordance with international Standard and applicable law

The Working Party considers that the concept of "third-party agents" includes subcontractors within the meaning of Article 2 (e) of the Data Protection Directive. Further comments regarding this concept (see point 9) are based on this assumption. The scope of this concept should be precisely defined.

Paragraph 4.1

The Working Party considers that paragraph 4.1 be amended to clarify that third-party agents must also comply with the Standard, even when this exceeds those standards applicable under domestic laws.

The draft Standard does not distinguish between the various categories of persons subject to it (athletes, supporting staff, third party). The application of the proportionality principle will however depend on the category to which the person belongs (which data? which stored data?). Consequently, the draft Standard should be modified in this regard.

Processing relevant and proportionate personal information

Article 5.3. should specify the personal information or the categories of personal information necessary to achieve the purposes referred to in a), b) and c) by taking into account the requirements of the principles of necessity and proportionality. As previously indicated, the implementation of these principles will vary according to the category of persons whose data will be processed (athlete, supporting staff).

Article 5.4 of the draft Standard provides that processed personal information must be exact, complete and updated. The last sentence of this paragraph, however, seems to soften this obligation towards anti-doping organisations. It even seems to move responsibility from the data controller to the data subject¹. The comment tends to confirm this move. In this respect,

¹"(...). Although this does not necessarily require Anti-Doping Organizations to verify the accuracy of all Personal Information they Process, it does require that Anti-Doping organizations correct or amend any Personal Information that they affirmatively know to incorrect or inaccurate as soon have possible".

the Working Party stresses that according to Article 6 (d) of the Data Protection Directive, all necessary measures must be taken so that inaccurate or incomplete data with respect to the purposes for which they are collected or later processed are erased or rectified. This responsibility falls to the data controller, if necessary, in response to a request for correction addressed by the data subjects.

Point 6 – Processing personal information with consent

Under Article 7 of the Data Protection Directive, any data processing must be based on a valid legal ground. The existence of such a legal base has fundamental importance when health data are processed.

Article 6.1

Article 6.1 of the draft Standard invites the anti-doping organisations to use the consent of the athletes and the members of their supporting staff to make their processing legitimate. The Working Party considers that such consent does not comply with the requirements of Article 2 (h) of the Data Protection Directive. According to this provision, consent is defined as "*any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*". The consent to the processing of data collected in the context of the execution of the obligations of the World Anti-Doping Code is neither free nor informed. The sanctions attached to a possible refusal by participants to subject themselves to the obligations of the Code (communication of localisation data, medical anti-doping controls) prevent the Working Party from considering that the consent would be, in any way, given freely². The Working Party also raises doubts as to whether the consent would be informed (see point 7 below).

As it is impossible to base the data processing on Articles 7 (a) and 8 (a) of the Data Protection Directive, it will have to be based on another acceptable legal ground. The Working Party recalls that the processing of data relating to infringements is not authorised even on the basis of the consent, even informed, of the data subject (Article 8 (2) of the Data Protection Directive).

The Working Party therefore recommends that WADA consider other grounds for processing personal data as provided by Article 7, and sensitive personal data as provided by Article 8 of the Data Protection Directive.

Various international agreements relating to anti-doping, such as the International Convention Against Doping in Sport or the Council of Europe Anti-Doping Convention could be possible legal grounds for processing, insofar as these conventions would invoke a binding legal obligation to which anti-doping organisations - under the national implementation of Article 7 (c) and Article 8 (4) of the Data Protection Directive - are subject as controllers.

Article 6.2

Article 6.2 of the draft Standard allows the possible processing of sensitive data, such as those previously defined in Article 3.2. Under the Data Protection Directive, sensitive personal data includes data relating to racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or sex life. The Working Party has very serious doubts as to the relevance of processing several of these categories of information, in particular if these

²For example item 6.3 of the draft Standard which requires that "*Anti-Doping Organizations shall inform Participants of the negative consequences that could arise from their refusal to participate in doping controls, including Testing*".

data are to be included in the ADAMS database. As such, the Working Party invites WADA to provide more information or re-examine the relevance of possible processing of such data and to specify in Article 6.2 the significant data intended to be processed within this framework. The definition in Article 3.2, moreover, includes genetic characteristics. The Working Party questions the legitimacy and the need for the processing of such data, and asks WADA to ensure that such processing is necessary. It recommends in any case a particularly high level of protection during their processing.

Article 6.4

The scope of Article 6.4 should be extended to allow the legal representatives of participants to be able to exercise the other rights envisaged by the draft Standard, such as those detailed in point 11.

Point 7 – ensuring appropriate information is provided to participants

The Working Party points out the requirements of Articles 10 and 11 of the Data Protection Directive, in particular to provide, in addition to the identity of the data controller, the identity of any of its representatives.

Article 7.2 provides that when the personal information is not collected from the participant, they are informed "as soon as possible". To satisfy the requirements of the Data Protection Directive (Article 11 (1)), this information will have to be communicated at the time of undertaking the recording of the data or, if a disclosure to a third party is envisaged, not later than the time when the data are first disclosed. In exceptional circumstances, this information will not have to be provided "*where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down in law*". However, these limitations should be interpreted strictly.

The Working Party also raises the point that under the comment to Article 7.2, the use of the terms "*he or she should (...) have reasonable access to information...*" seems to weaken the right to information of the data subjects. It recalls that the data subject's right to be informed is essential and forms part of the requirement for transparency of data processing.

Point 8 – disclosure of personal information to other anti-doping organisations and third parties

The Working Party stresses that a transfer from the European Economic Area to a third country can only take place if the third country ensures an adequate level of protection as described in Article 25 (2) of the Data Protection Directive or when the controller adduces adequate safeguards with respect to the protection of privacy or when that the transfer is based on one of the exceptions or derogations envisaged in Article 26 (1) of the Data Protection Directive.

In this instance, the ADAMS database is based in Canada. For the purposes of Article 25 (2) of the Data Protection Directive, Canada is considered as providing an adequate level of protection for personal data transferred from the European Community to recipients subject to the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA)³. However, it is not clear to the Working Party whether WADA or a national anti-doping

³ 2002/2/EC: Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539)

authority in Canada is considered to be the controller of the ADAMS database, or whether the controller is subject to PIPEDA. The Working Party recommends that this is clarified and, should the controller of the ADAMS database not be subject to PIPEDA, that further steps are taken to ensure that an adequate level of protection is provided for information transferred from within the European Community onto the ADAMS database.

The Working Party stresses the need to respect the “finality principle” and the requirement for compatibility of onward data processing with the initial purpose for which the data were collected.

As far as Article 8.4 is concerned, the Working Party repeats the remarks made in point 6 above, relating to the validity of consent. The Working Party also points to fact that this provision would not allow for the publication of personal information concerning athletes or other persons on the Internet as foreseen in Article 14.2.4 of the Anti-Doping Code (see above Point 2 – Code Provisions).

Point 9 – maintaining the security of personal information

As for point 9.1, the contact details of the person indicated by the anti-doping organisation should be immediately communicated to the people concerned (as well as the information referred to in point 7.1, and not only upon their request).

As for the subcontractors to whom the anti-doping organisations might have recourse (third-party agents – point 9.4), the Working Party recalls the rules prescribed by Articles 16 and 17 of the Data Protection Directive, in particular the obligation of the data controller to choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out.

Point 10 – retaining personal information only as necessary and ensuring its destruction

The Working Party welcomes the inclusion in this version of the draft of a provision relating to the duration of retention of data and of the obligation to erase those data when they are no longer needed, having regard to the purposes for which they were processed. However, it invites WADA to determine, as far as possible, and taking into account the experience gained in that field, a reasonable maximum retention period for those data - or at least for certain categories of data - by the anti-doping organisations. Point 2 concerning the rules on public disclosure in Article 14.2.4 of the Anti-Doping Code should not serve as a model here since it seems to be disproportionate in that it provides that “at a minimum” personal information on athletes or other persons who are said to have violated anti-doping rules should be placed on the Anti-Doping Organization’s website and “leaving the information up for at least one year.” (see above Part I).

The Working Party makes reference also to its Opinion 4/2007 on the concept of personal data⁴ to understand what is meant by “*anonymisation / anonymous data*” according to the Directive.

Point 11 – rights of participants with respect to personal information

The Standard envisages a right of access for the athletes and their supporting staff. Under Article 12 of the Data Protection Directive, any person concerned has in particular the right to obtain from the data controller information at least as to the purposes of the processing, the

⁴ http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2007/wp136_en.pdf

categories of data concerned and the recipients or categories of recipients to whom these data are disclosed. These elements are not envisaged by the draft Standard.

The project provides that in certain cases, the anti-doping organisations are not obliged to answer access requests. The Working Party notes in this respect that the exceptions formulated in particularly vague terms in points 11.1 (*unless to do so in a particular case would conflict with the Anti-Doping Organization's ability to fulfil its obligations under the Code*) and 11.2 (*requests that are plainly vexatious or excessive in terms of their scope or frequency, or impose a disproportionate burden in terms of costs or effort*) do not, on the face of the provision, appear to be in conformity with Articles 12 and 15 of the Directive. Any restriction of the right of access is only allowed if it conforms to the provisions of Article 13 of the Directive, which authorises Member States to adopt legislative measures aiming to restrict the scope of this obligation insofar as this restriction is necessary to safeguard the interests listed under those provisions

The Working Party notes with satisfaction that, in the event of refusal of exercise of the right of access by the participants, the latter will receive the reasons of such refusal in writing. It recalls, nevertheless, that this refusal is permissible only under the conditions of Article 13 of the Directive, which must be interpreted strictly.

Regarding Article 11.4, the Working Party stresses that, under Article 12 (c) of the Directive, the data controller must notify the third parties to which the data were communicated of any correction or deletion carried out because of the incomplete or inaccurate nature of the data unless this proves impossible or involves disproportionate efforts. To be compliant with the European data protection regulation, the terms "*where appropriate*" should be interpreted only within the meaning of these two exceptions.

Additional provisions

Lastly, the Working Party considers it regrettable that a number of key principles of the European data protection regime do not appear in the draft Standard. It invites WADA to consider inserting some additional provisions intended to guarantee the following:

- The banning of automated individual decisions (Article 15 of the Directive): in view of the sanctions to which the data processing can lead, this ban appears essential.
- Independent control on the implementation by anti-doping organisations of the minimal provisions contained in the Standard. Article 8.3 of the draft Standard indicates that an anti-doping organisation can express its concern to WADA about the possible non-compliance with the Standard by another organisation. The Working Party considers that such a mechanism for informants raises doubts about WADA's commitment to take care of the effective implementation and the respect of the minimal provisions enacted by the Standard. It notes, in addition, that non compliance with the standards is not accompanied by any sanctions against anti-doping organisations. To conclude, how effective will this Standard be?
- The existence of a right of remedy and a right of compensation for the damage suffered as a result of a processing operation incompatible with the Standard.
- The fact that national anti-doping organisations shall be subject to national laws regulating the processing of personal information.

The Working Party supports the initiative of WADA in favour of the adoption of minimal standards of privacy and personal data protection of the athletes and other people involved in the framework of the fight against doping. The Article 29 Working Party considers that this Standard can, taking into account its geographical field of scope, play a significant role with regard to data processing not subject to EU legislation or to legislation which has been considered adequate by the EU. This Standard is also likely, in all the states - whether they subject the data processing to adequate protection or not, to contribute to raising awareness among the anti-doping organisations.

The Working Party is pleased to notice the reference to the Data Protection Directive made in the preamble to this Standard project. However, it is not yet in a position where it can completely support this Standard, since the minimal requirements included do not appear to reach the minimal standards required by European data protection regulation. If the remarks made above are taken into account, it may lead to such a conclusion as would further precise information about the ADAMS database. The Working Party therefore invites WADA to take into account these comments in the development of the draft Standard, welcomes further clarification from WADA and is willing to meet with WADA for this purpose, if necessary.

Nevertheless, the Working Party still wishes to be kept informed of the follow-up which will be given to its remarks and, more generally, of the evolution of WADA's work on this draft Standard.

Done at Brussels, on 1 August 2008

*For the Working Party
The Chairman
Alex TÜRK*