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# Anti-Doping & Data Protection

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

# **Anti-Doping & Data Protection**

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

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

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

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## 1. Executive summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. In the anti-doping context, personal data can be transferred across the world. Transfer of personal data from the EU to a non-EU country is in principle only legitimate if one of three situations apply: (1) there is an adequacy decision, (2) there are appropriate safeguards or (3) a derogation applies. (1) With respect to Canada and Switzerland, the European Commission has adopted an adequacy decision, meaning that these countries are deemed to have adequate safeguards in place for the protection of personal data. Besides Canada and Switzerland, there are adequacy decisions for at least some data transfers to Andorra, Argentina, Faeroe Islands, Guernsey, State of Israel, Isle of Man, Jersey, New Zealand, United States of America and Eastern Republic of Uruguay, though the adequacy decision for the USA is not applicable to NADOs. It should also be recognised that recent jurisprudence of the European Court of Justice has made clear that adequacy decisions can be challenged before court. For data transfer to all other countries outside the EU and the European Economic Area, for which there is no adequacy decision, one of the other two grounds must apply. (3) A recital to the General Data Protection Regulation makes clear that a derogation is applicable to data transfers required and necessary for important reasons of public interest, for instance in order to reduce and/or eliminate doping in sport.. However, a derogation may only be invoked for specific situations, for example when there is a specific request from one NADO to another NADO to provide the whereabouts of an athlete in a certain time slot. In principle, the derogation does not apply to more structural forms of data transfer. (2) For the more structural forms of data transfers, appropriate safeguards should be in place.

Appropriate safeguards can be specified in a number of ways, such as through data protection clauses in contracts or certification mechanisms. WADA has issued a standard agreement for the sharing of information between different parties within ADAMS and has set out its own privacy standards in the ISPPPI. However, it is unsure whether these would qualify as appropriate safeguards, because they provide a lower level of protection than the GDPR. The findings of the study suggest that MSs should ensure that the transfer of personal data (for fighting doping in sport) to countries outside the EU (for which there are no adequacy decisions) are based on appropriate safeguards established in contractual clauses or administrative arrangements, subject to authorization by the competent supervisory authority.

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

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

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

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

## 2. Introduction

Athletes can be subjected to rules obliging them to provide data and tissue samples in the 'fight against doping'. A selected number of athletes must provide whereabouts information so that they can be subjected to out-of-competition testing and a larger group has to provide blood and urine samples that are tested on prohibited substances and methods. These data are shared with organisations based inside and outside of the European Union (EU). Not only do these measures affect professional athletes, they can also be imposed on amateur athletes that participate, for example, in a local tennis tournament. The question is how the data collection, storage and transfer can be designed in a way that all relevant principles relating to the fundamental rights to privacy and data protection are met and respected. This study makes an initial assessment of the potential gaps and tensions that exist in practice and provides recommendations for solving those gaps and easing the tensions.

The current data protection rules are enshrined in the Data Protection Directive (DPD) and from May 2018, the General Data Protection Regulation (GDPR) will be applicable instead. In addition, the right to privacy and data protection are incorporated in the EU Charter of Fundamental Rights (CFR) and the right to privacy, which includes rules on data processing, is protected under Article 8 of the European Convention on Human Rights (ECHR), of the Council of Europe. Although many of the core questions about the relationship between the anti-doping measures and the right to privacy and data protection have been discussed for years, the GDPR gives new momentum to carefully scrutinize potential conflicts and to resolve tensions.

The European Commission has requested a report to identify cases that would need to be addressed by national legislation in order to ensure lawful processing of personal data in the anti-doping context. The contract was awarded to the Tilburg Institute for Law, Technology and Society (TILT) of the Tilburg University and Spark Legal. The core team consisted of:

- Ronald Leenes (TILT; project leader)
- Peter McNally (Spark Legal)
- Mara Paun (TILT)
- Bart van der Sloot (TILT)
- Patricia Ypma (Spark Legal)

In addition, the project benefitted from an external expert group consisting of:

- Prof. dr. Jos Dumortier (Time.lex)
- Prof. dr. Marjan Olfers (VU University)
- Prof. dr. Han Somsen (Tilburg University)

The research lasted nine months, from September 2016 to May 2017. The interviews and research were conducted end of 2016, beginning of 2017. Changes to national laws, court cases and changes to the anti-doping rules introduced afterwards are not included or analysed in this report.

### 2.1 Aim of the study

The overall objective of this study is to assist the Commission in providing guidance to Member States in adopting and revising existing national legislation on anti-doping in sport to comply with the General Data Protection Regulation. This objective was to be achieved through an inventory of current legislation in all EU Member States, an analysis



of personal data processing practices for anti-doping purposes, by identifying gaps with respect to the lawful processing of personal data in this context and by providing guidance in closing these gaps through regulatory action. More specifically, the overall objective was to be addressed through the following specific objectives:

- **Objective 1:** Prepare a complete list of all relevant legislation at national level in the 28 EU Member States, defining provisions providing a legal basis for the processing (which includes collection and transfers) of personal data in the context of anti-doping activities. Briefly describe the purpose, the scope and the nature of these provisions and provide the legal texts and references.
- **Objective 2:** On the basis of the results of the aforementioned exercise and other relevant factors, determine a representative sample of twelve EU Member States, according to the methodology agreed with the Commission.
- **Objective 3:** Perform research on the scope and nature of personal data processing for anti-doping purposes in these twelve EU Member States, on the basis of the anti-doping practice defined in the World Anti-Doping Code and its associated standards and on the basis of interviews performed with the National Anti-Doping Organisations and the International Federations. The relevant information had to include answers to at least the following questions:
  - o Who processes personal data;
  - o What are the processing operations and procedures;
  - o How is personal data being processed and for what purposes;
  - o What personal data concretely is being processed;
  - o Are special categories of personal data being processed and if yes, which ones;
  - o Who are recipients;
  - o For how long is the data kept;
  - o What is the legal basis for processing;
  - o Are personal data being transferred outside the EU/European Economic Area (EEA);
  - o In cases of such international transfers what is the instrument for the Transfer under Art. 25 (COM adequacy decisions) or Art. 26 of Directive 95/46/EC;
  - o And, are there any specific safeguards applied.
- **Objective 4:** On the basis of the research performed above, and in the light of the EU Charter of Fundamental Rights, in particular Articles 7 and 8, and the EU data protection legislation (in particular Directive 95/46/EC and the national legislation implementing Directive 95/46/EC and Regulation (EU) 2016/679) as well as Directive (EU) 2016/680, which lays down data protection rules for organisations involved with law enforcement, identify cases that would need to be addressed by national legislation in order to ensure lawful processing of personal data in the anti-doping context.

The scope of the study is the lawful processing of personal data by the organisations involved in enforcing anti-doping in sport, e.g. the NADOs, Sport Federations and World Anti Doping Agency, in view of the General Data Protection Regulation. Within this scope are the legal bases for processing personal data, including health data, concerning athletes, participants and others associated with sport (e.g., Athlete Support Persons), as well as the safeguards to ensure the lawfulness of such processing, which includes transfer of data to third countries.

The study consists of three phases:

- **The Inception Phase:** In the Inception Phase, an inventory of relevant legislation pertaining to anti-doping in all 28 Member States was produced through desk

research, supplemented and validated by input from the NADOs in the Member States.

- **The Field Study and Analysis phase:** The Field Study aimed at obtaining a better understanding of the actual practice of the processing of personal data within the context of anti-doping in sport. This included studying the practices of NADOs as the entities responsible for the anti-doping tests, the supervisory bodies in view of their oversight of the NADOs as data controllers, and International Sport Federations in their capacity as interested parties and representatives of sportspersons, and the European Elite Athletes Association as a representative of the interests of one type of sportspersons, athletes. The analysis focussed on the procedures adopted by the NADOs and others, their legal foundation and execution, the entities responsible for their execution and their actual operation.
- **The Synthesis and Reporting Phase:** In the final phase of the project, all empirical findings were analysed and synthesised in view of Articles 7 and 8 of the CFR, Article 8 ECHR and the EU Data protection framework, in particular, the Data Protection Directive and its implementations in EU Member States, the General Data Protection Regulation, and the Police Directive (PD).

## 2.2 Approach and methodology

### 2.2.1 Inception Phase

In the Inception Phase, an inventory of relevant legislation pertaining to anti-doping in all 28 Member States was produced through desk research, supplemented and validated by input from the NADOs in the Member States. For each Member State a factsheet has been produced that provides an overview of the embodiment of the WADA Anti-Doping Code into the national legal order. It contains the defining provisions in relevant national legislation providing a legal basis for the processing (which includes collection and transfers) of personal data in the context of anti-doping activities. The purpose, scope and nature of these provisions were described and the legal texts, references and contact details of relevant stakeholders were provided. The Inception Phase furthermore provided preliminary findings of a comparison of the 28 Member States, a detailed outlook for the remainder of the project in terms of the proposed methodology for phases two and three, and a work plan including an overview of the preparation of the interviews in phase two.

The Inception Phase consisted of the following five tasks: data collection, validation, analysis, planning and development, reporting.

- **The collection of base material:** after a preliminary interview with a NADO and the kick-off meeting with the Commission, the template for the country reports/fact sheets were finalised and a protocol was designed. National respondents had 2 weeks for completing the fact sheet. Upon receipt, the draft reports were assessed and feedback requests were sent to the authors where necessary. They had three days to rewrite and/or to amend their draft reports. Upon receipt, the country reports were finalised.
- **Completing and validating base material:** the core team complemented the country reports with additional information where necessary and then sent the factsheet to the NADO of the country involved for validation. NADOs had two weeks to respond with potential corrections or amendments. The NADOs were also sent a small survey to provide the core team with additional, factual background information.
- **Analysis:** The third principal task in this phase consisted of analysing the base material. The core team has summarized and categorized the main findings that were gathered when analysing the fact sheets.
- **Developing further methodology:** The core team has elaborated on the methodology and work plan for the 'fieldwork' among NADOs, Data Protection Authori-

ties, WADA regional office for Europe, International Sports Federations and the European Elite Athletes Association to be conducted in Phase 2.

- **Drafting and presenting Inception Report:** The core team has produced the inception report and presented it to the European Commission. The report contained the background of the topic of the study, a legal analysis of the issues at stake from the perspective of the GDPR, a description of the various ways in which the anti-doping regulation has entered Member States' law, a summary comparison of the Member States' legal basis for the processing of personal data in the context of anti-doping in sport, a comparative analysis of the provisions relating to the processing of personal data in the context of anti-doping in sport in the 28 Member States, an outline of the proposed approach, methodology and planning for the remainder of the project and a proposal and justification for the Member States and Sports Federations to study in Phase 2.

The template that was sent to the national respondents can be found in Annex I. From the country reports, and additional information on the situation in national Member States, the core team has produced facts sheets per country. These may be found in Annex II. To help us select the relevant countries for further study in Phase 2, the core team has sent a survey to all NADOs. The survey may be found in Annex III.

For the selection of the relevant parties in Phase II, the core team has identified four models in which different approaches can be classified, in relation to, first, the status of the NADO and, second, the existence of a specified basis in law which enables the NADOs to collect and process data in the course of anti-doping procedures or whether a mandate is given to the NADO to develop anti-doping rules. The status of NADO is often closely related to the processing ground they may employ.

On the one hand, it has been identified that a NADO established under public law is generally mandated to implement the WADC obligations either with close regulation from the legislator (for instance, Romania), or entrusted with developing its own rules in discharging its mandate (for instance, Croatia, Denmark). In the majority of MSs with a public NADO, the athlete is obliged by law to comply with the rules of the NADO, i.e. the obligations under the WADC. Some MSs add extra requirements of consent, for the processing of data in TUE procedures or during the sample collection session (for example Italy), for the transfer of data to third countries (for example Romania), while others (for example Croatia) mention additionally that by providing personal data, the athlete is presumed to have agreed to its processing for the purpose of anti-doping procedures.

On the other hand, when a State leaves the WADC implementation to private entities, there have been two paths identified. Either the private NADO is recognized by the law and given a mandate to act accordingly (Austria, Germany, Greece, UK), or the MS does not intervene, which results in a purely private system (Estonia, Finland, Netherlands, Slovenia, Sweden).

**Model 1** is constituted by Member States which have opted for a **public NADO**, while **regulating its activities in laws**. Part of this model are: Belgium, Bulgaria, Cyprus, Czech Republic, France, Hungary, Italy, Latvia, Malta, Portugal, Romania, Spain.

**Model 2** is constituted by Member States which have opted for a **public NADO**, while leaving it at the **discretion of the NADO to implement the WADC** obligations in its own by-laws. Part of this model are: Croatia, Denmark, Lithuania, Luxembourg, Slovakia, Ireland, Poland.

**Model 3** is constituted by Member States which have entrusted a **private NADO** to discharge WADC obligations, however, included a **mandate and/or some kind of minis-**

**terial oversight over the NADO's activities.** This may have a bearing on the processing ground used, for instance, when the NADO is given the powers to collect and process information in a law (for example Austria). This model comprises: Austria, Germany, Greece, the United Kingdom.

**Model 4** is constituted by Member States which have a **purely private anti-doping system**. While the MS has ratified the UNESCO Convention, the implementation of the WADC is taken up solely by a private entity. This means that there is no processing ground prescribed by law. This model comprises: Estonia, Finland, Netherlands, Slovenia, Sweden.

Based on these four models, the selection of Member States to be interviewed was developed. Additional factors were deemed of relevance, which determine the particular interest represented by a Member State, in the light of the scope of the study. The core team has used these criteria to select countries within the models. These factors are among others:

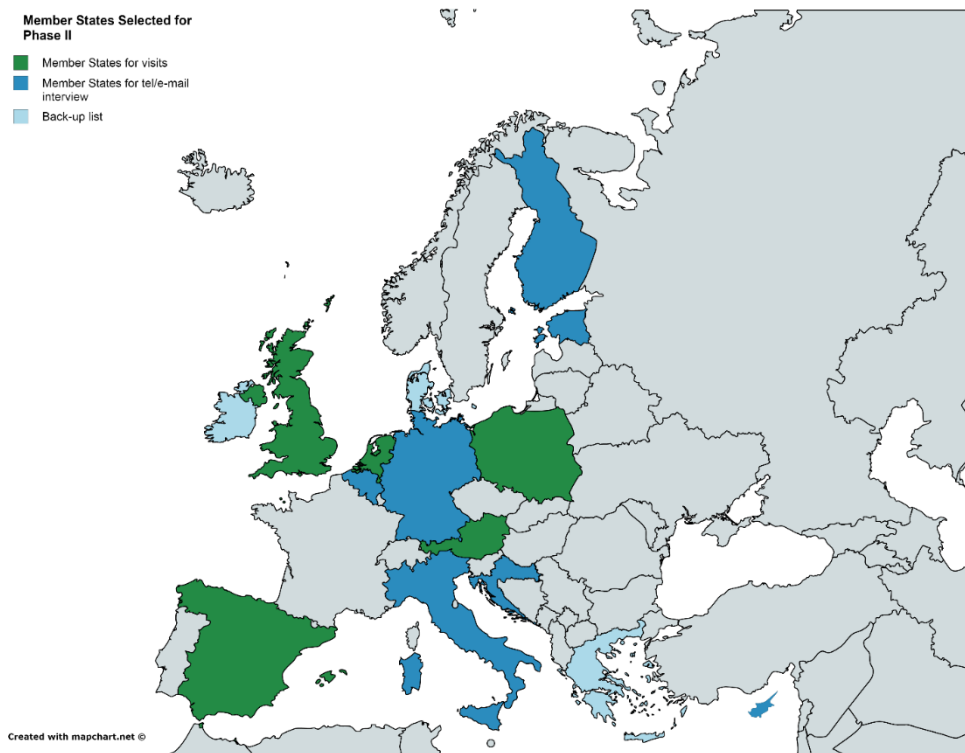
- processing grounds deployed
- the structural/institutional peculiarities
- potential cooperation with law enforcement authorities
- diverging rules with respect to the WADA standards
- the volume of samples collected (with 2015 as reference year)<sup>1</sup>
- whether the DPA or the NADO has issued any opinion of particular interest
- new legislative projects
- additional privacy/data protection rules in national provisions whether there is a new law

Member State	Authority	Total samples
Germany	NADA	13546
France	AFLD-NADO	7141
UK	UKAD	5873
Italy	NADO ITALIA	5377
Spain	ESP-NADO	4470
Portugal	ADoP	3561
Sweden	RF	3292
Poland	PANDA	2965
Romania	ANAD-Romania	2951
Finland	FINADA	2462
Belgium	NADO Flanders BEL-CFWB French Comm.	2082 1269
Netherlands	ADAN	1943
Austria	NADA Austria	1569
Denmark	ADD	1418
Czech Republic	CADC	1387
Ireland	ISC	1221
Hungary	HUNADO	1217
Greece	ESKAN	954
Croatia	CITA	528
Bulgaria	BUL-NADO	523
Cyprus	CYNADA	266
Slovakia	SADA	264
Slovenia	SLOADO	238
Estonia	EADA	209
Latvia	LAT-NADO	177
Luxembourg	ALAD	166
Malta	MLT-NADO	73
Lithuania	LTU-NADO	56

<sup>1</sup> [https://www.wada-ama.org/sites/default/files/resources/files/2015\\_wada\\_anti-doping\\_testing\\_figures\\_report\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2015_wada_anti-doping_testing_figures_report_0.pdf)

*Table 1 Total samples collected by NADOs in 2015 (source: WADA 2015 Anti doping testing figures report)*

Finally, the core team has taken into account the geographic distribution of the countries.



*Figure 1: Member states selected for study in phase II*

From this, the following section was made:

Member States selected for physical interviews:

- From Model 1: Spain
- From Model 2: Poland
- From Model 3: Austria, UK
- From Model 4: Netherlands

Member States selected for e-mail/telephone interviews:

- From Model 1: Belgium, Cyprus, Italy
- From Model 2: Croatia
- From Model 3: Germany
- From Model 4: Estonia, Finland

Other parties were chosen to include the perspectives of an IF, of WADA, of athletes and of a Data Protection Authority. These were:

- International Rugby Federation
- EU Athletes
- WADA
- DPA

### 2.2.2 Field Study and Analysis Phase

The field study aimed at obtaining a better understanding of the processing of personal data in practice, within the context of anti-doping in sport. The analysis has focused on the procedures adopted by the NADOs and others, their legal foundation and execution, the entities responsible for the execution and their actual operation. Furthermore, the analysis took into account the IT systems used within the procedures, as well as those used by the sportspersons themselves, such as the ADAMS system they use for keeping track of their whereabouts. Phase 2 of the research consisted of three steps: interview preparation, conducting the interviews and the initial analysis.

- **Interview preparation:** In this step, the interview protocol and its associated questionnaires were developed. Input for the protocol was sought through an analysis of the (technical) documentation provided by the WADA and selected NADOs, as well as the output of the legal analysis of Phase One and the results of the exploratory interviews. The protocol guided the interviewers to conduct the interviews in significantly similar ways. The questionnaire was composed of open questions to ensure that room was left for interviewees to expand on the topics they are familiar with. The exploratory interviews conducted in Phase One served to inform and help channel the research within this phase of the project. Also, the various WADA and respective NADO technical standards, such as the International Standard for the Protection of Privacy and Personal Information and the International Standard for Laboratories were used in the interview design. The various processes and expected ways in which personal data are being collected and processed have been explored in the interviews. To foster the cooperation of the various parties which the study team wished to interview, a recommendation letter issued by the Commission was sent. Interviewees were selected on the basis of their knowledge of both the anti-doping (test) procedures as well as the processing of personal data in these procedures. The variety of interviewees has allowed for a wide range of perspectives, ensuring an unbiased and balanced understanding of the main issues at stake. The different NADOs represent diverse practical implementations of testing procedures and data processing practices, while the other stakeholders have provided different perspectives on the oversight, impact and effects of the data processing in anti-doping practices. The output of this task was an interview protocol, which can be found in Annex IV.
- **Conducting interviews:** the five selected core Member States, as well as WADA, EU Athletes and the International Rugby Federation have been visited in person by two of our core team members. Another core team member has conducted the seven telephone interviews with NADOs. While the study team wished to interview the DPAs of the five core Member States selected, only one was willing to conduct a telephone interview. Additional of the record interviews with athletes and people involved in policy making were conducted to obtain more background information. The interview notes have been compiled into 'thick descriptions' of the processing of personal data in the context of anti-doping in sport practice by the selected NADOs, the oversight on these practices by regulatory authorities and how other relevant stakeholders view the processes and its data protection and fundamental rights' issues. Minutes of the interviews have been drafted and sent to the interviewees, which they approved.
- **Analysis:** Subsequently, the initial analysis of the fieldwork results was conducted. The core team has compiled an internal deliverable that incorporates the interview notes and an analysis of similarities and differences found in the various settings.

### 2.2.3 Synthesis and Reporting Phase

This Final Report includes the following elements:

- The list of all relevant legislation at national level in the 28 EU Member States, defining provisions providing a legal basis for the collection, processing and transfers of personal data in the context of anti-doping activities, with description of the scope and the purpose of these provisions. The country factsheets are in Annex II, and a summary overview is presented in the core text of the Final Report.
- Detailed description of the scope and nature of data processing for anti-doping purposes in the twelve EU Member States identified in the Inception Phase.
- Identified cases that would need to be addressed by national legislation in order to ensure lawful processing of personal data in the anti-doping context.

### 2.3 Limits of the study

Although this study provides a good overview of the current rules by WADA, the national legislation and the practical implementation thereof where it regards data gathering, storage and sharing within the anti-doping context, it is important to point out that the findings presented in this study are based on an incomplete overview of the complex landscape of anti-doping in sport. More concretely, the following limitations should be noted. For the WADA rules, only a few of the many documents produced by WADA could be included in the description presented here. With respect to the interviews, it has to be underlined that the interviews differed in time span, and due to constraints on the side of interview partners, sometimes only lasted 1 hour. In addition, only one Data Protection Authority was willing to conduct an interview. This means the interviews yielded insights mainly from people operating within the anti-doping context.

### 2.4 Content and Structure of this report

The structure of the report is as follows:

Chapter 3 gives an introduction into the WADA structure and rules. In particular, it describes the testing of athletes and the gathering of information about them, the storage of the data and the sharing of data between the different players involved, and finally, it gives a brief overview of how the data are used to make decision and decide on sanctions.

Chapter 4 presents a detailed comparative analysis of all the results obtained from the country reports produced by the national correspondents. It discusses the type of regulation, the status of the NADO, the way international instruments work through the national order, the differences and similarities between the MSs rules and the WADA instruments and the way MSs approach data protection and informational privacy.

Chapter 5 turns to the data gathered during the Field Study Phase, for which interviews with 12 NADOs, 1 DPA, 1 IF, the WADA and the EU Athletes were conducted. The procedures for testing athletes will be described as well as the types of data gathered. Comparative descriptions are also provided on how parties store and analyse the data, decide on the transfer of the data, especially outside the EU, and publish data.

Chapter 6 analyses the legal implications from the results obtained in sections 3, 4 and 5. It will focus on the legal grounds for processing personal data, the legal grounds for processing sensitive personal data and the legal ground for the transfer of personal data. In addition, it will describe how the obligations of the data controller and the rights of the athletes play a role in the anti-doping context. Finally, it will provide reflections of the general principles of necessity, proportionality, subsidiarity and effectiveness, as enshrined in fundamental rights law.

Chapter 7 will identify the most important cases that need to be addressed in national legislation and provide suggestions on how to address those cases.



## 3. Data processing under the WADA framework

### 3.1 Introduction

WADA has a quite complex structure of documents, standards and guidelines. For this section of the report, about 200 documents from WADA comprising together of about 4.000 pages were analysed. Only 6 of those, the Code and the five international standards, are compulsory for anti-doping organisations to take into account, but other instruments, such as the technical documents and the different guidelines for testing, are so detailed and require so much expertise, that parties seldom diverge from them.

The main purpose of this study is to get a fair idea of which data are processed and how; this might quite easily develop into describing the whole process, because almost everything in the anti-doping context is connected. For testing, it is not only important to describe which samples are taken, but also how. For example, entering an athlete's body with a needle may be seen as a medical procedure or interfering with his/her bodily integrity as protected by the right to privacy. In addition, urine sample are taken with a Doping Control Officer having direct visual of the athlete's genitalia. The samples and in any case, the data abstracted from it may qualify as sensitive personal data, which makes it important to describe which safeguards are applied for transporting the samples to the lab and how they are handled in the lab. Another example are so called Therapeutic Use Exemptions (TUE) that athletes can apply for, allowing them to take if mandatory conditions are met, otherwise prohibited, substances. In order to qualify, they must be able to demonstrate medical reasons for the usage of these substances. This requires the physician sending a medical file or in any case, certain medical data to the relevant TUE committee in question and to the external members of the commission judging on the exemption, which makes it useful to give a brief introduction of how this process works. The same counts for the Athlete Biological Passport (ABP), which are longitudinal profiles derived from variables measured in an athlete's urine or blood; if a test diverges significantly from the athletes previous tests, the relevant profile is sent to an external panel of experts, anonymously, but if the athlete objects to their findings and wants to provide additional information on why the values have been fluctuating, the expert panel will receive information which will usually allow them to infer the identity of the athlete.

Similarly, the lab does not know who the samples they test belong to – they only have a sample number –, only certain employees within an anti-doping organization can link the sample number to a specific athlete. This normally qualifies as pseudonymous data, but if the test is positive, the athlete may request a second analysis by the lab during which the athlete has the right to be present to witness the confirmatory analysis in which case his/her identity will be made known to some members of the lab. Another reason to go into more detail is that one of the explicit research questions is whether there is profiling, in the sense of the GDPR, in the anti-doping context. This requires describing how decisions are made on the basis of the lab results and which sanctions are attached to those decisions, to establish whether 'automatic decision-making' takes place. The rights and obligations of athletes and the role consent plays in the anti-doping framework is of obvious relevance to the question of data protection. And to give a final example, legitimacy and proportionality play an important role under the privacy and data protection framework, hence it is pivotal to discuss the extent of the testing authority claimed by WADA and anti-doping organisations over the athletes.

Section 2 gives a brief introduction of the WADA organisation and its regulatory system. Section 3 details the test planning that is made by the anti-doping organisations and describes the actual testing of the athletes. Section 4 specifies the rules on the storage and sharing of data within the anti-doping system. Finally, section 5 provides insights in how the data gathered are used in the decision-making process.

## 3.2. The World Anti-Doping Agency (WADA) and its regulatory framework

### 3.2.1 WADA's regulatory framework

One of WADA's main tasks is to issue regulations, guidelines and standards on the fight against doping.<sup>2</sup> There are dozens of such documents. The most important one is the World Anti-Doping Code (WADC or the Code),<sup>3</sup> which contains the general rules for the collection of athletes' data, the tests which can be performed on blood and urine samples, the sanctions that can be imposed on the athletes for violations of the rules, and the possibilities for appeal. Additionally, five international standards have been adopted: 1) The list of prohibited substances and methods<sup>4</sup> which is reviewed every year; 2) the standard on testing and investigations;<sup>5</sup> 3) the standard for laboratories;<sup>6</sup> 4) the standard regarding on therapeutic use exemptions<sup>7</sup> and 5) the standard for the protection of privacy and protection of personal information.<sup>8</sup> Each of these documents is extensive, describing in detail how organisations such as the national anti-doping agencies must function. Next to the Code and the five standards, model rules, guidelines and protocols are adopted in order to support the organisations in proper implementation of the WADA rules. The WADC stresses that there are three levels of documents: 'The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs. The main elements are: Level 1: The Code Level 2: International Standards Level 3: Models of Best Practice and guidelines'<sup>9</sup> Both the WADC and the five international standards are mandatory for organisations to adopt and implement in order to be deemed compliant. This does not hold true for the third category, the models of best practices and guidelines. Still, in practice, organisations tend to follow those rules meticulously.

Presently, more than 660 organisations have adopted the WADC, including the International Olympic Committee (IOC), the International Paralympic Committee (IPC), all Olympic Sports International Federations (IFs) and all the IOC recognized IFs, National Olympic and Paralympic Committees and National Anti-Doping Organisations (NADOs).<sup>10</sup> One of the WADA Foundation Board's tasks is to assess whether these organisations adequately follow the rules. To be compliant, the rules must be accepted, implemented and effectively enforced by these organisations.<sup>11</sup>

<sup>2</sup> WADA also takes care of assisting all anti-doping organizations worldwide, developing anti-doping education and prevention, fostering scientific research, coordinating anti-doping activities globally, etc.

<sup>3</sup> WADA, 'The World Anti Doping Code'. <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>

<sup>4</sup> WADA, 'International Standard: Prohibited List (January 2017)'. [https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29\\_-\\_wada\\_prohibited\\_list\\_2017\\_eng\\_final.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29_-_wada_prohibited_list_2017_eng_final.pdf) See also: WADA, 'Index of Prohibited Substances and Methods' <https://www.wada-ama.org/en/what-we-do/prohibited-list/index-prohibited-substances-and-methods>

<sup>5</sup> WADA, 'International Standard for Testing and Investigations'. [https://www.wada-ama.org/sites/default/files/resources/files/2016-09-30\\_-\\_isti\\_final\\_january\\_2017.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2016-09-30_-_isti_final_january_2017.pdf)

<sup>6</sup> WADA, 'International Standard for Laboratories'. [https://www.wada-ama.org/sites/default/files/resources/files/isl\\_june\\_2016.pdf](https://www.wada-ama.org/sites/default/files/resources/files/isl_june_2016.pdf)

<sup>7</sup> WADA, 'International Standard for Therapeutic Use Exemptions'. [https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-istue-final-en\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-istue-final-en_0.pdf)

<sup>8</sup> WADA, 'International Standard for the Protection of Privacy and Personal Information'. [https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-istue-final-en\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada-2016-istue-final-en_0.pdf)

<sup>9</sup> WADC, p. 12.

<sup>10</sup> <https://www.wada-ama.org/en/code-signatories>

<sup>11</sup> <https://www.wada-ama.org/en/what-we-do/the-code/code-compliance>

The compliance of signatories is reviewed through a process which is ISO-certified.<sup>12</sup> Recommendations regarding the compliance status of signatories are made by the Compliance Review Committee to WADA's Foundation Board, which can ultimately declare a signatory non-compliant. Such a non-compliance decision may result in consequences such as ineligibility to bid for or hold sports events, forfeiture of offices and positions within WADA and other consequences pursuant to the Olympic Charter.<sup>13</sup>

### 3.2.2 Anti-Doping Rule Violations

There are 10 types of Anti-Doping Rule Violations (ADRVs) enlisted in the WADC, for which athletes or third persons can be deemed in violation of the Code:<sup>14</sup>

1. Presence of a substance or method in an Athlete's Sample
2. Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method
3. Evading, Refusing or Failing to Submit to Sample Collection
4. Whereabouts Failures
5. Tampering or Attempted Tampering with any part of Doping Control
6. Possession of a Prohibited Substance or a Prohibited Method
7. Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method
8. Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition
9. Complicity
10. Prohibited Association

First, some of the ADRV's are not aimed at athletes, but at their staff members or others associated. Trafficking of drugs is seldom done by athletes, but usually by their doctors, team managers or trainers. In similar vein, the administration of a prohibited substance is in general directed not at the athlete itself, but at third parties. The possession of prohibited substances or methods can apply to both athletes themselves and third parties. Complicity, the ninth ADRV, means assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, which is usually also directed at third parties.

Second, ADRV 10 is directed primarily at athletes who associate themselves with staff members or other third parties that have been previously held in violation of the WADC or its standards and are placed on the Prohibited Association List by WADA.<sup>15</sup> This list, and the focus on third parties is important to WADA because, as Craig Reddie, WADA's president has stated: 'WADA is increasingly of the belief that athletes do not dope alone, and that often there is a member of their entourage encouraging them to cheat'.<sup>16</sup>

Thirdly, it is important to note that both the ADRV's directed to third parties and the prohibited association rule are, so to say, circumstantial. If a certain drug is transported by an athlete or their staff or if athletes associate themselves with someone on the black list, this does not mean or prove that the athlete is or was planning to take drugs to en-

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<sup>12</sup> ISO 9001:2015.

<sup>13</sup> Article 23.6 WADC

<sup>14</sup> Article 2 WADC.

<sup>15</sup> [https://www.wada-ama.org/sites/default/files/resources/files/asp\\_list\\_update\\_11.04.2017\\_disclaimer\\_and\\_list.pdf](https://www.wada-ama.org/sites/default/files/resources/files/asp_list_update_11.04.2017_disclaimer_and_list.pdf)

<sup>16</sup> <https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-global-list-of-suspended-athlete-support-personnel>

hance their sport performance. This also holds true for the third category of ADRVs, which is focused on evasion. Grounds 3, 4 and 5 all aim at sanctioning athletes when they do not fully cooperate with the testing procedures. This regards evading, refusing or failing to cooperate with actual sample collection and when the athlete fails to comply with the whereabouts requirements. With respect to the latter, if in the period of 1 year, the athlete has missed three tests and/or has filled his whereabouts in an incorrect way, this will qualify as an ADRV. Tampering means conduct which subverts the doping control process such as intentionally interfering or attempting to interfere with a doping control official, providing fraudulent information to an anti-doping organization or intimidating or attempting to intimidate a potential witness.

The first and second ADRV are aimed at the actual use of prohibited substances or methods. It is either the use itself (second ground) or the presence of substances in the body of the athlete (first ground) which qualify as an ADRV. What is seen as a prohibited substance or method is published in a list by WADA, which is updated yearly. The WADA has sole discretion on this point. WADA can place a substance or method on the list if it meets at least two of the three following requirements:<sup>17</sup> the substance or method has the potential to enhance or enhances sport performance; the substance or method has an actual or potential health risk to the athlete; the substance or method violates the spirit of sport.<sup>18</sup>

### 3.2.3 Prohibited substances and methods

The prohibited substances list contains both prohibited substances and prohibited methods. An example of a prohibited method may be blood transfusions used, inter alia, in cycling.<sup>19</sup> The prohibited substances may be further divided into four subcategories: Sport enhancing drugs such as growth hormones or EPO; Masking agents that are not in themselves sport enhancing, but could be used to mask the intake of sport enhancing drugs; Drugs that may cause direct danger, such as alcohol in automobile, air sports or archery; Recreational drugs, such as marijuana. Consequently, only a portion of the prohibited substances are banned for their presumed sport enhancing effect. The list is reviewed annually through a consultation process and based on the recommendations of a List Expert Group and WADA's Health, Medical and Research Committee. The List is approved by the WADA Executive Committee. But no external validation of scientific evidence, for example as to the real sport-enhancing effect of substances, takes place.

Most drugs are prohibited for all sports that fall under WADA's monitoring. But there are some substances that are only prohibited in particular sports. First, the intake of alcohol in air sports and automobile sports, archery and powerboating. Second, betablockers are prohibited in-competition in archery, automobile, billiards, darts, golf, shooting, skiing/snowboarding, underwater sports, automobile, archery and powerboating. For archery and shooting, also out-of-competition use of betablockers by athletes is prohibited.

The subdivision of substances and methods prohibited in-competition and out-of-competition is one that runs through the entire list of prohibited substances, whereas some substances are prohibited at all times for athletes.

There are also three methods prohibited at all times. First, the manipulation of blood and blood components. This is directed at the practice known as blood transfusion. Second, chemical and physical manipulation. This is directed at practices that try to influence the results from tests, such as substitution of urine and intravenous infusions and injections

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<sup>17</sup> Article 4 WADC

<sup>18</sup> WADAC, p. 14.

<sup>19</sup> <http://www.cyclingnews.com/features/mechanical-doping-a-brief-history/>

– by injecting water in the blood system, athletes may try to lower the level of certain drugs in their blood. Third and finally, the most elusive one, gene doping.<sup>20</sup> It is a relatively new phenomenon by which genes are tampered with from a very early stage, to modify them in a way that makes a person fit to be an athlete. WADA has an expert group to advise it on this matter.<sup>21</sup> So far, gene doping seems quite rare.

Then there are the substances that are prohibited only in-competition. There are no methods that are only prohibited in-competition.

There are two further observations to be made. First, there is a difference between substances that are absolutely prohibited and those where there is a threshold. The latter category may include substances that are natural to the human body, but in high levels, may indicate that drugs have been taken; it also includes extraneous substances. Second, there is a difference between so called specified and non-specified substances. All methods are considered non-specified. The sub-division for specified and non-specified substances and methods is relevant because the sanctions for a violation in relation to a non-specified substance is higher than in relation to specified substances. Although the WADA insists that specified substances not be considered less important or less dangerous than other doping substances, the reason for making this sub-division is that the specified substances are more likely to have been consumed by an athlete for another purpose than performance enhancement.

### 3.2.4 Therapeutic Use Exemptions

Athletes are permitted to use or have in their possession prohibited substances or methods for medical reasons. In such cases, the Code requires athletes to apply for a so called Therapeutic Use Exemption (TUE). Athletes performing on an international level should apply for a TUE with the International Federation, all other athletes should apply with their NADO.<sup>22</sup> A Major Event Organiser (MEO) may also grant TUEs in connection with the event. For athletes who do not perform at the top of their sport either nationally or internationally, ADOs may, under specific circumstances, permit them to apply for a TUE retroactively (after being tested).<sup>23</sup> The WADA monitors the grant of TUEs. If WADA decides to overturn the decision to grant a TUE, this decision may be appealed before the CAS.

One of the WADA Standards is the International Standard for Therapeutic Use Exemptions (ISTUE), which provides further guidance on this point. For obtaining a TUE, it specifies that, by a balance of probability, the athlete should show that each of the following conditions is met:<sup>24</sup> Prohibited substance or method is needed to treat an acute or chronic medical condition; The use of the substance or method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the athlete's normal state of health; There is no reasonable alternative to the use of the prohibited substance or method; The necessity for the use of the prohibited substance or method is not a consequence, wholly or in part, of the prior use (without a TUE) of a substance or method which was prohibited at the time of such use by WADA.

All NADOS, IFs and MEOs must install a TUEC, that is, a Therapeutic Use Exemption Committee, that decides on the grant of a TUE. A TUEC should include at least three physicians with experience in the care and treatment of athletes and knowledge of clinical, sports and exercise medicine, be free of conflicts of interests and be independent. A positive decision must indicate the dosage, frequency, route and duration of the administra-

<sup>20</sup> <https://www.wada-ama.org/en/gene-doping>

<sup>21</sup> <https://www.wada-ama.org/en/gene-doping-expert-group>

<sup>22</sup> Article 4.4.2 and 4.4.3 WADC.

<sup>23</sup> Article 4.4.5 WADC.

<sup>24</sup> Section 4 ISTUE.

tion of the prohibited substance or method that is permitted.<sup>25</sup> Normally, a TUE granted by one organization will be respected by other ADOs, but in cases where this does not apply, athletes may request a TUE again.<sup>26</sup>

### 3.3 Testing athletes and gathering data

#### 3.3.1 Types of tests

The testing of athletes may be done in-competition (IC) and out-of-competition (OOC). All ADOs in principle have the authority to conduct both types of tests. The majority of tests are based on urine and blood samples, although in some sports also alcohol breath tests are used. The samples gathered may be used to test for traces of prohibited substances or markers and for creating/feeding an athlete's biological passport. The biological passport is a longitudinal profile of markers measured in an athlete's blood or urine. By monitoring these markers over time, the ABP can identify deviations which may be indicative of doping and that require follow up by the ADO and in some cases, review by an expert.

Blood and urine samples are considered best suited for discovering drug use: 'Historically, the urine matrix has been a matrix of choice for anti-doping as it is non-invasive to collect and offers the benefit of concentrating some analyses of interest for drug testing in sport. Blood has been emphasized more recently primarily as not all drugs or methods of interest can be tested in urine and also to facilitate validation of information notably pharmacokinetic information of drugs in development into the anti-doping context. Use of urine or blood does not exclude other matrices such as hair analysis in the future, however WADA accredited laboratory analytical methods are currently only validated for blood and urine. Results in hair or other matrices cannot be used to invalidate urinary or blood anti-doping tests for this reason. WADA is also working on developing methods on saliva at a research level as an alternative matrix despite some limitations.<sup>27</sup>

The WADC makes clear that any athlete (amateurs or professionals, those in testing pools or not, etc.) may be required to provide a sample at any time and at any place by any Anti-Doping Organization with testing authority.<sup>28</sup> This means that each NADO has both in- (IC) and out-of-competition (OOC) testing authority over all athletes who are nationals, residents, license-holders or members of sport organizations of that country or who are present in that National Anti-Doping Organization's country. In addition, International Federations have IC and OOC testing authority over all athletes who are subject to their rules, including those who participate in international events or who participate in events governed by the rules of that International Federation, or who are members or license-holders of that International Federation or its member National Federations, or their members. Thirdly, each MEO has testing authority over all athletes entered in one of its future events or who have otherwise been made subject to the testing authority of the Major Event Organization for a future event. Fourthly, WADA itself has testing authority. WADA's Director General may in exceptional circumstances direct doping controls on its own initiative or as requested by other Anti-Doping Organizations.<sup>29</sup>

ADOs develop test distribution plans that describe where the ADO will focus its testing on. Focusing attention is necessary because NADOs have testing authority over sometimes millions of citizens, requiring strict and careful selections to be made, both with an eye on the costs and in terms of effectiveness and efficiency of the tests. The plan is

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<sup>25</sup> Article 6.8 ISTUE.

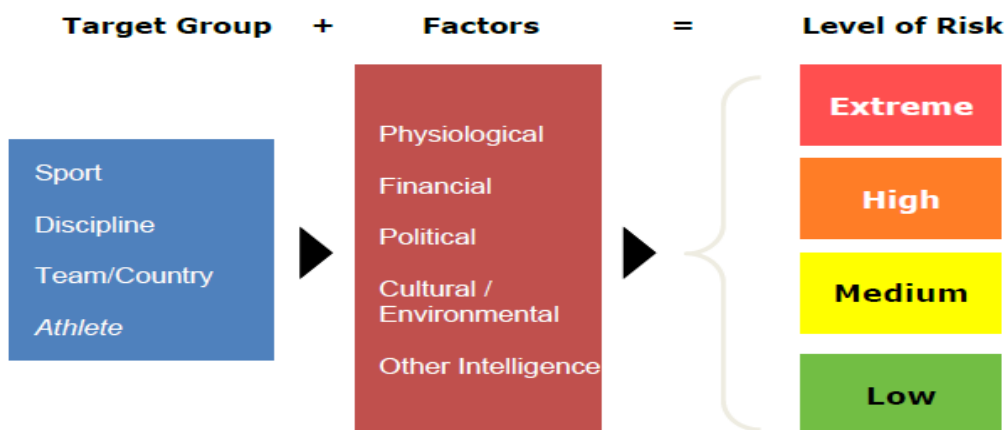
<sup>26</sup> Section 7 ISTUE.

<sup>27</sup> E-mail received from WADA, 2 March 2017.

<sup>28</sup> Article 5 WADC.

<sup>29</sup> Article 20.7 WADC.

based on a risk assessment.<sup>30</sup> Test Distribution Plans (TDPs) include an analysis of which prohibited substances and methods are likely to be abused in certain sports, incorporating the following criteria:<sup>31</sup> the physical and other demands of the relevant sport; the possible performance-enhancing effects that doping may elicit in such sport; the rewards available at the different levels of the sport; the history of doping in the sport; available research on doping trends; information received/intelligence developed on possible doping; the outcomes of previous test distribution planning cycles. In addition, the ADO can also consider the potential doping patterns in its sport, nation or event.<sup>32</sup> Once the plan has been designed, the second step is selecting those who can be subjected to it. In this respect, it should be mentioned that the ISTI gives ADOs explicit discretionary power to limit the number of athletes subjected to tests.<sup>33</sup> For prioritization purposes, the ISTI lays several criteria in the hands of the ADOs.<sup>34</sup>



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Figure 2 Risk levels defined in the ISTI

WADA's 'Technical Document for Sport Specific Analysis' specifies Minimum Levels of Analysis (MLA) for particular Prohibited Substances for select sports and disciplines, expressed as a percentage of the total number of eligible Tests and based on a Physiological Risk Assessment of that sport/discipline. ADOs are at liberty to conduct more tests for certain sports or disciplines. They may also ask laboratories to do more and more elaborate tests than is suggested at a minimum. The technical document is aimed at the higher echelons of sports to ensure the 'right' type of testing is taking place on the 'right' athletes; those most at risk for doping with these select substances such as Erythropoiesis Stimulating Agents and human Growth Hormone: National level athletes and the international level athletes.<sup>36</sup> ADOs can request multiple analyses on Samples collected during the same Sample Collection Session. The MLA can also be used for designing the Test Distribution Plan.

WADA requires that as a general rule, testing should take place between 5 a.m. and 11 p.m, unless serious and specific suspicion of doping use is available to the ADO.<sup>37</sup> However, an athlete may be required to provide a sample at any time and at any place by any ADO with testing authority over him/her. Accordingly, an athlete may not refuse to

<sup>30</sup> Article 5.4 WADC.

<sup>31</sup> Article 4.2 ISTI.

<sup>32</sup> Article 4.2.3 ISTI.

<sup>33</sup> Article 4.3.1. ISTI.

<sup>34</sup> Article 4.4-4.6 ISTI.

<sup>35</sup> [https://www.wada-](https://www.wada-ama.org/sites/default/files/resources/files/wada_guidelines_effective_testing_2014_v1.0_en.pdf)

[ama.org/sites/default/files/resources/files/wada\\_guidelines\\_effective\\_testing\\_2014\\_v1.0\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_guidelines_effective_testing_2014_v1.0_en.pdf)

<sup>36</sup> Article 3.3 Technical Document for Sport Specific Analysis. <https://www.wada-ama.org/sites/default/files/resources/files/wada-tdssa-v2.2-en.pdf>

<sup>37</sup> Comment to 5.2 WADC.

submit to sample collection on the basis that such testing is not provided for in the Test Distribution Plan and/or is not being conducted between 5 a.m. and 11 p.m., and/or that the athlete does not meet the relevant selection criteria for testing or otherwise should not have been selected for testing.<sup>38</sup>

In principle, all testing is conducted without informing the athlete that he/she will be tested on a particular day on a particular time.<sup>39</sup> This is called no advance notice testing. The element of surprise is deemed important so that doping athletes are not afforded time to prepare manipulation of the doping control process.

Furthermore, the ISTI specifies: 'Very exceptionally, i.e., in the small number of sports and/or disciplines where it is determined in good faith that there is no material risk of doping during Out-of-Competition periods, there may be no Out-of-Competition Testing.'<sup>40</sup> This means that in principle, athletes from all sports should be subjected to out-of-competition testing occasionally.

### 3.3.2 Intelligence and investigations

The WADC specifies with regard to intelligence gathering that ADOs shall obtain, assess and process anti-doping intelligence from all available sources to inform the development of an effective, intelligent and proportionate Test Distribution Plan, to plan target testing and/or to form the basis of an investigation into a possible anti-doping rule violation. In addition, ADOs can investigate so called atypical test findings and atypical passport findings. Finally, according to the WADC, ADOs shall investigate 'any other analytical or non-analytical information or intelligence that indicates a possible anti-doping rule violation(s) [] in order either to rule out the possible violation or to develop evidence that would support the initiation of an anti-doping rule violation proceeding.'<sup>41</sup>

Consequently, intelligence plays a role in three phases: (1) when designing the test distribution plan and selecting athletes and sports for further testing; (2) when through testing, ADOs have become aware that there may be an ADRV, but more intelligence is needed to verify such suspicion; (3) intelligence gained from other sources, that may be used to design targeted tests. While the presence and the use of prohibited substances can be determined by analysing human tissues, gathering intelligence is necessary for detecting and/or verifying the other anti-doping rule violations.<sup>42</sup>

To obtain more intelligence, WADA has designed a whistle-blower program, which includes a specific policy. Besides financial and legal assistance, WADA may decide to provide the whistle-blower with a financial reward, such as to incentivize people around the world to provide WADA and other ADOs with relevant information about doping and misconduct in sports. In addition, WADA has issued Information Gathering and Intelligence Sharing Guidelines.<sup>43</sup> WADA encourages every ADO to have a separate intelligence unit that gathers and shared data on potential anti-doping rules violations.

### 3.3.3 Whereabouts and out-of-competition testing

To assist ADOs in locating athletes for out-of-competition testing, athletes may be asked to provide their whereabouts. These athletes are usually the top-athletes and/or those

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<sup>38</sup> Article 4.5.5 ISTI.

<sup>39</sup> Article 4.6.2 ISTI.

<sup>40</sup> Article 4.6 ISTI.

<sup>41</sup> Article 5.8 WADC.

<sup>42</sup> Comment to 11.1.1 ISTI.

<sup>43</sup> [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_guidelines-information-gathering-intelligence-sharing\\_final\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_guidelines-information-gathering-intelligence-sharing_final_en.pdf)



that are deemed most prone to the usage of prohibited substances. They are put in the so called Registered Testing Pool, either by their NADO or by their IF.<sup>44</sup> Whereabouts information may be used for a variety of purposes, such as for locating the athlete, for planning, coordinating or conducting doping controls, providing information relevant to the biological passports, to support an investigation into a potential anti-doping rule violation and to support proceedings alleging an anti-doping rule violation. Apart from these purposes, the ISTI makes explicit that 'the collection of whereabouts information can have a useful deterrent effect.'<sup>45</sup>

Three things are important to note. First, also athletes that are not in the registered testing pool may be tested out-of-competition – although in such cases, it may be difficult for the ADO to locate the athlete. Second, for both these athletes and the athletes in the registered testing pool, the ADO is at liberty to use its intelligence and investigations authority to locate them. Third, although athletes in the registered testing pool usually provide their whereabouts for one hour a day, so that they can be tested during that timeslot at a pre-determined location, the ADO is at liberty to tests any athlete, including those in the RTP, outside the indicated hours. Hence, testing potentially involves all athletes based on whereabouts information provided by specified athletes or not.

### 3.3.4 Testing personnel

The ISTI, in an annex, specifies general requirements for Sample Collection Personnel.<sup>46</sup> There are two absolute minimum requirements that must be respected. First, no Doping Control Officer (DCO) may be an underage (younger than 18 under WADC).<sup>47</sup> Second, Blood Control Officers (BCOs) must have the requisite professional training and the qualifications to execute blood collection from a vein. The ISTI specifies that testing personnel should avoid conflicts of interest, meaning that they cannot be involved in the administration of the sport for which testing is being conducted or related to, or involved in the personal affairs of, any athlete who might provide a sample at that session. In general, persons must receive comprehensive theoretical training, must observe the different types of testing and perform an on-site sample collection session before being qualified to act as a DCO. Accreditation shall only be valid for a maximum of two years.<sup>48</sup> Next to DCOs, the WADC distinguishes chaperones, who can assist the DCO during collection sessions in the form of providing written notification of athletes, witnessing sample provision or escorting athletes from notification to sample provision.

### 3.3.5 Testing

Prior to testing, a TDP must be designed and DCOs, chaperones and potential other personnel must be appointed. Subsequently, the athletes must be located and their identity verified. The athletes tested should be informed about the procedure and their rights and obligations. With respect to no advance notice testing, which will be in the majority of cases, it is important that the chaperone continuously stays with the athlete from the time of notification to the arrival at the Doping Control Station. The sample collection personnel have a duty to document the different steps and any particularities that take place.<sup>49</sup> There are special rules applicable to conducting alcohol tests,<sup>50</sup> urine tests,<sup>51</sup> blood tests<sup>52</sup> and out-of-competition tests,<sup>53</sup> but these will not be described in detail.

<sup>44</sup> Article 5.6 WADC.

<sup>45</sup> Comment to 4.8.1 ISTI.

<sup>46</sup> Annex H ISTI.

<sup>47</sup> WADC p. 136. The Toolkit, however, refers to the age of majority in their country. See article 3.1 Toolkit for Doping Control Officers. [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_dco\\_toolkit\\_v3\\_full\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_dco_toolkit_v3_full_en.pdf)

<sup>48</sup> [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Guidelines\\_SampleCollectionPersonnel\\_EN.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Guidelines_SampleCollectionPersonnel_EN.pdf)

<sup>49</sup> Article 5.2 ISTI.

In general, when contact is made, the athlete must be informed:<sup>54</sup>

- That the athlete is required to undergo a sample collection
- Of the authority under which the sample collection is to be conducted
- Of the type of sample collection and any conditions that need to be adhered to prior to the sample collection
- Of the athlete's rights, including the right to:
  - o Have a representative and, if available, an interpreter accompanies them
  - o Ask for additional information about the sample collection process
  - o Request a delay in reporting to the Doping Control Station for valid reasons;
  - o Request modifications, when the athlete has impairments
- Of the athlete's responsibilities, including the requirement to:
  - o Remain within direct observation of the DCO/Chaperone at all times from the point initial contact is made until the completion of the sample collection
  - o Produce identification
  - o Comply with sample collection procedures and the possible consequences of failure to comply<sup>55</sup>
  - o Report immediately for sample collection, unless there are valid reasons for a delay, as determined in accordance with Article 5.4.4.
- Of the location of the Doping Control Station;
- That should the athlete choose to consume food or fluids prior to providing a sample, he/she does so at his/her own risk;
- Not to hydrate excessively, since this may delay the production of a suitable sample
- That any urine sample provided should be the first urine passed by the athlete subsequent to notification

When contact is made, the DCO/Chaperone shall:<sup>56</sup>

- From the time of such contact until the end of the sample collection session keep the athlete under observation
- Identify themselves to the athlete using the documentation
- Confirm the athlete's identity as per the criteria established

Subsequently, the athlete must sign an appropriate form<sup>57</sup> to acknowledge and accept the notification. If the athlete refuses to confirm being notified, or evades the notification, the sample collection staff shall endeavour to inform the athlete of the consequences of refusing or failing to comply. When possible, the DCO shall continue to collect a sample. There may be reasons for delay in any part of the procedure on the athlete's behalf. It is up to the DCO to decide whether the reasons for delay are valid.<sup>58</sup>

<sup>50</sup> [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_guidelines\\_breath\\_alcohol\\_testing\\_2014\\_v1.0\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_guidelines_breath_alcohol_testing_2014_v1.0_en.pdf)

<sup>51</sup> [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_guidelines\\_urine\\_sample\\_collection\\_2014\\_v1.0\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_guidelines_urine_sample_collection_2014_v1.0_en.pdf) See also: Annex D - Collection of Urine Samples ISTI.

<sup>52</sup> [https://www.wada-ama.org/sites/default/files/resources/files/guidelines\\_blood\\_sample\\_collection\\_v5\\_sept\\_2016.pdf](https://www.wada-ama.org/sites/default/files/resources/files/guidelines_blood_sample_collection_v5_sept_2016.pdf) See also: Annex E ISTI.

<sup>53</sup> Annex I ISTI.

<sup>54</sup> Article 5.4.1 ISTI.

<sup>55</sup> Failures to comply must also be documented. Annex A - Investigating a Possible Failure to Comply ISTI.

<sup>56</sup> 5.4.2 ISTI.

<sup>57</sup> <https://www.wada-ama.org/sites/default/files/resources/files/wada-doping-control-form-v8.pdf>

<sup>58</sup> 5.4.4 ISTI.

During a test, the Doping Control Station should ensure the athlete's privacy and where possible, should be used solely for tests, at least for the duration of the Sample Collection Session. The athlete is entitled to be accompanied by a representative and/or interpreter and minors<sup>59</sup> and athletes with impairments may be accompanied by a representative. When the athlete has physical impairments that make urine collection difficult, modifications may be required.<sup>60</sup> The bottles, containers and tubes that are used should be numbered, be sealed to ensure tampering is evident and to avoid contamination, and it should be ensured that the identity of the athlete is not evident from the equipment itself and the materials used should be clean and sealed prior to usage. The DCO shall provide the athlete with the opportunity to hydrate. The DCO should document the process and must provide the athlete with the opportunity to document any concerns he/she has about how the process.

The documentation shall include at least:

- Date, time and type of notification (no advance notice or advance notice);
- Arrival time at Doping Control Station;
- Date and time of sealing of each sample collected and date and time of completion of entire sample collection process
- The athlete's name, date of birth, gender, home address, email address and telephone number, sport and discipline and the name of the coach and doctor
- The sample code number;
- The type of the sample (urine, blood, etc);
- The type of test (In-Competition or Out-of-Competition);
- The name and signature of the DCO/Chaperone, or where applicable, the BCO
- Partial sample information
- Required laboratory information on the sample
- Medications and supplements taken within the previous seven days and/or blood transfusions within the previous three months, as indicated by the athlete
- Any irregularities in procedures;
- Athlete comments or concerns regarding the conduct of the collection session
- Athlete consent for the processing of sample collection data;
- Athlete consent or otherwise for the use of the sample(s) for research purposes;
- Where applicable, the name and signature of the athlete's representative
- The name and signature of the athlete
- The name and signature of the DCO
- The name of the testing authority
- The name of the sample collection authority
- The name of the results management authority

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<sup>59</sup> Annex C - Modifications for Athletes who are Minors ISTI. Article C.4.4 'Athletes who are Minors should be notified in the presence of an adult, and may choose to be accompanied by a representative throughout the entire Sample Collection Session. The representative shall not witness the passing of a urine Sample unless requested to do so by the Minor. The objective is to ensure that the DCO is observing the Sample provision correctly. Even if the Minor declines a representative, the Sample Collection Authority, DCO or Chaperone, as applicable, shall consider whether another third-party ought to be present during notification of and/or collection of the Sample from the Athlete.' For out-of-competition testing, a location should be selected where the presence of an adult is most likely, for example a training venue.

<sup>60</sup> Annex B ISTI - Modifications for Athletes with Impairments. Article B.4.6 'Athletes who are using urine collection or drainage systems are required to eliminate existing urine from such systems before providing a urine Sample for analysis. Where possible, the existing urine collection or drainage system should be replaced with a new, unused catheter or drainage system prior to collection of the Sample. The catheter or drainage system is not a required part of Sample Collection Equipment to be provided by the Sample Collection Authority; instead it is the responsibility of the Athlete to have the necessary equipment available for this purpose.'

Special rules apply to athletes that have a biological passport, which actually consists of two modules, one based on blood samples and another based on urine samples.<sup>61</sup> Some laboratories are not accredited by WADA for general testing, but are approved for conducting analyses in support of the haematological module of the Athlete Biological Passport (ABP).<sup>62</sup>

### 3.4. Sharing and storing the data

#### 3.4.1 Transport to the laboratory

After the samples have been taken from the athlete by the DCO, he/she must ascertain two things. First, the DCO should provide the relevant documentation to the Anti-Doping Organization that has mandated the test. Second, it should be ensured that the samples are transported to the laboratory in a safe and secure manner. The ISTI contains elaborate rules for both.<sup>63</sup> For the transport of the samples, a so-called chain of custody applies. This means that the samples may never be out of sight of the DCO or the courier that transports the sample to the lab. The Sample Collection Authority has the responsibility to ensure that samples are transported in 'a manner that protects their integrity, identity and security.'<sup>64</sup> To ensure the integrity of the samples, temperature variations and time delays must be avoided as far as possible. It is important to point out that the documentation identifying the athlete shall not be sent to the laboratory. Consequently, the samples are pseudonymous.<sup>65</sup>

When the samples arrive at the laboratory,<sup>66</sup> via the chain of custody, the transport container and recording should be checked for any irregularities,<sup>67</sup> such as when tampering is evident, the sample is not properly sealed, the volume is inadequate, the transport or the documentation does not meet the applicable standards, etc.<sup>68</sup> Essential for the laboratories are the so called external record and the internal chain of custody. The internal chain of custody consists of documentation such as worksheets, logbooks and forms.<sup>69</sup> On the retention of the samples, it is stressed that the lab must retain the "A" and "B" sample(s) without a so called Adverse Analytical Finding or Atypical Finding for a minimum of three months after the final analytical ("A" Sample) report is transmitted to the testing authority. Samples with irregularities shall be stored frozen for a minimum of three months following the report to the testing authority.<sup>70</sup>

There may roughly be three outcomes of the sample analysis by the lab:

- There is an Adverse Analytical Finding. According to the WADC, this is: 'A report from a WADA-accredited laboratory or other WADA-approved laboratory that, consistent with the international Standard for Laboratories and related Technical Documents, identifies in a Sample the presence of a Prohibited Sub-

<sup>61</sup> The passport was introduced in 2009, focusing on haematological variables for the detection of blood doping. In late 2013, coming into effect per 2014, a second module was introduced, namely the 'Steroidal Module'. This module monitors selected urinary steroid concentrations over time in order to detect steroid doping.

<https://www.wada-ama.org/en/athlete-biological-passport>

[https://www.wada-ama.org/sites/default/files/resources/files/guidelines\\_abp\\_v6\\_2017\\_jan\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/guidelines_abp_v6_2017_jan_en.pdf)

<sup>62</sup> [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Criteria\\_Haematological\\_Laboratory\\_June\\_2010\\_EN\\_FINAL.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Criteria_Haematological_Laboratory_June_2010_EN_FINAL.pdf)

<sup>63</sup> Section 8 and 9 ISTI.

<sup>64</sup> Article 9.3.1 ISTI.

<sup>65</sup> See also: Annex K ISTI.

<sup>66</sup> See on the analysis of the sample also article 6 WADC.

<sup>67</sup> Section 5 ISL.

<sup>68</sup> Article 5.2.2.3 ISL.

<sup>69</sup> Technical Document: TD2009LCOC.

<sup>70</sup> Article 5.2.2.6 ISL.

stance or its Metabolites or Markers (including elevated quantities of endogenous substances) or evidence of the use of a Prohibited Method.<sup>71</sup> In principle, this is enough to establish an ADRV.

- There is an Atypical Finding. According to the WADC, this is: 'A report from a WADA-accredited laboratory or other WADA-approved laboratory which requires further investigation as provided by the international Standard for Laboratories or related Technical Documents prior to the determination of an adverse analytical finding.'<sup>72</sup> This is typically the case where from the analysis of the sample itself, there is no direct proof that the athlete conducted prohibited behaviour, but it is suspicious enough to investigate the matter further, for example by subjecting the athlete to additional tests and/or by gathering additional intelligence.
- No indication of the use of prohibited substances or methods.

The ISL specifies that unencrypted email is not authorized for any reporting or discussion of Adverse Analytical Findings or Atypical Findings if the athlete can be identified or if any information regarding the identity of the athlete is included.<sup>73</sup>

### 3.4.2 Anti-Doping Administration & Management System (ADAMS)

WADA promotes the use of a web-based database management system, ADAMS, for the storage and sharing of data in the entire anti-doping process. ADOs shall use ADAMS or another system approved by WADA to report doping control information.<sup>74</sup> ADAMS is non-obligatory for most parts, but increasingly, ADOs around the world seem to be using it for the management of their data. ADAMS simplifies the daily activities of all stakeholders and athletes involved in the anti-doping system, by enabling ADOs to collect and process doping control related data pertaining to participants (athletes).<sup>75</sup> Its purpose is to help coordinate anti-doping activities and assist stakeholders with their implementation of the WADC.<sup>76</sup> It is also the WADA clearinghouse where all data can be stored, including laboratory results, Therapeutic Use Exemptions and information on Anti-Doping Rule Violations. Though ADAMS, information can be easily stored, processed and shared between all relevant partners over the world.

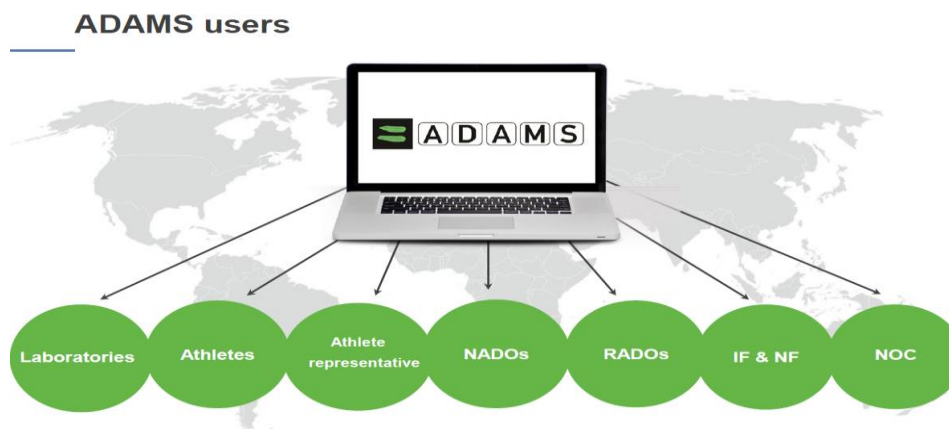


Figure 3 ADAMS users

<sup>71</sup> WADC, p. 130.

<sup>72</sup> WADC, p. 132.

<sup>73</sup> Article 5.2.6.14.4 ISL.

<sup>74</sup> Article 14.5 WADC

<sup>75</sup> <https://www.wada-ama.org/en/list-of-organizations-using-adams>

<https://www.wada-ama.org/en/implementation>

<sup>76</sup> Website and general use agreement.

In compliance with the Annex to the International Standard for the Protection of Privacy and Personal Information, the rules governing the retention of information in ADAMS are the following:

Modules	Categories of data	Data retention <sup>77</sup>
Whereabouts Information	<ul style="list-style-type: none"> <li>a) place of residence;</li> <li>b) a daily one-hour time slot during which the Athlete must be available for Testing;</li> <li>c) information regarding an Athlete's regular activities, such as training and other employment;</li> <li>d) competitions in which an Athlete is scheduled to compete; and</li> <li>e) the name and contact details of designated individuals who may be contacted in the event an Athlete is unavailable for Testing as indicated in their Whereabouts Information.</li> </ul>	<ul style="list-style-type: none"> <li>- 18 months (commencing from the date to which the Whereabouts Information relates.)</li> <li>- missed tests data: longer period of time and at least until it has been clearly established whether an anti-doping rule violation has been committed under the Code or any applicable laws.</li> <li>- if Athlete is part of ABP, 10 years</li> </ul>
TUEs	<ul style="list-style-type: none"> <li>a) an Athlete's TUE request(s), including the name and contact details of the Athlete's physician;</li> <li>b) TUE decision(s), including status and scope (such as, product concerned, dosage, and period of validity); and</li> <li>c) information, which may include medical records and other information supporting TUE request(s) and relevant to the assessment of such TUE request(s) ("Sensitive TUE-related Information"<sup>78</sup>).</li> </ul>	<ul style="list-style-type: none"> <li>- 10 years commencing with its entry onto ADAMS</li> <li>- in the event an anti-doping investigation or related proceedings are pending upon the expiry of 10 years, the TUE-related information shall be retained until the investigation into such anti-doping rule violation or any related proceedings have concluded</li> </ul>
Doping Control	<ul style="list-style-type: none"> <li>a) information relating to test distribution planning;</li> <li>b) Mission Orders;</li> <li>c) Sample collection information and handling; and</li> <li>d) Doping Control Forms.</li> </ul>	<ul style="list-style-type: none"> <li>- 18 months</li> </ul>
Result Management	<ul style="list-style-type: none"> <li>a) information regarding Adverse Analytical Findings, including laboratory analysis and results;</li> <li>b) information regarding atypical findings, including laboratory analysis and results;</li> <li>c) information relating to anti-doping rule violations;</li> <li>d) information relating to sanctions (such as suspensions, disqualifications, pending suspensions and pending disqualifications); and</li> <li>e) information relating to missed tests and non-compliance with rules relating to the submission of Whereabouts Information</li> </ul>	<ul style="list-style-type: none"> <li>- 10 years</li> <li>- in the event of a pending anti-doping rule violation investigation, the Results Management-related information shall be retained until an investigation concerning an anti-doping rule violation or related proceedings have concluded</li> </ul>
Athlete Biological Passport (ABP)	<ul style="list-style-type: none"> <li>- Haematological Module collects information on Markers of blood doping</li> <li>- The Steroidal Module collects information on Markers of steroid doping.</li> <li>- Given that additional information is required from Athletes beyond what is collected in traditional Doping Control documentation pursuant to the ISTI, supplemental or revised documentation may be required</li> </ul>	<ul style="list-style-type: none"> <li>- 8 years</li> </ul>

WADA has provided the following information on who can write and read in the different modules in ADAMS.

<sup>77</sup> [https://wada-main-prod.s3.amazonaws.com/resources/files/WADA\\_ISPP\\_Annex\\_Retention\\_Time\\_EN.pdf](https://wada-main-prod.s3.amazonaws.com/resources/files/WADA_ISPP_Annex_Retention_Time_EN.pdf)

<sup>78</sup> The Parties shall ensure that Sensitive TUE-related Information will be disclosed only to an Athlete, his or her physician, and the competent TUE Review Committee and not to any other Anti-Doping Organizations, unless the Athlete in question has specifically requested the Parties to release such information. Schedule 2 ISA agreement.

## Whereabouts accessibility

### Possible sharing rules:

- Whereabouts custodian can grant access to other relevant ADO.

Note: WADA has access to all submitted whereabouts as per art. 14.3

	Not submitted	Submitted
Athlete	Write	Write
Athlete representative	Write	Write
W. Custodian	None	Write
Other ADO	None	Read
WADA	None	Read
Lab.	None	None

## TUE accessibility

- TUE are only editable by the sporting organization

- TUEs are accessible to organizations with access to the athlete profile, only in accounts configured to have such access.

- The medication information related to TUEs can only be shared upon specific request, for recognition purposes.

	Submitted	Approved	Support doc.
Athlete	Write	Read	Write
Athlete doctor	Write	Read	Write
Physician ADO	Write	Write	Write
Other ADO	Read	Read	None
WADA	Read	Read	Read
Lab.	None	None	None

## Test planning accessibility

- Planned mission orders and tests are only available to the testing authority and sample collection agency

### Sharing rules:

- ADO can share planned tests with other ADO
- Any organization with access to the athlete record can see completed tests.

	Planned Tests	Completed Tests	DCF
Athlete	None	Read*	None
Testing Authority	Write	Write	Write
Sample Collection Authority	Write	Write	Write
Results Management Authority	None	Read	Write
Lab.	None	None	None
WADA	None	Read	Read
Other ADO	None	Read	None

## Lab results accessibility

- Testing authority and results management authority have read access to their results.

- WADA has read access to all lab results.

- Only WADA accredited laboratories have access to ADAMS.

- It is not possible to share lab results in ADAMS.

	Negative result	Adverse result	Atypical result
Athlete	Read*	Read*	Read*
Testing Authority	Read	Read	Read
Sample Collection Authority	None	None	None
Results Management Authority	Read	Read	Read
Lab.	Write	Write	Write
WADA	Read	Read	Read
Other ADO	None	None	None

## Hematological passport accessibility

	DCF	Biological result	Hematological passport	Expert report	APMU report
Athlete	None	Read	None	None	None
Testing Authority	Write	Read	None	None	None
Passport Custodian	Read	Read	Read	Read	Read
Passport Custodian APMU	Read*	Read	Read	Read	Write
Passport Custodian Experts	Read*	Read	Read	Write	None
WADA	Read	Read	Read	Read	Read
Biological lab	None	Write	None	None	None

### Sharing rules:

- Biological passports can be shared by the passport custodian with either the athlete NADO or IF.
- Sharing agreement template in ABP Guidelines.

## Results management accessibility

	RESULT	AAF/ATF	ADRV	SANCTIONS	FILING FAILURE
Athlete	Read*	None	None	None	None
Testing Authority	Read	Write	Write	Write	Write
Sample Collection Authority	None	None	None	None	None
Results Management Authority	Read	Write	Write	Write	Write
Lab.	Write	None	None	None	None
WADA	Read	Read	Read	Read	Read
Other ADO	None	Read	Read	Read	Read

### Sharing rules:

- It is not possible to share lab results in ADAMS.

ADAMS is hosted in Canada. WADA stresses that strong technical, organizational and other security measures have been applied to ADAMS to maintain the security of the data entered onto ADAMS.<sup>79</sup> In addition,<sup>80</sup> WADA and ADOs have put in place strict internal and contractual (through the ADAMS user agreement) guarantees to ensure that personal data remain confidential and secure. Access to data is strictly on a need-to-know basis. WADA's legal statement to ADAMS holds that any litigation, dispute or claim arising from or related to the use of ADAMS shall be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved in accordance with the Code of sports-related arbitration.<sup>81</sup> Still, because ADAMS and WADA fall under the Canadian data protection regime, it seems that disputes relating to the processing of personal data could also be judged by Canadian courts.

### 3.4.3 Sharing data

WADA initiated guidelines for NADO to NADO partnerships.<sup>82</sup> NADOs formally cooperate through the Institute of National Anti-Doping Organisations (iNADO),<sup>83</sup> which helps NADOs to improve their programs and to adopt best practices.<sup>84</sup> WADA has also published Guidelines for Optimizing Collaboration Between International Federations and National Anti-Doping Organizations in order to encourage the sharing of data between NADOs and IFs.<sup>85</sup> Such cooperation is necessary, WADA believes, in order to build stronger working partnerships, develop greater levels of trust, and encourage openness to information and intelligence sharing. WADA has issued a number of model rules for parties involved, such as for national Olympic committees,<sup>86</sup> NADOs,<sup>87</sup> IFs<sup>88</sup> and for ME-

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<sup>79</sup> About the security measures, WADA has stated the following in a private e-mail (dated 29 March 2017): "Processing activities are performed by a dedicated WADA team, although some processing is performed by an IT services firm, which has ISO9000 and SSAE 16 certifications, as does our secure data center facility, and is under contractual obligations to keep the data secure. A non-exhaustive list of other relevant security measures includes the following:

- Servers hosted in secure data centre, physical and logical (management) access restricted to select IT infrastructure management personnel.
- Dedicated hosting network, isolated from the rest of the business, with management access restricted by two-factor RSA SecurID.
- Change management processes.
- Network firewall, IDS and web-application firewall.
- Security monitoring by IBM Managed Security Services.
- Data in transit encrypted using TLS.
- Logging of network and application activity
- Access and authentication controls related to ADAMS data, such as user account credentials, multi-level permissions, and sharing rules."

<sup>80</sup> Article 4.2 'For the avoidance of doubt, each Party shall: 4.2.1 Process Personal Information contained in ADAMS for anti-doping purposes alone; 4.2.2 treat Personal Information contained in ADAMS as confidential information at all times; 4.2.3 grant access to Personal Information contained in ADAMS only to persons identified in this Agreement, the Code or the International Standard, unless otherwise required by applicable laws; 4.2.4 in the event that Personal Information is disclosed, inform recipients of the confidential nature of such information and the limited purposes for which it can be used, require such recipients to treat the Personal Information confidentially, and, when necessary, enter into agreements in writing with the recipients to preserve the confidential nature of the Personal Information; 4.2.5 respect and observe the technical security measures contained in ADAMS and, where appropriate, implement additional organizational security measures to prevent unauthorized access to Personal Information contained in ADAMS; and 4.2.6 ensure that all ADAMS Users to whom it has granted access have been informed of and received training in how to use ADAMS in a secure manner.' [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_adams\\_user\\_agreement\\_ado\\_version\\_2015.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_adams_user_agreement_ado_version_2015.pdf)

<sup>81</sup> <https://www.wada-ama.org/en/adams-legal-statement>

<sup>82</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-Guidelines-International-NADO-Cooperation-EN.pdf>

<sup>83</sup> [http://www.inado.org/fileadmin/user\\_upload/INADO\\_Articles\\_Final\\_January\\_2012\\_1\\_.pdf](http://www.inado.org/fileadmin/user_upload/INADO_Articles_Final_January_2012_1_.pdf)

<sup>84</sup> <http://www.inado.org/about/this-is-inado.html>

<sup>85</sup> [https://www.wada-ama.org/sites/default/files/resources/files/wada-if-nado-collaboration-guidelines\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada-if-nado-collaboration-guidelines_en.pdf)

<sup>86</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-NOC-Model-Rules-v2.0-EN.doc>

<sup>87</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-NADO-Model-Rules-v3.0-EN.docx>

<sup>88</sup> [https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-if-model-rules-v3.0-en\\_0.doc](https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-if-model-rules-v3.0-en_0.doc)



Os.<sup>89</sup> In addition, it has issued Guidelines for Major Event Organisers.<sup>90</sup> All these documents encourage the sharing of data between the different players where necessary, mostly on a need to know basis.

It should be recognized that on the one hand, there are substances on WADA's prohibited list which are only prohibited in regards to sports, and on the other hand, there are substances that are banned and possession of which is a criminal offence in some countries. Furthermore, some of the substances on WADA's prohibited list may only be supplied by medically trained personnel conditional on a medical prescription; the distribution of such substances by others may be qualified as a criminal offence in some countries. There is an additional issue of drug trafficking when substances are transported from country A to country B, when in at least one of these countries the substance is prohibited under criminal law. A number of other issues may also be addressed via criminal law. For example, in some countries, it is a criminal offence to participate in professional athletic events under fraudulent presumptions.

In its investigation guidelines, WADA mentions a number of examples in which the cooperation between law enforcement agencies and ADOs was successful, such as the Olympic Winter Games in Turin. It encourages such cooperation on a national and international level. WADA itself has signed a cooperation protocol with the World Customs Organisation and a Memorandum of Understanding with INTERPOL.<sup>91</sup>

### 3.5. Use of the data

#### 3.5.1 Analysing the lab results

As indicated above, the lab results can have three outcomes: Adverse Analytical Finding (AAF), Atypical Finding (ATF) and no finding. The WADC sets rules for the management of these results.<sup>92</sup> When reviewing AAFs, the ADO must undertake two steps: determine whether the athlete has been granted or will be granted a TUE and second, whether there has been any apparent departure from the International Standard for Testing and Investigations or the International Standard for Laboratories that may have caused the AAF. If the ADO decides not to bring forward the AAF as an ADRV, it shall notify both the athlete and the other ADOs involved. Else, the ADO must notify the athlete of the relevant information, his/her rights and the potential consequences.<sup>93</sup>

When reviewing an ATF, the ADO must again determine whether the athlete has been granted or will be granted a TUE and second, whether there has been any apparent departure from the relevant standards that may have caused the ATF. If neither applies, the ADO must investigate the matter further.<sup>94</sup> Sometimes, such investigations could be extensive, other times, they might be quite minimal, for example if the NADO has previously determined that an athlete has a naturally elevated testosterone/epitestosterone ("T:E") ratio, confirmation that an ATF is consistent with that prior ratio is a sufficient investigation. In principle, the athlete will not be informed about such investigations.

Then there are special rules in the WADC for both Atypical Passport Findings and Adverse Passport Findings,<sup>95</sup> for the review of Whereabouts Failures<sup>96</sup> and for the review of the

<sup>89</sup> <https://www.wada-ama.org/sites/default/files/wada-2015-meo-model-rules-v3.0-en.docx>

<sup>90</sup> [https://www.wada-ama.org/sites/default/files/resources/files/guidelines\\_for\\_major\\_events\\_final\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/guidelines_for_major_events_final_en.pdf)

<sup>91</sup> [https://wada-main-](https://wada-main-prod.s3.amazonaws.com/resources/files/WADA_Investigations_Guidelines_May2011_EN.pdf)

[prod.s3.amazonaws.com/resources/files/WADA\\_Investigations\\_Guidelines\\_May2011\\_EN.pdf](https://wada-main-prod.s3.amazonaws.com/resources/files/WADA_Investigations_Guidelines_May2011_EN.pdf)

<sup>92</sup> Comment to Article 7 WADC.

<sup>93</sup> Article 7.3 WADC.

<sup>94</sup> Article 7.4 WADC.

<sup>95</sup> Article 5 WADC.

<sup>96</sup> Article 7.6 WADC.

other ADRVs.<sup>97</sup> The ISTI also contains special rules for the Results Management Requirements and Procedures for the Athlete Biological Passport.<sup>98</sup> Neither of these will be discussed in detail.

### 3.5.2 Proof and liability

When it comes to the proof of doping, it is important that the WADC incorporates a special set of rules on the burden of proof and liability.<sup>99</sup> The ADO has the burden of establishing that an anti-doping rule violation has occurred – but the standard of proof is establishing that an anti-doping rule violation has occurred ‘to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.’<sup>100</sup> If the athlete or other person in question can show that the rules of procedures prescribed in the ISL or the ISTI may have reasonably caused the AAFs, the ADO shall have the burden of proof that this did not result in the AAF.

WADA has opted for the model of strict liability. Under this rule, it is not necessary that intent, fault, negligence, or knowing use of a prohibited substance or method by the athlete is demonstrated by the ADO in order to establish an anti-doping rule violation. Rather, when a prohibited substance is found in the athlete’s sample, this will count as a violation, whether or not the athlete intentionally used a prohibited substance or was negligent or otherwise at fault. The only flexibility is with the sanctioning, where the intention of the athlete may be taken into account.<sup>101</sup>

### 3.5.3 Hearings and appeal

The WADC gives details about the right to a fair hearing.<sup>102</sup> Hearing must be held within a reasonable time by a fair and impartial hearing panel. The decision should be intelligible and publicly disclosed.<sup>103</sup> The decisions made at the ADO level may be appealed before CAS. CAS shall do a full review of the case and is not deferred by the findings being appealed.<sup>104</sup> In contrast to other parties, WADA has no obligation to exhaust internal remedies before going to CAS. For appeals involving international-level athletes or international events, the decision may be appealed exclusively to CAS. For all other instances, the decision may be appealed to an independent and impartial body in accordance with rules established by the NADO.

WADA’s Results Management, Hearings and Decisions Guidelines suggest that the pre-hearing preferably runs as follows:<sup>105</sup>

- The person in question will be charged by the Result Management Authority (RMA)

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<sup>97</sup> Article 7.7 WADC.

<sup>98</sup> Annex L ISTI – Results Management Requirements and Procedures for the Athlete Biological Passport.

<sup>99</sup> Article 3 WADC.

<sup>100</sup> Article 3.1 WADC.

<sup>101</sup> <https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping>

<sup>102</sup> Article 8 WADC.

<sup>103</sup> Sometimes, there may be agreement on a single hearing before CAS.

<sup>104</sup> Article 13 WADC.

<sup>105</sup> Article 5.1.1 Results Management, Hearings and Decisions Guidelines [https://www.wada-ama.org/sites/default/files/wada\\_guidelines\\_results\\_management\\_hearings\\_decisions\\_2014\\_v1.0\\_en.pdf](https://www.wada-ama.org/sites/default/files/wada_guidelines_results_management_hearings_decisions_2014_v1.0_en.pdf)

- He/she may indicate the desire either to dispute the charge and/or the consequences
- The RMA will arrange for the charge to be resolved by a hearing panel
- A hearing panel will be formed to resolve the charge
- Both the RMA and the person in question may exchange their evidence and provide a pre-hearing submission that explains their case

The Guidelines suggests that the fairness of the hearing process should be safeguarded, *inter alia*, by providing:<sup>106</sup>

- The impartiality of the hearing panel
- Access to evidence
- The ability to question the evidence used to base a charge
- Practical matters such as access to translation
- A reasonable timeframe

The following elements shall be included in the written decision of the hearing panel:<sup>107</sup>

- Jurisdiction and applicable rules
- Factual background
- ADRV. With respect to a AAF, the hearing panel must establish the lab results and ascertain that there is not departure from the ISTI or the ISL or a TUE. When there is a non-analytical case, it must establish the evidence and explain why it considers that the evidence presented does or does not meet the required standard of proof.
- Sanction
- Appeals routes

As specified before, most decisions can be appealed before CAS and even a CAS decisions can be appealed to the Swiss Federal Tribunal in particular circumstances, such as when there is:

- Irregular constitution of the arbitration panel.
- Issue regarding jurisdiction
- Violation of key principles, such as equal treatment of the parties and the right to be heard

### 3.5.4 Sanctions

The WADC specifies that an ADRV following from an in-competition test for individual sports will automatically lead to the disqualification of the results obtained during the competition, including forfeiture of any medals, points and prizes.<sup>108</sup> When several team members in team-sports are tested positively, the other team members should be subjected to targeted testing during the competition or event. When three or more members of the same team are tested positively, sanctions may be imposed on the team, such as the loss of points or disqualification.<sup>109</sup> Apart from these rules,<sup>110</sup> most rules on sanctions in the Code relate to individuals. The WADC contains specific rules for the sanction of ineligibility of the athlete when an ADRV has been established.<sup>111</sup>

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<sup>106</sup> Article 5.1.2 Results Management, Hearings and Decisions Guidelines.

<sup>107</sup> Article 5.2.2 Results Management, Hearings and Decisions Guidelines.

<sup>108</sup> Article 9 WADC.

<sup>109</sup> Article 11 WADC.

<sup>110</sup> See also article 12 WADC on the sanctions against sporting bodies.

<sup>111</sup> Article 10.2 WADC, Article 10.7 WADC.

Intent of the athlete does play a role when he/she knew that there was a significant risk that the conduct might constitute, or result in, an anti-doping rule violation and manifestly disregarded that risk. An ADRV may be qualified as unintentional if the substance that was used is prohibited in-competition, while the athlete can show that its use was out-competition (in a context unrelated to sport performance).

The decision, when it is final, shall be communicated to all relevant parties and shall be publicly disclosed, of which the athlete must be notified.<sup>112</sup> The public report shall include:

- The sport
- The ADRV
- The name of the athlete or other person
- The prohibited substance or method involved
- The sanction imposed.

When the outcome of the procedure is that the athlete or other person did not commit an anti-doping rule violation, the decision may be publicly disclosed only with the consent of the athlete or other person involved. The public reporting is also not mandatory when the athlete or other person is a minor – than this shall be optional, at the discretion of the ADO.

### **3.5. Conclusion**

This chapter has provided a glimpse of the complex landscape of anti-doping in sport, the various entities involved and the many rules and regulation that apply. The collection and processing of personal data of athletes has been described from the perspective of the WADA Code. In the next chapter, the legal foundation for personal data processing in the EU Member States will be discussed.

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<sup>112</sup> Article 14.3 WADC.

## 4. Comparative overview of MS legislation

In this chapter, the comparative results gained from the country reports are presented. For each member state a detailed country report has been produced by a local legal expert. The national expert considered national laws, regulations by NADOs, DPAs and other organisations relevant to this study and, in some case, on jurisprudence or other relevant decisions based on a template (see Annex I) provided by the core project team. Next, the country reports have been condensed into compact fact sheets per country, which may be found in Annex II. This chapter provides a high-level analysis of the country reports, focusing on the different approaches the Member States have adopted regarding combatting doping in sport.

### 4.1 Legal background of anti-doping measures in the Member States

The domain of anti-doping is characterized by a multi-layer structure with many stakeholders. In addition to the WADC, UNESCO, the Council of Europe and Member States are involved in the regulation of doping in sports. These stakeholders use different instruments to achieve their goals. The WADA Code has already been described in the previous chapter. Next, there is the Copenhagen Declaration on Anti-Doping in Sport, a political document through which signatories signalled their intention to formally recognize and implement the Code through an international treaty. The Copenhagen Declaration was finalized in 2003. Pursuant to the Code, governments subsequently drafted an international convention under the auspices of UNESCO, to allow formal acceptance of WADA and the Code. In addition, the Council of Europe has adopted the Anti-Doping Convention (Strasbourg, 16.XI.1989). And finally, the Member States can adopt legislation to address doping in sport. This section discusses how the various layers come to the fore in the 28 EU Member States, starting with the WADA Code, moving on to UNESCO and CoE, and ending with the national regulation.

#### 4.1.1 WADA Code, UNESCO Convention and CoE Convention

All Member States have recognized and/or implemented the WADA Code. However, there are some nuances among the countries. In AT and HR, the WADA Code is legally binding, while in CZ the Wada Code is incorporated into the Czech legal order as an international treaty. MT refers to the WADA Code in the national anti-doping regulations and adopts and incorporates it. Similarly, in Sweden, the WADA Code has been translated in Swedish into the national anti-doping regulation. In Latvia, the WADA Code is not directly implemented in Latvian law, but the State Sports Medicine Centre (institution carrying out doping controls in Latvia) considers the Code to be binding through the UNESCO International Convention against Doping in Sport. Spain mentions the WADA Code in a circular, while SK refers to the WADA Code in a specific article of the national sport act, which is the only direct reference to that instrument in the law.

All Member States have ratified the UNESCO Convention.<sup>113</sup> In addition, all Member States have ratified the Council of Europe Anti-Doping Convention.<sup>114</sup>

#### 4.1.2 Legal form of national regulation of anti-doping

The majority of Member States have either implemented anti-doping rules via an Act of Parliament<sup>115</sup> (AT, FR, RO), or else by a mixture<sup>115</sup> of an Act of Parliament and some lower

<sup>113</sup> <https://www.wada-ama.org/en/unesco-convention-ratifications>

<sup>114</sup> [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135/signatures?p\\_auth=5pdpdyB9](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135/signatures?p_auth=5pdpdyB9)

<sup>115</sup> The term Act of Parliament is used in a broad sense, to include Statutes, Codes, Laws etc

instrument such as a Ministerial Decree or regulations of a public body (CY, DE, DK, EE, EL, HR, IE, IT, LT, LU, MT, PL, PT, SK, ES). In this case, the approach is usually to set out the broad strokes in general legislation (often a "Sports Act"), including the provision of a legislative basis for the establishment of a NADO, while leaving the details as to how the anti-doping rules should apply to a subordinate instrument, whose legitimacy derives from the aforementioned legislation.

In AT, the anti-doping rules take the form of a Federal Act<sup>116</sup> which establishes the NADO and sets out its responsibilities for various aspects of doping control. The Act also defines the testing pool, and describes the whereabouts requirements etc. In FR, the law on the fight against doping was introduced to the Code du Sport.<sup>117</sup> In the case of RO, the anti-doping rules are set out in an Act of Parliament,<sup>118</sup> while the establishment of the NADO, and the more detailed functioning of the doping control system are set out in a separate Act of Parliament.<sup>119</sup>

In CY, the Act which ratified the UNESCO Code<sup>120</sup> provides the legal basis for more detailed measures introduced by administrative Acts of the Minister.<sup>121</sup> It is the latter instruments which set out the anti-doping control system in CY, with the legal basis having been provided by the former Act of Parliament. In DE, the Anti-Doping Act<sup>122</sup> sets out, *inter alia*, the prohibition on doping, and the specific data protection provisions related to data collection in the anti-doping context. The more detailed rules on anti-doping are set out by the National Anti-Doping Code, which are passed by the NADO. In DK, the anti-doping rules are contained in several Acts of Parliament: the Integrity in Sports Act establishes the organisation and powers of the NADO, while the Anti-Doping Act which prohibits certain substances, has a more public-health oriented objective. This is supplemented by a Ministerial Order, which implements the latest version of the WADA Code, and updates the list of prohibited substances.

In EE, rather than passing a separate anti-doping Act, a section was inserted into the Sports Act on Compliance with Anti-Doping Rules. The Sports Act is a general legislative Act regulating sport, which inserts an obligation on athletes to follow the anti-doping rules. The more detailed rules are then set out in the Statute of the Estonian Anti-Doping Agency.

In EL, there are two main Acts of Parliament which are relevant: Law 2725/1999 is the general sports governance instrument providing the legal basis for anti-doping activities in EL, while Law 4373/2016 introduces the necessary adjustments to harmonize Greek legislation with the new Anti-Doping Code of World Anti-Doping Agency and other provisions. In addition to these two instruments, there are several Ministerial Decisions introducing measures and mechanisms necessary to implement the International Convention against doping in sport,<sup>123</sup> specifying the list of prohibited substances and methods, as mandated by the Law 2725/1999,<sup>124</sup> establishing a body of sample-takers as part of the

<sup>116</sup> Bundesgesetz über die Bekämpfung von Doping im Sport (Anti-Doping-Bundesgesetz 2007 – ADBG 2007) StF: BGBl. I Nr. 30/2007 (NR: GP XXIII AB 105 S. 24. BR: 7688 AB 7701 S. 746

<sup>117</sup> Code du Sport, Livre II, Titre III, Sante des sportifs et lutte contre le dopage, L. 230

<sup>118</sup> Law no. 227/2006 regarding prevention and control of doping in sport

<sup>119</sup> no. 69/2000 of physical education and sport

<sup>120</sup> Act 2009 [N.7 (III) / 2009] on the International Convention (UNESCO) against Doping in Sport (Ratification)

<sup>121</sup> Decree 227/2009 on the Anti-Doping (Determination Competent Authority); Decree 498/2011 - Measures implementing the Convention, Appendices and its Annexes, Operation of the Competent Authority, Disciplinary Board Function Anti-Doping Organization and Operation Secondary Disciplinary Committee Anti-Doping)

<sup>122</sup> Anti-Doping Act of 10 December 2015 (Federal Law Gazette I, p. 2210)

<sup>123</sup> 3956/2012 Necessary measures and procedures, mechanisms and systems provided by the International Convention against doping in sports (Paris, 19/10/2005) and necessary arrangements for its implementation. (Official Gazette 343, 17.02.2012)

<sup>124</sup> Ministerial Decision 34912 (1)/2011 Determination of prohibited substances and methods of doping, within the meaning of Articles 128B and 128C of Law 2725/1999.

National Council for Combating of Doping,<sup>125</sup> and appointing Members of the National Council of Combating Doping which had been established with the law 2725/1999, as amended.<sup>126</sup>

In HR, the Sports Act was passed in 2006 (and subsequently amended). It provides, *inter alia*, that athletes must not take prohibited substances (doping) and they must not act against the rules of the Croatian Olympics Committee, International Olympics Committee and the World Anti-Doping Agency. This Act was followed up by a Governmental Decree on Establishment of the Croatian Anti-Doping Agency<sup>127</sup>, as a specialized institution to monitor and enforce international agreements on fight against doping in the Republic of Croatia. Under the Sports Act and the Decree the Croatian Anti-Doping Agency (CADA) was established to carry out expert tasks established by international conventions on the fight against doping, the Sports Act, the Decree and the Statute by: systematic monitoring and coordinating anti-doping actions of governmental and non-governmental organizations, proposing and executing anti-doping measures, and by applying conventions, the World Anti-Doping Code, and rules of international sport federations and the International Olympics Committee. CADA answered to the Ministry for its professional work. With the amendment of the Sport Act in 2010<sup>128</sup> and of the Health Care Act in 2010<sup>129</sup>, CADA was merged with the Croatian toxicology institution, which changed its name into Croatian Institute for Toxicology and Anti-doping (CITA).

In IE, the Parliament passed the Sport Ireland Act 2015, which establishes the NADO, and gives it the power to, *inter alia*, make anti-doping rules, along the lines envisaged by the Act.<sup>130</sup> Pursuant to this power granted by the Sport Ireland Act 2015, the NADO passed the Anti-Doping Rules 2015, which set out the detailed rules concerning the fight against doping in Ireland.

In IT, Law 230/2007 transposed the WADA Code into Italian sports law, and ratified and implemented the International UNESCO Convention; it introduced the Code and the Wada's International Standards.<sup>131</sup> The NADO then passed more detailed rules on how anti-doping would be carried out.<sup>132</sup>

In LT, the Law on Physical Education and Sports<sup>133</sup> defines doping, recognises anti-doping as one of the principles of physical education and sport, and bans the use of doping agents and methods. The detailed anti-doping rules were set out in an order by the Director of the Lithuanian Anti-Doping Agency.<sup>134</sup>

In LU, an Article was inserted into the Sports Code on the "Fight Against Doping", which sets out that Luxembourg will fight against doping in sport, by means of a national organ, and incorporates the list of banned substances. The NADO (itself established by a joint decision of the Minister for Sport and the Luxembourg Olympic and Sport Commit-

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<sup>125</sup> Ministerial Decision No. 39047/2009 (Official Gazette 1771 / 25.08.2009) Establishment of a Body of Samplers of the National Council for Combating Doping (ESKAN).

<sup>126</sup> Decision. No. ΥΠΟΠΑΙΘ/ΓΔΥΑ/ΔΑΟΠΑΑΔ/ΤΑΕΥ/205990/11368/1009/82 (Official Gazette 557, Issue Y.O.D..D, 30.7.2015) Formation of the National Council for Combating Doping (ESKAN)

<sup>127</sup> Official Gazette of Republic of Croatia no. 18/07

<sup>128</sup> Official Gazette of Republic of Croatia no. 124/10

<sup>129</sup> Official Gazette of Republic of Croatia no. 139/10

<sup>130</sup> Sport Ireland Act 2015 (Part 4)

<sup>131</sup> Law 230/2007, Ratification and implementation of the international convention against doping in sports adopted at the UNESCO General Conference the 19 of October 2005

<sup>132</sup> Sports Anti-Doping Rules (version 1/2016 – March 10th 2016)

<sup>133</sup> Law on Physical Education and Sports No. I-1151 of 20 December 1995 (last updated 2008-04-24 No. X-1501)

<sup>134</sup> Order of the Director of the Public institution Lithuanian Anti-doping Agency on the adoption of the Anti-doping Rules of 23 December 2014 No. V-3

tee) then passed the Luxembourg Anti-doping Agency Code, setting out the more detailed rules.

In MT, Sports Act (Chapter 455) provides the fight against doping, while the Anti-Doping Regulations 2015<sup>135</sup> set out the detailed rules. The NADO was appointed by the Minister for Sport pursuant to Anti-Doping Regulations, in exercise of powers conferred by the Sports Act.

In PL, anti-doping provisions are set out in the Sports Act<sup>136</sup> as amended, which provides, *inter alia*, the legal basis for the establishment of the NADO. The NADO established the Polish Anti-Doping Rules, which are a comprehensive set of institutional, procedural and substantive rules determining what doping is and how it is to be detected and sanctioned by the NADO.<sup>137</sup>

In PT, the anti-doping law is an Act of Parliament which establishes the NADO and its responsibilities, as well as defining, *inter alia*, what is an athlete.<sup>138</sup> This is supplemented by several Ministerial Orders, establishing the execution norms for the PT Anti-Doping Law,<sup>139</sup> determines the anti-doping controls that can be performed by doctors, nurses and other technical personnel,<sup>140</sup> establishing a list of prohibited substances and methods<sup>141</sup>, regulating the functioning of the National Anti-Doping Council,<sup>142</sup> etc.

In SK, the Sports Act establishes the NADO and its functions and responsibilities.<sup>143</sup> The NADO then established the Anti-doping Rules, which contain detailed rules on anti-doping, as well as data protection provisions.

In ES, an Act of Parliament sets out the functions on the NADO, requires publication of the list of prohibited substances etc.<sup>144</sup> The detailed operation of the anti-doping system is set out in several circulars of the NADO,<sup>145</sup> while the statute of the NADO is approved by an executive decree.<sup>146</sup>

Other Member States have opted to implement anti-doping measures solely by means of some kind of Government Decree or Ministerial Order (BE, BG, CZ, HU, LV).

The rest of the Member States feature only rules drafted by the NADOs themselves. Here, a distinction can be drawn between the rules drafted by those NADOs which are public bodies (UK), and those which are private entities (FI, NL, SI, SE). In the case of the former, the rules are passed by a NADO which is regarded as a non-departmental government body which, although independent, operates on the basis of a management agreement with a ministerial department. In other words, the NADO has been delegated a public function by Government. In the latter (private) case, there does not seem to be any public law element to the anti-doping rules. They are more like private law rules passed and administered by the NADOs, which athletes agree to be bound by (i.e. a contract) in order to participate in a particular activity.

<sup>135</sup> L.N. 17 of 2015

<sup>136</sup> Act of 25 June 2010 on Sports, as amended by Act of 7 July 2016

<sup>137</sup> Polish Anti-Doping Rules (available in Polish at <http://www.anty doping.pl/upload/2015/PPA.pdf>)

<sup>138</sup> Law 38/2012 of 28 August as amended by Law 33/2014 and Law 93/2015

<sup>139</sup> Portaria n.º 11/2013, de 11 de janeiro

<sup>140</sup> Portaria n.º 232/2014, de 13 de novembro

<sup>141</sup> Portaria n.º 411/2015

<sup>142</sup> Despacho n.º 9621/2010, de 8 de junho

<sup>143</sup> Statute no. 440/2015 coll. on sports and on the changes and amendments of certain statutes

<sup>144</sup> Organic Law 3/2013, of the 20th of June, on the protection of the athlete's health and against doping in sport activity.

<sup>145</sup> Circular 3/2016 de AEPSAD, Circular 2/2016 de AEPSAD

<sup>146</sup> Royal Decree 461/2015, of the 5th of June, approving the Statute of the Spanish Agency for Health Protection in the sport sector



All Member States implemented the anti-doping rules by what can be classed as a “sports governance instrument”, although in some Member States (FR, DE, HU, PT, ES) these were noted as also including criminal law provision.

#### 4.1.3 The goal of national anti-doping rules

The vast majority of Member States (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, IE, LT, LU, LV, RO, SK, SI, UK), set out the goals of the anti-doping rules in the memorandum, recitals or preamble to their laws. Within this group, five main categories of goals have been identified, such as the *fairness of the competitions* (AT, FI, DE, EL, HR, LT, LU, RO, SK) the *athletes’ health protection* (AT, BE, DK, EL, FI, FR, LT, LU, RO), the *development of physical education and sports* (BG, LT), the *promotion of integrity and honesty in sports* (BG, DK, FI, IE, LT, SK), and the general *fight against doping*, in particular, the use of doping substances and doping methods (BE, CZ, DE, EE, ES, LT, LU, LV, SE, SI, UK). Some of the remaining Member States (NL, PL, CY, HU, IT, MT, PT) have not laid down specific goals in the memorandum or preambles of laws, although some of them have specified goals in their internal documents.

## 4.2 The National Anti-Doping Organizations

The NADOs of the Member States are tasked with executing the anti-doping measures. The way they are instituted and governed differs and has a bearing on how they operate and what their powers and responsibilities are. First, their legal status in the Member States is presented. Next the cooperation between NADOs and other agencies (law enforcement) is discussed as this also affects the processing of personal data regarding athletes.

### 4.2.1 Legal status

The NADOs of the Member States can be grouped in 3 broad categories, in terms of legal status. The majority of NADOs (BG, CY, CZ, DK, ES, FR, HR, HU, IE, IT, LV, LT, LU, MT, PL, PT, RO, SK) are public bodies, usually either established by law or by government. Other NADOs can be classed as private bodies, which are either enacted based on legislation, government decision or are subject to ministerial oversight (AT, BE,<sup>147</sup> DE, EL, UK<sup>148</sup>). Thus, although they are classed as private bodies, they have some link either to public law or public governance. The final category of NADOs identified are those which are private bodies initiated by private initiative with no apparent basis in public law (EE, FI, NL, SI, SE). In relation to two of these Member States (NL, SI), there are legislative proposals afoot which might lead to a change to a public law status.<sup>149</sup>

### 4.2.2 Testing and investigation

The most important guidelines for the operation of the NADOs derive from the WADA, the regulatory provisions in most Member States is silent about the actual operation of the NADOs. Twenty-One Member States implement the WADA International Standard for Testing and Investigation (ISTI) (or adopt related provisions) outlining how testing is to be conducted, via/in their main anti-doping legal/regulatory instruments (AT, BE, BG, CZ, ES, FI, FR, HR, HU, IE, IT, LT, LV, LU, ML, NL, PT, RO, SE, SV, UK), whilst seven Member

<sup>147</sup> References to the NADO in BE should be read as references to the Flemish NADO

<sup>148</sup> UK Anti Doping is referred to by the UK Government’s website as a non-departmental public body. However, it is technically incorporated as a private company limited by guarantee, despite Government ownership and funding. Hence, while it is referred to elsewhere as a public body, in terms of legal status, it is referred to as a private entity.

<sup>149</sup> See also: [http://ec.europa.eu/assets/eac/sport/news/2014/docs/doping-prevention-report\\_en.pdf](http://ec.europa.eu/assets/eac/sport/news/2014/docs/doping-prevention-report_en.pdf)

States implement it (or adopt these provisions) via a separate instrument (CY, DE, DK, EE, EL, PL, SK).

#### 4.2.3 Persons to whom the rules apply, and conditions for inclusion in testing pools

Twenty Member States make the applicability of their anti-doping rules dependent on the athletes' being members of certain organisations or sport related bodies (e.g. federations at international and /or national level), on falling under the jurisdiction of a sport's body, or at competing in certain events (AT, BG, HR, EL, LV, RO, CY, CZ, EE, FR, IE, IT, LU, PT, SI, ES, UK, SK, DK, DE). It appears that, in at least one Member State, the legislation can potentially be applicable to any person who practices sports (BE). Furthermore, four Member States identify categories of athletes to whom the anti-doping rules may apply, but also leave a margin of discretion to their NADOs to include other athletes in those lists (FI, LT, ML, SE). HU mentions the applicability of rules specifically to 'professional athletes' and these are the ones to be subjected to doping testing. It defines professional athletes as: a) adults and the first consequent members of the junior age group who are part of the international national team; b) competitors at international sports competitions, c) the first three ranked competitors in national competitions). Finally, in PL decisions in this respect are entirely at the discretion of the Polish NADO (which is to follow international standards).

Ten Member States set out the criteria for inclusion of a sportsperson in the Registered Testing Pool (BG, CY, EE, EL, FI, FR, HR, LV, LT, RO). Within this group, in CY, there is no relevant information available on the National Testing Pool and the General Testing Pool, whilst, in LV no further categories of pools exist. Six Member States (CZ, DK, HU, IE, IT, SI) provide conditions for inclusion in the Registered Testing Pool and in the National Testing Pool, while SK specifies the conditions for inclusion in the National Testing Pool and in the General Testing Pool. Two Member States follow the WADA Code provisions (DE, MT) and two other Member States do not seem to specify the conditions to be included in a testing pool (ES, LU). A number of differences have been noted in respect of some Member States. SE defines the criteria to be included in the Registered Testing Pool and in the Testing Pool which is a complement to the RTP. In the UK, the NADO establishes a National Registered Testing Pool and it may also establish a further pool of athletes not in the National Registered Testing Pool (the "Domestic Pool"). AT delegates the enactment of the test pool to the NADA and the sports federations and it does not distinguish between the various testing pools. PT does not follow the three categories of testing pools, but the national law defines three 'target groups' to be included in a Testing Pool according to the category of sport they belong to. Finally, in PL decisions in this respect are entirely at the discretion of the Polish NADO (which is to follow international standards).

#### 4.2.4 Processing Athletes' data

The WADA International Standard for Privacy and Protection of Personal Information (ISPPPI) contains a set of provisions regarding the processing of athletes' personal data. This standard is mandatory for NADOs, but has to be aligned with national data protection regulation in the Member States. Four Member States implement Article 6<sup>150</sup> of the WADA ISPPPI as it is (AT, CY, DE, HU) and 10 others implement it by reference (BG, CZ, DK, FI, HR, IE, IT, ML, SK, UK). Six Member States adopted their own provisions and also make reference to the ISPPPI (BE, EE, EL, LU, SE, SI). These national laws may be comparable to the wording of Article 6 but differ from it in some aspects (e.g. EE law does not include provisions in relation to minors or people with disabilities; whilst EL only contains provisions corresponding to Article 6.1). Five other countries adopted provisions

<sup>150</sup> Processing Personal Information in Accordance with Law or with Consent.

on this topic in their anti-doping laws / regulations but do not make reference to the ISPPPI (PT, PL, ES, LV, RO). The rules in all those five countries have some differences in relation to Article 6. Subsequently, LT and FR do not have anti-doping rules relating to Article 6 of ISPPPI (in relation to FR the report clarifies that, in this case, general data protection rules will apply). The Netherlands has not adopted provisions similar to Article 6 of the ISPPPI.

#### **4.2.5 NADO criminal law powers**

Most Member States do not provide for criminal law powers for their NADOs (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LV, LT, LU, NL, PL, PT, RO, SE, SI, SK, UK). In France, Article L. 232-11 of the Sports Code provides that, on top of the officials having a mandate under the criminal procedural code, officials under the authority of the Sports Minister and persons authorized by the French NADO and sworn in are entitled to carry out controls conducted by the French NADO or required by the World Anti-Doping Agency, a NADO or international sports body. Article L. 232-25 further provides that opposing these controls may result in 6 months of imprisonment and a fine of up to € 7500. In Malta, The Sport Act (Article 55(2)) provides: "Any person who fails to comply with the provisions of any regulations providing for anti-doping measures or regulating or prohibiting the unsanctioned use of prohibited substances or regulating behaviour in sport facilities shall on conviction be liable to imprisonment for a term of not less than three months but not exceeding ten years or to a fine (multa) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87) but not exceeding twenty-three thousand and two hundred and ninetythree euro and seventy-three cents (23,293.73) or to both such imprisonment and fine." Article 51 of same notes: "For the purposes of the Criminal Code and of any provisions of a penal nature, the members of SportMalta, and of any directorate, management committee, advisory committee, as well as of the Sport Appeals Board and every officer or employee of SportMalta, shall be deemed to be public officers."

#### **4.2.6 Official programme of cooperation**

The vast majority of Member States do not have official programmes of cooperation between NADOs with police or other agencies. Exceptions are Belgium (NADO & Federal Police), Bulgaria (NADO & Customs Agency), Hungary (NADO & National Police), IT (anti-doping rules provide for cooperation between NADO & special anti-doping police force), and the UK (memorandum of understanding between NADO and other agencies). However, notwithstanding the lack of official programmes, cooperation may take place on a case to case basis. In addition, the national rules often require the NADO to alert law enforcement bodies of criminal activity.

#### **4.2.7 List of prohibited substances**

In the anti-doping rules of several Member States (CY, CZ, EE, EL, IE, HR, IT, MT, PL, SE, SI, SK, UK) the WADA list of prohibited substances is incorporated by reference, while one (LU) incorporates the list by reference to the UNESCO Convention. Germany incorporates the list by reference to both WADA and UNESCO, while Austria incorporates it by reference to the Council of Europe Convention. In the rest of the Member States, a prohibited substances list is adopted, not by reference, but by publication in the national rules (often as an annex), and is updated upon update of the WADA list/list in annex to UNESCO Convention (BE, BG, DK, ES, FI, FR, HU, LT, LV, NL, PT, RO).

There is generally not a link made between the anti-doping lists and the list of substances prohibited by criminal law (AT, BE, BG, CY, CZ, DE, DK, EE, EL, FR, HU, IE, IT, LT, LU,

LV, MT, NL, PL, PT, SI, UK). However, there is a number of interesting Member States in this regard:

- In Croatia, the crime of unauthorized production and marketing of banned substances in sport has been in force as a separate criminal offense as of 2013. According to the Criminal Code, the Minister of Health is obliged to issue a list of substances banned in sport for the purpose of application of the above stated Article. This List of substances prohibited in sport ("Lista tvari zabranjenih u sportu", Official Gazette of Republic of Croatia no. 116/13) was issued by the Minister of Health in 2013 and it has not been amended since. There is no reference to WADA or other rules /standards in this List. However, in its Work Plan and Program for 2016 CITA announced it would initiate the procedure for amending the List, before the Ministry of Health, in relation to the mentioned Article 191a of the Criminal Code. It considers that the List needs to be amended in order to comply with the 2016 WADA List of prohibited substances.
- In Spain, in order to adapt the list of prohibited substances to the UNESCO Convention, a resolution was passed with a list of substances and methods prohibited in sport contained in the Annex to this resolution (Resolución de 17 de diciembre de 2015, de la Presidencia del Consejo Superior de Deportes, por la que se aprueba la lista de sustancias y métodos prohibidos en el deporte). This set of provisions are linked to the substances prohibited via criminal law. Article 361bis of the Penal Code affirms that is forbidden the prescribing or supplying of "prohibited substance" not therapeutically-justified.
- In Finland, import and dissemination of doping agents is regulated by Chapter 44 of the Finnish Criminal Code. It prohibits the illegal manufacturing, import and distribution of doping agents and their possession with the purpose of dissemination. Import and dissemination of doping agents is regulated by Chapter 44 of the Finnish Criminal Code. The use of doping agents is also subject to the Medicines Act and the regulations of the Criminal Code on smuggling, unlawful dealing in imported goods and narcotic agents. Doping agents according to the Criminal Code are: synthetic anabolic steroids and their derivatives; testosterone and its derivatives; growth hormones and; chemical substances that increase the production of testosterone, its derivatives or growth hormone in the human body.

Several Member States have rules imposing criminal sanctions for the production, sale, distribution etc. of substances on the prohibited list for doping purposes. But the link is to the prohibited list for anti-doping, rather than to a criminal law list (examples include Lithuania and Romania). In Slovakia, there is a separate list of substances with an anabolic or hormonal effect for the purposes of the criminal code. In Sweden, there is no explicit list provided for in the criminal law, rather a basic definition of prohibited substances is given in Article 1 of the Act. It is up to the courts to decide which substances are prohibited according to the law. The Swedish Public Health Agency (Folkhälsomyndigheten) has, however, a list of substances that might fall within the scope of the law.

### **4.3 National Privacy and Data Protection rules**

#### **4.3.1 Reference to National Data Protection Act in Doping Rules**

Fourteen Member States (BE, BG, CY, CZ, DE, EL, ES, FR, HR, IE, IT, PT, SE, SI) contain an explicit reference to the national data protection act in their anti-doping rules. The

other fourteen Member States either do not include any reference (AT, DK, EE, LT, LU, MT, NL, PL, RO) or contain a generic mention to the applicable data protection legislation (FI, HU, LV, SK) or data protection requirements (HU).

#### 4.3.2 Constitutional protection

Three Member States do not have written constitutional provisions regarding privacy, data protection or bodily integrity (IE, FR, UK). In IE, for example, these are considered 'unenumerated rights', whilst the UK has no written constitution. All other Member States have constitutional provisions regarding these rights. However, the scope and nuances of these provisions vary. Hence, 11 Member States have constitutional provisions with regard to the right to privacy (BG, DK, EE, IT, LT, LU, ML, RO, BE, CY, SK), and - within this group - BE, CY and SK also have written provisions regarding bodily integrity. AT and EL have constitutional provisions specifically regarding personal data (EL's constitution also covers bodily integrity). Four Member States have provisions protecting both privacy and data protection (HR, CZ, HU, SI) and five others have provisions regarding privacy, data protection, as well as bodily integrity (FI, PL, NL, PT, ES). It is worth mentioning three Member States individually: DE has no provision regarding those rights but they are deemed to be subsumed in the 'general right of personality' (Article 2 (1) of the German Constitution); the Latvian Constitution has a provision regarding private life (Article 96) and the Constitutional Court has interpreted this right of inviolability of private life as to encompass, inter alia, the protection of the individual's physical (and mental) integrity; finally, the Swedish Constitution affords protection to the right of privacy, including in its scope protection against 'body searches (..) and other such invasions of privacy' (Art. 6).

#### 4.3.3 Grounds for processing personal data

In the vast majority of Member States, the grounds for processing personal data set out in Article 7 of Directive 95/46/EC are transposed without any material differences. In a handful of Member States, there were minor differences, such as the lack of the transposition of the word "unambiguous" in relation to consent (EL, FR, IE,<sup>151</sup> UK), while in another Member State (DK) "explicit" consent is required. In some Member States, terms such as "vital interests" were interpreted with more granularity in the national transposition, either narrowly referring to the "life" of the data subject (FR), to "life or physical integrity" (HR), or to "injury or other damage to health; and serious loss of or damage to property" (IE). In one Member State (EL), the "vital interests" exception "only applies if the data subject is physically or legally incapable of giving his/her consent."

Similarly, some Member States interpret the "public interest" with more granularity, referring to issues such as "the administration of justice" (IE, UK). Other exceptions include where the data subject personally publishes the data (HR), or where the processing is made on the basis of documents already available to the public (RO). In Sweden, there is an exception for "unstructured data", but only insofar as privacy of the data subject is not infringed. Certain Member States may require closer analysis on this point, as their national provisions are phrased quite differently from Article 7 of Directive 95/46/EC (IT, SK, SI), or because several additional grounds are included (FI).

#### 4.3.4 Grounds for processing sensitive personal data

Unlike the grounds for processing personal data, in the majority of Member States, the grounds for processing sensitive personal data differ materially from those in the Di-

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<sup>151</sup> In Ireland, there is also provision for family members to give consent in the event of the data subject lacking capacity.

rective. In a handful of Member States (DE, HU, IT, LV, MT, RO, ES, UK), there is no material difference. Most of the Member States have fully transposed the grounds in the Directive, but several have gone further. Nonetheless, France does not appear to have transposed the ground in Article 8(2)(b), while in Croatia, the measure transposing the 8(2)(b) exception appears to be broader than the Directive and not limited to the employment law context. Denmark, meanwhile, has explicitly limited the scope of processing under 8(2)(d) to data covered by the provisions transposing 8(2)(b) 8(2)(c) and 8(2)(e). Several Member States provide for processing for scientific research or statistical purposes (AT, BE, FI, FR, LU, SE). Some Member States provide for processing in the case of filing or defending lawsuits (FI, LT, LU, NL, PT, SE).

Other exceptions include:

- Literary or artistic purposes (BG)
- Obligations under international law (NL)
- Criminal activities (LT, LU)
- National Security (CY, LU)<sup>152</sup>
- Health and social insurance (SK)
- Legal obligation on the data controller to process (LT)
- Healthcare exception (FR, PT, SE)<sup>153</sup>
- Additional exceptions that fall within the public interest (IE, NL, PL, PT)<sup>154</sup>

Austria provides an exception to the prohibition of processing personal data where data is anonymised, while in Latvia there is a minor difference in wording where “explicit consent” is transposed as “written consent”. In Estonia, the grounds are the same as for processing personal data, with the exception that the processing has to be registered at the Data Protection Inspectorate (supervisory body) or a person responsible for protection of personal data has been appointed by the processor. In Greece and Slovenia, the phrasing of the transposition measures differs significantly with the Directive, and may need to be examined more closely.

#### 4.3.5 Categories of sensitive personal data

In the majority of Member States, there is no material difference between the categories of sensitive personal data in their national legislation, and those in Article 8 of the Directive (AT, BE, BG, CZ, EE, FR, DE, HU, IT, LU, LV, MT, NL, PT, SK). Some Member States’ legislation explicitly extended health data to “genetic data”, “biometric data” or “data relating to the human genome” (BG, CZ, EE, LU, PT, RO, SI). The main additional category that was noted was data related to criminal or minor offences (CY, EL, ES, FI, HR, IE, LT, PL, RO, SE, SI, UK). In addition, Portugal specifies the category of “private life”, while Poland mentions data concerning “addictions”. Romania includes “data which permit geo-localisation” and “data related to minors”. Two Member States include social welfare-related data (EL, FI). Denmark has a detailed provision, which is phrased quite differently. However, it is unclear if it adds additional categories of sensitive data, or if it merely elucidates more precisely the conditions pursuant to which data may be processed.

#### 4.3.6 Provisions regarding minors whose personal data is being processed

In line with the Data Protection Directive 95/54/EC, twenty-one Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IT, LT, LV, LU, PL, PT, SK, SE, SI) have not adopted specific provisions affecting minors whose personal data is being processed.

<sup>152</sup> Although this seems to be a transposition of Article 8(5) of the Directive.

<sup>153</sup> This may be transposition of Article 8(3) DPD.

<sup>154</sup> This may be transposition of Article 8(5) DPD.

Whilst, seven Member States have introduced special measures to protect minors (HR, HU, IE, MT, NL, RO, UK). Within this latter group, three Member States (HU, NL, UK) provide provisions concerning the age when children can consent to processing his/her personal data without a legal representative's consent. In Croatia, the processing of personal data of a minor requires parental consent or consent of another legal representative of the minor, while in Ireland the consent may be given by a different person from the data subject - namely, a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject, only if the data subject, by reason of his or her age, is likely to be unable to appreciate the nature and effect of such consent. In Malta, personal data of minors can be processed by persons acting in loco parentis in relation to a minor (e.g. teacher) without parental or legal guardian consent if the processing is in the best interest of the minor. Differently, in Romania, for processing minors' personal data there is a requirement for prior notification of Data Protection Authority.

#### **4.3.7 Transfer of personal data to third countries**

The transposition provisions of the majority of Member States are noted as being materially similar to Article 25 and 26 of the Directive (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, MT, NL, PL, PT, SE, UK). A number of differences have been noted in respect of some Member States. In Denmark, the law requires "explicit consent" to the proposed third country transfer, rather than "unambiguous consent" as stated in the Directive. It permits transfers that are necessary for the purposes of prevention, investigation and prosecution of criminal offences and the execution of sentences or the protection of persons charged, witnesses or other persons in criminal proceedings. It also permits transfers to a third country if the transfer is necessary to safeguard public security, national defence or national security.

In Latvia, the transposing measure does not seem to include the exception provided in Article 26(1)(c) of the Directive. Lithuania's law is similar, but, there is more detail on the evaluation procedure of the adequate level of legal protection of personal data and one additional ground is added for the transfer of personal data to a third country which does not ensure an adequate level of protection (the prevention or investigation of criminal offences).

In Romania, in all situations the transfer of personal data to another state will require prior notification to the DPA. The article does not apply when the processing is conducted for journalistic, literary or artistic aims. The transfer is always permitted when necessary for the proper conduct of criminal procedures or for the ascertainment, exercising or defending a legal right, as long as the data is processed for this purpose and not retained more than necessary.

#### **4.4 Legal interpretation of data protection aspects of anti-doping in sport**

The Article 29 WP has issued two opinions related to anti-doping.<sup>155</sup> Also National Data Protection Authorities have issued opinions on data protection related issues in anti-doping, and finally, also disputes involving data protection and privacy have come to the fore.

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<sup>155</sup> Article 29 Working Party, Opinion 3/2008 on the World Anti-Doping Code Draft International Standard for the Protection of Privacy, 576-00-00-08/EN WP 156, adopted on 1 Aug 2008. Article 29 Working Party, Second opinion 4/2009 on the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on related provisions of the WADA Code and on other privacy issues in the context of the fight against doping in sport by WADA and (national) anti-doping organizations, 0746/09/EN WP 162, adopted on 6 April 2009.

#### 4.4.1 Opinions, statements or decisions of DPAs

Several DPAs have issued statements, opinions or decisions relevant to anti-doping.

- In Belgium, the Privacy Commission has closely followed and given advice on the reworking of the national anti-doping legislation. It praised the initiative to focus more on data protection and subject less athletes to whereabouts-regime. Still, the privacy commission stressed the importance of providing relevant information on protection of privacy to the athletes.
- In Cyprus, there is one relevant announcement issued by the Office of the Commissioner for personal data protection in Cyprus on 1st November 2012. The announcement concerns the issue of public disclosure of anti-doping sanctions imposed to athletes and the compliance of the Cypriot NADO with a recommendation of the Commissioner regarding the retention periods of the data. The announcement refers to 'consent' as a legal ground for processing in anti-doping cases and concludes that such consent of the athlete is not freely given since it is necessary for his or her participation to athletic competitions, and is generic. Thus, consent is not a valid ground for making public the decisions of the Disciplinary Council of the Anti-Doping Agency and the Secondary Disciplinary Committee on Anti-Doping. Nevertheless, the Commissioner regards as appropriate the ground of "compliance with a legal obligation with which the controller is subject". The Commissioner argues the disclosure of the decisions should not be published online or the decisions can also be published anonymized.
- In France, the DPA is consulted each time the revision of anti-doping legislation has an impact on the right to data protection. Its latest opinion is Opinion 2013-283 of 10 October 2013 on the draft of the regulatory act relating to the creation by the French NADO of a personal data processing system within the framework of the implementation of the biological profile of athletes. The French DPA viewed no objections based on data protection law to the adoption of the data processing system.
- In the Netherlands, the DPA has issued an opinion on the new law which is now before parliament, in which it was critical of the proposal.
- In Portugal, the DPA has issued an authorisation regarding the processing of personal data for the purposes of an 'authorisation of therapeutic treatment'. The DPA found that consent from the athlete, although present, was not necessary as the Anti-Doping Law already provided sufficient legal basis for the processing of such personal data.
- In Spain, in a Resolution on the Form for the authorization of therapeutic use of doping, the DPA affirmed that the form and the relating consent request contained therein were compliant with the law on Personal Data Protection. However, the DPA also affirms that instead of the entire clinical history of the athletes, only the clinical history connected to the medical situation justifying the use of such form shall be provided, based on the principle of proportionality.
- In Sweden, the Data Inspection Board has strong criticism of the Government Re-port, in which processing of sensitive data within anti-doping was considered in line with the Swedish Personal Data Act. The Board especially criticised



the suggestion by the committee to publish details of athletes who have committed doping offences on the Internet.

- In the United Kingdom, the most interesting case for the purpose of this study involves a request to make public the details of drug tests carried out on weightlifters during the previous 24 months. The ICO held that that transparency and accountability in doping was a "legitimate interest pursued by the controller".

#### 4.4.2 Court decisions

Only 4 examples of relevant judicial pronouncements have been identified.

- In Belgium, the Court of Arbitration delivered a judgement in which it annulled a paragraph in a law which mandated the publication of disciplinary suspensions on a public website.
- In Hungary, in a Supreme Court decision in a case concerning an athlete's doping use, the judge underlined the importance of data processing being in line with data protection rules.
- In the Netherlands, two cases have dealt with the relationship between anti-doping and privacy/data protection. Although they were determined in favour of the existing legal situation, it helped stimulate discussion in parliament, which resulted in the current proposal for the law.
- In Sweden, there has been a recent decision of an Administrative Court of Appeal, in which it was held that the Swedish Sports Confederation's processing of individuals' personal numbers in the online database for the purposes of state aid was not necessary within the meaning of the Personal Data Act.

#### 4.5 Conclusion

The country studies reveal a mixed image of anti-doping regulation and how data protection aspects are addressed. The WADA Code plays a prominent role in this domain and all MS have, one way or another, adopted the Code in their legal system. In some cases, the Code itself is legally binding, in others its legal force comes through adherence to the UNESCO anti-doping convention or the CoE convention. In some Member States, the Code's provisions are implemented in national law. Most Member States have "Sports Acts" or specific anti-doping legislation. Usually this regulation originates at the highest legislative level in the state or as ministerial decrees or similar and in any case belongs to public law. In a few Member States, the regulation of doping in sport is currently entirely left to the NADOs (which follow the WADA Code closely). The articulated reasons for addressing doping in sport vary, but a general urge to fight doping, fairness, integrity and honesty of sport are the most mentioned, next to the athletes' health protection.

NADOs in general are public bodies regulated by law directly (and the WADA Code), or under ministerial oversight. A few NADOs are private bodies with no apparent basis in public law and without governmental oversight. The testing conducted by the NADOs derives from the WADA ISTI, which is referenced in the Sports Acts of most (21) Member States or in separate instruments. With respect to athletes within the testing jurisdiction of the NADOs, clear differences can be observed. All the top-level athletes are covered, but at the lower levels there is variety in whether or not an athlete is part of (a) testing pool. Hence, there is inequality in eligibility for testing throughout the Member States.

The majority of Member States follow the WADA privacy and protection of personal information rules, either by implementing art. 6 ISPPPI as is, or by referencing the provision in their national anti-doping law. Important to note is that the EU data protection regulation prevails in case the ISPPPI conflicts with it. This topic will be further explored in chapter 6 of this report. Most NADOs do not have criminal law powers, but are in most cases required to inform law enforcement bodies of criminal activity.

Slightly over half of the MS refer to the data protection regulation as a framework within which anti-doping has to take place. Most Member States have transposed the core provisions relevant for the processing of athletes' personal data for anti-doping purposes without significant material differences. This in particular concerns the requirements regarding processing ground and its elements (e.g., consent, vital interest, public interest), sensitive personal data, data regarding minors, and transfer of personal data to third countries. The regulation at the level of the Member States is mostly silent about the legal foundation for the processing of personal data in the context of anti-doping. The general provisions (based on/referring to art. 7 DPD and art. 6 WADA IPPPI) are often mentioned, but which concrete processing ground is deemed appropriate or legitimate for the processing of personal data regarding athletes is lacking in most cases. We will return to this important topic in chapters 5 and 6.

## 5. Field Study

This chapter turns to the data gathered during the Field Study Phase, for which interviews with 12 NADOs, 1 DPA, 1 IF, the WADA and the EU Athletes were conducted. The procedures for testing athletes will be described, as well as the types of data gathered. Comparative descriptions are also provided on how parties store and analyse the data, decide on the transfer of the data, especially outside the EU, and on the publication of data. The description of the results refers to the interviews with the NADOs, except where indicated. We start with some background data to illustrate the scale and scope of anti-doping practices in the 12 Member States explored in the field study.

### 5.1 Quantitative aspects of doping control programmes

#### 5.1.1 Number of tests (2016, unless otherwise stated)<sup>156</sup>

NUMBER OF SAMPLES COLLECTED	AT	BE <sup>157</sup>	CY	DE	EE	ES	FI	HR	IT	NL	PL	UK
Urine Samples taken In-Competition	759	1126	14 1	447 6		207 5	108 4	32 0		1488	1636	2426
Blood Samples taken In-Competition					96 <sup>158</sup>				5244 <sup>159</sup>			
Urine Samples taken Out-Of-Competition	111 5	748	21	778 5		109 9	140 8	33 0		1033	1147	4910
Blood Samples taken Out-Of-Competition					210 <sup>160</sup>				2546 <sup>161</sup>			
	621	826	6	204 5		552	214	0		256	466	2149

<sup>156</sup> EU Athletes noted that the low number of Anti-Doping Violations, especially for Out of Competition Tests, compared to the number of tests raised serious questions around the proportionality of the data collected.

<sup>157</sup> The statistics for Belgium concern only Flanders, as a representative of the Flemish NADO was interviewed as part of this study.

<sup>158</sup> Statistical breakdown per blood/urine not available (mostly urine).

<sup>159</sup> Statistical breakdown per blood/urine not available (mostly urine).

<sup>160</sup> Statistical breakdown per blood/urine not available (mostly urine).

<sup>161</sup> Statistical breakdown per blood/urine not available (mostly urine).

### 5.1.2 Number of athletes subjected to controls

NUMBER OF ATHLETES SUBJECTED TO CONTROLS	AT	BE <sup>162</sup>	CY	DE	EE	ES	FI	HR	IT	NL	PL	UK
<b>NUMBER OF ATHLETES IN VARIOUS TESTING POOLS</b>	700 in testing pool (200 top segment, 500 basic segment)	4 testing pools (848 athletes in total)	22-27	500 athletes in RTP, 2000 in NTP, 5000 in general testpool, 1500 in team testpool.	150	250	105	60-90	450	350	80-100	445
<b>NUMBER OF ATHLETES FOR WHOM A BIOLOGICAL PASSPORT EXISTS<sup>163</sup></b>	steroidal: all athletes in testing pool; haematological: approx. 100	steroidal: all athletes in testing pools, plus each athlete who is controlled Haematological: 0	Steroidal: all athletes; Haematological: 0	steroidal: every athlete in a testing pool. Haematological: 450	43	2420	82	steroidal: all athletes; haematological: 0	Steroidal: all athletes; haematological: 50-70	>60. Will rise to 80-100	NADO did not know	Steroidal: all athletes tested
<b>NUMBER OF UNDER-AGE ATHLETES SUBJECTED TO TESTS</b>	approx. 10	No stats	7	No stats	approx. 40	205	98	5-10% of total of athletes tested	No stats	approx. 5% of all tests	No stats	No stats
<b>NUMBER OF AMATEUR ATHLETES SUBJECTED TO TESTS</b>	no definition of amateur	No stats	No clear distinction between amateur/professional	Definition of amateur varies per sport	approx. 10	192	no stats	no differentiation on basis of economic remuneration	No stats	No stats	No amateurs tested	No stats

### 5.1.3 Number of TUEs

Member State	TUEs granted
Austria	10
Belgium (Flanders)	33
Cyprus	0
Germany	75
Estonia	0
Spain	179
Finland	?
Croatia	9
Italy	372
Netherlands	97
Poland	?
United Kingdom	83

<sup>162</sup> The statistics for Belgium concern only Flanders, as a representative of the Flemish NADO was interviewed as part of this study

<sup>163</sup> WADA noted that a 3<sup>rd</sup> module to the ABP is coming soon; an endocrine module.

## 5.2 Basis for athlete selection

The WADA Code lists three categories of athletes in the Standard for Whereabouts Requirements: the so-called Registered Testing Pool (RTP), the National Testing Pool (NTP) and the General Testing Pool (ATP)<sup>164</sup> The NADOs noted the following criteria (generally based either on the risk profile of the sport or of the athlete or a mixture of both) for selection athletes for inclusion in the testing pools:

- In Austria, a risk assessment based on (1) sport; and (2) individual athlete is applied. NF helps (is obliged by law) with creation of RTP, by advising. Individual risk assessment looks at factors such as level of participation, performance, possible suspicious activity (in accordance with WADA and International Standards).
- In BE,<sup>165</sup> the RTP only concerns elite athletes. There are 4 categories in the RTP (each of which has different whereabouts requirements).
- In CY, an athlete is included in the RTP if he/she satisfies 1 of 3 criteria: athlete is in a national sponsorship scheme for high level athletes; athlete is in a national team; depending on athlete's history of doping, or vastly improved performances etc.
- In DE, risk assessment is based on (1) sport; and (2) level of athlete. The RTP includes athletes in international testing pool, and "A squad athletes" in a sport with risk level A. The NTP includes A squad athletes in sport risk levels B & C, B squad athletes in sport risk group, and all athletes in the wider team circle for Olympic games.
- In EE, the current criteria (in process of changing) are:
  - Risk level of sport
  - Whether in receipt of financial support from Olympic Committee
  - If athlete trains alone or in another country;
  - If ABP has been created, and remove will prevent examination of trend;
  - Info from national federations (e.g. indicating that he has retired)
- In ES, risk assessment is based on various criteria, such as atypical passport findings, whether athlete receives financial support, the history or behaviour of the athlete etc.
- In HR, risk assessment is based on:
  - Sport risk profile
  - Sport's popularity
  - Athletes who have previously tested positive (or being coached by someone who has previously coached positive athletes)
  - Participation in national teams
- In IT, risk assessment is based on:
  - Sport risk profile
  - If athlete has previously tested positive (or some other history the player has)
- In NL, it is based on:
  - Sport risk profile
  - Level of competition
  - History of doping, or if there is suspicion of doping and it would not be possible to pick up on doping without whereabouts
  - Also, if information from IF
- In PL, it is based on:
  - Sport risk profile
  - Level of sport (most important criterion)

<sup>164</sup> See article 5.6 of the WADA Code 2015, as well as ISTI.

<sup>165</sup> All references to Belgium should be read as references to NADO Flanders, which was interviewed for this study. It should be noted that Belgium has several NADOs.

- Popularity of the sport
- High level athletes
- Also, if registered in international federation.
- In the UK, the risk assessment is based on it is based on the risk assessment of the sport and then on an individual athlete level. The National Governing body can also input and provide recommendations, however, ultimate decision of the RTP is with UKAD. World Rugby noted that the testing pool contains roughly the top 20 teams at the World Cup and the top 10 in the Sevens Series. This totals approximately 900 athletes. The Registered Testing Pool contains high risk players.
- EU Athletes questioned whether it was necessary to subject all sports to an equal extent to the anti-doping rules preferring a more risk based and evidence based approach; whether it was necessary to subject the current number of athletes to tests; and had concerns about the treatment of recreational drugs within the WADA Code.

### 5.3 Types of Data Collected

NADOs generally noted that they do not collect data regarding staff or team members unless it is provided by the athlete himself on the doping control form, or received via tiplines. In addition, no “other samples” aside from blood and urine were noted as being collected. More particularly:

- In AT - all types of data are collected
  - Open source, info re: staff and info re: team members all used for investigation
  - Whereabouts only for testing pool
- In BE – all types of data are collected
  - Whereabouts only testing pool
  - Blood taken out of comp on testing pool, urine take out of comp on testing pool, blood never taken in competition, urine may be taken on all athletes in competition
  - TUEs for all but amateurs (who can do it retroactively)
- In CY – all types of data are collected (except about team members)
  - Whereabouts Registered Testing Pool only
  - Very rarely take blood (exceptional case)
- In DE - all types of data are collected, apart from info regarding team members,
  - Whereabouts collected for Registered Testing Pool (via ADAMS) and National Testing Pool (elsewhere)
- In EE – all types of data are collected, but very little info collected about staff or other team members
- In FI - all types of data are collected apart from staff, team members, data from open sources
- In HR – all types of data are collected except blood, and info regarding team members
- In IT – all types of data are collected except data relating to team members. In addition, whereabouts data collected only for the Registered Testing Pool
- In NL – all types of data collected, except data relating to team members, whereabouts only for the Registered Testing Pool
- In PL – all types of data collected, except data relating to team members, whereabouts only for the Registered Testing Pool
- In ES – rarely if ever collect data on staff or team members (all other data), whereabouts data are only collected for the Registered Testing Pool.

- In UK – all types of data collected
- EU Athletes stressed the privacy invasiveness of OOC tests and biological passports and questioned the proportionality given the low level of ADV. Athletes had also reported concerns about the procedures for taking blood and urine.

## 5.4 Procedures for gathering data

### 5.4.1 Whereabouts

Whereabouts are generally collected by means of athlete submitting information on ADAMS. However, in DE, ADAMS is used for whereabouts only with respect to athletes in Registered Testing Pool. For those in the National Testing Pool, whereabouts are provided otherwise than through ADAMS. In EE, where the Registered Testing Pool has different layers, athletes on 1 layer are obliged to submit 3 months accommodation and training schedule and timeslot, whereas those on another are only required to submit the 1 hour timeslot. A similar approach is adopted in BE.

In BE and DE, among others, team whereabouts can be submitted by a nominated person on behalf of the team. Meanwhile, in HR and AT<sup>166</sup>, it was noted that whereabouts is not used for teams, as the whereabouts function on ADAMS was less useful than for individuals. In AT, a nominated person submits the team whereabouts via e-mail.

In ES, it was noted that athletes to whom the whereabouts requirement applied are often tested outside of the 1 hour time-slot, in order to avoid the issue of athletes “calculating”. It was also noted in ES that the preference is for a large portion of samples to be taken out of competition.

### 5.4.2 Blood and urine

Generally, blood is not taken “in competition” because of the requirement for the athlete to be at rest for a minimum time period prior to taking sample (IT), but also due to cost and difficulty (CY). In some Member States, blood samples are never taken (HR). In NL, it was noted that the percentage of the tests which involve blood samples has increased due to budget increases. It was noted in AT that there was a requirement that only doctors take blood samples. It was generally noted that when urine samples are taken in competition, the NADOs follow the ISPPPI procedure, with respect to the requirements for the testing station, waiting room etc. In ES, it was noted by the NADO that it outsources most of the testing to PwC, because it is cheaper and professional.

### 5.4.3 Therapeutic Use Exemptions

Generally, the application for the TUE is done through ADAMS but via a separate application form which the athlete submits to the NADO along with the necessary medical data. Once the decision is taken by the NADO’s TUE Committee, this decision is uploaded to ADAMS. In some Member States (CY), the athlete has the choice to submit the application on ADAMS or via paper application directly to the NADO. In EE, the athlete is advised to contact the NADO before submitting TUE, to ascertain if it is necessary (as it might not be due to low levels of the substance). In HR, athletes can submit the application via post, email or fax. The HR NADO noted that there is not yet a secure way of doing it, as currently ADAMS is only used by athletes in the RTP, so using ADAMS for TUEs would not be possible for athletes not in the TUE, who are not registered in ADAMS. In PL, the NADO noted that entering the data in ADAMS after the TUE decision was challenging, as

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<sup>166</sup> In AT, a nominated person submits team whereabouts via email

some data was missing. However, this seems to have been rectified by aligning the TUE form with the required fields in ADAMS (for example, a field for dosages was included in the TUE decision form). World Rugby noted that it has its own TUE Committee, and generally TUEs from NADO are submitted via ADAMS. However, in respect of those NADOs who do not use ADAMS for TUEs, World Rugby relies on them transferring the information to it.

#### **5.4.4 Other data**

It was noted by most NADOs that they may rely on open sources to collect certain data such as recent performances of athletes, or location of sporting events or for the conduct of investigations. In PL and NL, it was noted that social media are sometimes used to check whereabouts. In addition, the name of the athlete's doctor and trainer is requested on the doping control form. Furthermore, most NADOs noted the existence of a "tipline" where they receive anonymous tips about possible doping infringements.

### **5.5 Information and Consent**

#### **5.5.1 Information**

Upon collection of each category of data, the athlete receives fairly general information about what the data is being used for, but this is often quite unspecific. In respect of whereabouts data, athletes in the RTP are provided with a notification through which they are informed that they are included in the RTP, and setting out their rights and duties. In addition, the ADAMS platform provides information about the data processing. In relation to the blood and urine samples, the NADOs generally noted that the doping control form (based on WADA standards) includes information on the processing of the data. In addition, several NADOs (BE, CY, DE, EE, HR, IT) stressed the importance of the role of the Doping Control Officer (DCO) in explaining the information to the athletes, and informing them of their rights and responsibilities. In Finland, it was noted that the information is provided in the Finnish anti-doping rules, as well as on the doping control form, while in IT, it was noted that there is a section of the website dedicated to explaining how the data is processed. In AT, it was noted that the reason the athlete has been selected for testing is not provided to him by the DCO (just a reference to the doping-control-order). World Rugby noted that when players become selected for inclusion in the testing pool, they sign to indicate that they have been notified, and receive a Player Handbook, which explains all the procedures.

#### **5.5.2 Consent**

Consent takes a different form for each category of personal data. NADOs do not request consent to collect data from open sources for investigations. For whereabouts, the athlete's consent is requested by ADAMS the first time that they use it. In addition, in AT, the athlete signs a letter of commitment upon selection for RTP, where he/she provides consent. In EE, the NADO has the practice of asking the athletes to submit (in addition to consenting via ADAMS platform) written consent to the NADO.

For blood and urine samples, the athlete's consent is regarded by NADOs as being provided by signing the doping control form, which informs them of the data processing on the reverse of the form. Similarly, for TUEs, there is a section on the application form which sets out how the data will be processed, and the athlete signs the application form. NADOs generally noted that the doping control forms and the TUE application forms reflected WADA standards.



Regarding the generation of the athlete biological passport, the Polish NADO noted the assumption that the consent to the testing (by signing the DCF) was sufficient. Other NADOs (NL, UK) also noted that the DCF covers all data uploaded to ADAMS.

World Rugby noted that consent is provided as part of the participation agreement for tournaments. In other words, if you sign up to play you are deemed to have accepted the doping rules. EU Athletes noted that free and informed consent is effectively non-existent within the current sporting and legal structures.

## 5.6 Differentiation

In most Member States, the only differentiation between types of athletes in terms of the procedure for data collection was with respect to minors, for whom all Member States had special procedures in accordance with the International Standard Special Procedures for Minors (accompanied by parent/guardian etc). In addition, in BE minor non-elite athletes do not need to request TUEs – just a letter from their doctor is sufficient. In DE, amateurs are only tested in-competition. In ES, there is limited testing for amateurs due to budget constraints and the fact that there is a need to better educate amateurs in respect of anti-doping. However, it is noted in several Member States that there is no clear delineation of amateur/professional. In respect of whereabouts for teams, certain NADOs allow for this to be delegated to one person on behalf of the team (BE, DE, ES). The UK adopts a tiered approach where the top tier will provide whereabouts in ADAMS, the other tiers submit whereabouts via other forums e.g. email. NADOs indicated that athletes were mostly not employed, although a small group received government subsidy or grants; consequently, only some NADOs differentiated testing on this point.

## 5.7 Legal ground for processing personal data and sensitive personal data

The legal justification for processing personal data and sensitive personal data is a core topic in this study. Personal data may only be processed if done under one of the processing grounds listed in articles 7 and 8 of the Data Protection Directive (articles 6 and 9 of the GDPR).

### 5.7.1 Personal data

Most NADOs mentioned consent as a legal basis for processing personal data (AT, EE, ES, FI, HR, NL, PL). In AT and NL, it was noted that consent was currently the sole basis relied upon, although in both Member States, legislation is anticipated which will provide explicitly for the processing by the NADO in the public interest. In the other Member States where consent was mentioned, other bases were also mentioned. 2 NADOs (UK, FI) mentioned as a possible legal basis the necessity of the performance of a contract to which the data subject is party (corresponding to Art 6(1)(b) GDPR). However, both also mentioned other grounds. Compliance with a legal obligation was mentioned by several NADOs (CY, EE, ES, PL), although CY was the only NADO referring to this as the only possible basis. No NADO mentioned a legal basis corresponding to (d).

Several NADOs referred to (e) (BE, HR, UK, PL). DE seemed to refer to this – the German anti-doping law provides that the NADO can process certain categories of personal data, as necessary to apply the doping control system. BE also noted (c) as a ground. Finland referred to legal bases (a), (b) and (c), and noted that the NADO processes personal data on the basis of permission from the data protection authority (it explains to the DPA how it intends to process each category of personal data, and the DPA gives its approval). Only one NADO (UK) suggested (f) as the legal basis. World Rugby indicated the possibility of relying on several different grounds, but noted that there is currently a review ongoing in light of the GDPR.

WADA noted the legal grounds for processing personal data as being:

- the public interest
- necessary for the performance of a contract (in certain cases)
- consent

### 5.7.2 Sensitive personal data

For the processing of sensitive personal data, the picture is less clear. In CY, the NADO mentioned that they required explicit consent for the “disclosure” of sensitive personal data. In AT and NL, both rely currently on explicit consent, but will soon have legislation in force which provides a public interest basis Art 9(2)(g) GDPR. HR mentioned (a) and (g). (g) was also mentioned in EE. In Italy, the NADO specified that under Italian data protection law, they need to send a request to the DPA setting out the purpose of data collection and how it will be processed. This is then approved by the DPA. In DE, there is a specific provision in the anti-doping law which provides for the processing of such data. In FI and ES, no specific legal basis that differed the basis for collection non-sensitive data was mentioned. In the UK, the NADO suggests that legal ground (i) may be applicable. In BE, consent was noted as the basis for collecting information in TUEs and also the biological passport. WADA noted that it is unclear why the Article 29 Working Party indicated that the processing of sensitive data is not necessary.

## 5.8 Storage of Data

### 5.8.1 Use of ADAMS

NADOs generally use ADAMS for storing personal details, whereabouts (although in DE, ADAMS is not used for athletes in the Testing Pool, as opposed to the Registered Testing Pool), information on blood and urine samples, and athlete biological passports. In DE, the NADO specified that ADAMS is not used for amateur athletes. For TUEs, some NADOs (such as CY, HR, FI) noted that they have recently begun uploading decisions to ADAMS. In NL, use of ADAMS had initially been opposed by the government, but it is now going to be used. In AT, it was noted that ADAMS was not used for TUEs. In the majority of Member States, the NADOs noted that the TUE decision is uploaded to ADAMS by the NADO after the application has been decided upon (DE, FI, HR, IT, EE, NL, PL) rather than the entire application being made and processed via ADAMS. Thus, the medical documents themselves tend not to be uploaded. In HR, it was noted that a separate platform other than ADAMS should be developed to share data related to TUEs. One NADO (HR) noted the drawback to doing the entire application via ADAMS was the fact that ADAMS is only used by athletes in the testing pool, who are registered with ADAMS. It would not be possible to have other athletes apply for TUEs via ADAMS as they are not registered. Several NADOs noted that they do not use the test distribution plan module (EE, ES, NL).

### 5.8.2 Retention Period

All NADOs and Rugby International followed the retention periods as specified in the WADA standards. In Belgium, there is a Government Decree, which sets the retention periods. These are identical to the periods included in the WADA standards followed. WADA noted that it might be necessary to extend retention dates, in order to act as a deterrent to doping.

### 5.8.3 Data Security

NADOs, in general, only send samples to the lab with only a code on them (i.e. no personal data). Some specific examples of security measures include:

- Confidentiality agreements (ES, UK)
- Encrypted emails (EE, FI)
- Regular changing of passwords (AT)
- Anonymization of data sent to TUE Committee (BE, DE, AT)
- Limited number of staff with access to ADAMS (AT, UK, CY, IT, PL)
- Periodic audit of access (UK)
- Anti-virus, firewalls etc (PL, IT, AT)
- Anonymization of final decisions of proceedings prior to publication (NL)
- In CY, it was noted that pseudonymisation is not used, but may be considered in the future, particularly if guidance on pseudonymisation techniques were provided.
- In IT, an annex to the decree sets out all the technical measures to be applied such as passwords, anti-virus etc.
- WADA makes use of anonymization and pseudonymisation techniques.

## 5.9 Sharing of Data

### 5.9.1 Laboratories

In all Member States, the samples are either sent to the lab by courier or brought directly by the Doping Control Officer. A chain of custody form is used. In some countries, the sample is brought back to the NADO office before going to the lab (EE, HR, NL). If so, this is recorded on the chain of custody form. In all Member States, the lab communicates the results by uploading the sample code and the result on ADAMS. In addition, in several Member States, the lab sends the information via email (BE, HR) or fax (DE, FI, HR, IT).

### 5.9.2 Sharing inside EU (protocols)

The following was mentioned during interviews with NADOs:

NADOs noted transmitting data to other NADOs within the EU, by means of uploading to ADAMS. In some Member States, it was noted by the NADOs that they assume other EU-based NADOs will respect EU data protection rules (CY, DE). In other Member States, the NADOs noted that they shared on the basis of contractual clauses, which address the protection of personal data (particularly the UK). In NL, the NADO noted that it does not require contractual clauses in order to share data with other EU-based NADOs, but sometimes signs such clauses when sent by other NADOs (the UK, in particular, was mentioned). In EE, it was noted that sharing data is done via a recently-adopted format received at a recent WADA training session.

In several Member States (AT, ES, FI, IT, PL,<sup>167</sup> UK), it was noted that data was only shared with EU-based international federations on the basis of contractual clauses ensuring protection of personal data.

In HR, no special protocols for sharing data with NADOs or international federations within the EU were noted. In AT, it was noted that TUE files are not shared, and that other data are shared on the basis of necessity.

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<sup>167</sup> However, in PL, it was noted that not all of the contractual clauses to be used have been completed, due to resource constraints.

In Flanders, it was noted that sharing of data inside the EU is only possible where the recipient is another ADO, a law enforcement body, or a judicial or disciplinary body.

### 5.9.3 Sharing outside EU (protocols and instruments relied upon)

It should be noted that the questions relating to sharing of data took place in the context of a wider interview with representatives of each NADO, covering several subjects. This reflected the intention of the study team to ascertain details about how the NADOs carried out their activities in practice, rather than conducting purely legal interviews with dedicated data protection experts (although in some instances, data protection specialists were present). Thus, the level of detail provided in the answers to this question tended to vary among NADOs.

It was generally noted by the representatives of NADOs who were interviewed that the NADOs share personal data with other NADOs based outside the EU by means of the ADAMS system, onto which they upload personal data of athletes. In CY, it was noted that such sharing was conducted on foot of permission from the national data protection authority, which had declared Quebecois law as offering adequate protection of personal data.<sup>168</sup> In DE, in light of confusion which previously arose in relation to the ADAMS, the NADO noted relying on a comfort letter from the General Manager of WADA stating that ADAMS' data protection practices are in line with EU data protection law.<sup>169</sup>

Where NADOs noted that they share data directly with non-EU NADOs, they generally noted either sharing on the basis of European Commission decisions that the third country in which the NADO is based ensures an adequate level of protection or on the basis of contractual clauses ensuring sufficient protection for personal data. In the Belgian region of Flanders, the NADO (as a public body) can only share data with other entities outside the EU, where it has received approval of an independent commission for the data transfer. The independent commission will assess whether a data transfer has a legitimate reason, respects privacy law, and looks into the appropriate safeguards of the transfer and the safeguards provided by the recipient of the data. Upon the decision granting approval, NADO Flanders executes the decision accordingly. In EE, it was noted that data is transferred using a recently-adopted format which was received during a recent WADA training. In HR, the interview participant indicated that there were no specific protocols for sharing data with other NADOs, and that it did not distinguish between EU and non-EU NADOs for this purpose.

In relation to sharing data with International Federations, several Member States explicitly mentioned the use of contractual clauses ensuring sufficient protection for personal data (AT, FI, ES, UK). Notably, in CY, an issue was identified in relation to sharing with the IAAF, which is based in Monaco, which is not subject to an adequacy decision. Rather than sharing with the IAAF based on contractual clauses ensuring protection of personal data, the NADO noted that it is easier to share with European Athletics which is based in Switzerland. NADO Italia also noted that it does not share data with international federations which are based outside the EEA.

A concern that was noted by World Rugby was the insertion of a clause in participation agreements for tournaments which indicates that data will be sent outside the EU, whenever necessary for anti-doping purposes. The athlete signs the participation agreement,

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<sup>168</sup> Since a recent amendment to the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA), the entity operating ADAMS is no longer regarded as a controller subject to Quebecois law, but is subject to PIPEDA, thus rendering this observation out of date. See Chapter 6.

<sup>169</sup> It should be noted that the confusion referred to has been clarified by the recent amendment of PIPEDA.

thus ostensibly consenting to the transfer.<sup>170</sup> EU athletes also noted during an interview conducted during this study, that the transfer of data outside the EU, and the need to ensure that athletes' data is safe in third countries, was an issue.<sup>171</sup>

#### 5.9.4 Cooperation with Law Enforcement Agencies

In addition to the formal arrangements described in the previous chapter, the Field Study yielded the following results. In several Member States, cooperation happens pursuant to a protocol or memorandum of understanding with law enforcement agencies such as customs or police forces (BE, FI, IT, UK). In CY, such a protocol is in the process of being agreed, which will be based on the recommendation for sharing from the CoE Convention Monitoring Group. In some MSs (AT, DE) the anti-doping law sets out the manner in which sharing with such authorities should happen. In other Member States (EE, HR, ES), it was noted that while there is no formal protocol in place, the cooperation happens on an ad hoc basis. In NL, it was noted that there is not proper sharing at present, but that the new legislation is expected to provide for protocols for such sharing. In PL, it was noted that violations are shared with police, as it is potentially a criminal act.

#### 5.10 Analysis and Publication of Data

An important aspect of anti-doping measures is the analysis of samples and monitoring athletes' behaviour in view of their biometric passport and deciding on cases in which substance abuse is detected/suspected.

##### 5.10.1 Results

In the case of an adverse analytical finding, the proceeding is generally the same in each Member State, with NADOs noting that they follow the WADA guidelines on results management, meaning they:

- Check for a TUE (or if a TUE can be obtained retroactively)
- Check for deficiencies in the doping control
- Inform the athlete and his/her federation
- Ask the athlete if they can provide an explanation for the substance being present
- Opportunity for B sample to be tested

With respect to atypical findings, generally further investigation is undertaken. In ES, it was noted that the investigations are conducted on a case-by-case basis, and in PL it was noted that there is no written procedure, while in DE the NADO noted that there is a specific protocol concerning further investigation.

Generally, the steps taken by NADOs are:

- Where applicable, review of ABP to compare with previous results
- Possibly test again in the future
- Communication with the lab for further information or to conduct further tests on the sample (AT, CY, NL, PL)
- Consideration of any information which may have been received via the tipline (DE)

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<sup>170</sup> The issue of consent not being a satisfactory ground for processing personal data in the anti-doping context is discussed at Chapter 6.

<sup>171</sup> EU athletes expressed concerns that at times governments and WADA seemed to turn a blind eye to questionable data transfers such as at the Sochi Games.

In EE, it was noted by the NADO that it consults with the Nordic Athlete Passport Management Unit. WADA noted that it does not usually test athletes, but in the exceptional case that it does, results management is conducted by the NADO which has jurisdiction over the athlete.

In terms of effectiveness, most NADOs noted that the biological passport seldom yielded Adverse Analytical Findings, but were used mainly to design targeted testing. Both the biological passports and, though to a lesser extent, the out-of-competition testing were primarily regarded as effective in terms of deterrence, and less so in terms of yielding evidence towards ADRVs.

### 5.10.2 Sanctions

Generally, there is an independent sports tribunal or disciplinary committee which hears the case. In some Member States, there is the possibility of an appeal to a judicial body, while in others the appeal is heard by a sports appeals tribunal. NADOs also made reference to the possibility of appeal to the Court of Arbitration for Sport (CAS). In DE, the appeal goes straight to CAS without a first appeal at national level. In AT and ES, the athlete has the choice between appealing to the national court and going to the CAS. Indeed, in ES, it is noted that the determination of the sanction is made by the Director of the NADO, with an appeal to the Spanish Sports tribunal. In BE, the procedure differs depending on whether the athlete is an elite athlete, in which case the procedure is dealt with by the federation (several federations organise a doping tribunal which also has an appeal body). For non-elite athletes, the NADO sends it to a Disciplinary Commission, which has an appeal body. In both cases, there is the possibility of an appeal to the Council of State. EU Athletes raised concerns about the effectiveness of sanctions as a deterrent whilst also believing that the current bans for first offences were disproportionate – especially for recreational drugs such as cocaine which was almost always non-performance enhancing. WADA and EU Athletes both denounced the criminalisation of doping in sport, except in cases of drug trafficking or clear illegal activities.

### 5.10.3 Publication

The manner of publication of sanctions varies among Member States. Some NADOs publish on a closed list, as they are prohibited by their Data Protection Authorities from publishing open source (BE, DE<sup>172</sup>). In DE, the rationale is that it would be disproportionate to potentially ruin the athlete's non-sporting career. EU Athletes also noted this issue. In CY, the NADO is allowed to publish but not online. In some other Member States, there is no such closed source publication requirement (AT, EE, ES, HR, UK), while in PL the NADO is not allowed to publish without the athlete's consent. In some Member States, publication is not realised by the NADOs but by the national federations (EE, FI, NL). In NL, there are no uniform rules among national federations as to how much data they publish, but there are guidelines. In EE, the fact that federations publish negative findings about athletes without telling them was noted by the NADO as a problem.

In general, there are limitations on what can be published, and NADOs can usually publish only basic information such as the name of athlete, the sport, the violation, and the duration of the suspension. However, in the UK, the NADO attaches the decision of the anti-doping panel. A few NADOs (AT, EE, ES) specifically noted that nothing related to minors is published, while in EE, it was also specified that nothing related to amateurs was published. In the UK, nothing related to minors has been published but the situation seems unclear legally. World Rugby noted that it publishes full decisions (a full written

<sup>172</sup> As the German NADO is in Bonn, its Data Protection Authority is the North Rhine-Westphalia Commissioner for Data Protection and Freedom of Information (LDI NRW).

statement of the disciplinary panel). If the case goes to CAS, World Rugby also publishes the CAS decision.

## 5.11 Miscellaneous input

### 5.11.1 Athlete complaints

The majority of NADOs noted that they have not received complaints from athletes regarding the processing of their personal data. The exception is Estonia, where they have received complaints from athletes about the use of the whereabouts system. The athletes who complained had previously served bans for doping violations. Meanwhile, the UK NADO noted that they receive an occasional data subject request, but it is very rare (4-5 cases in 15-16 years). In PL, the NADO noted that while there were no complaints, it may also be the case that athletes have poor knowledge of data protection issues.

### 5.11.2 Comments or suggestions of NADOs

The NADOs were asked at the end of the interviews if they had any comments or suggestions about the application of data protection rules to anti-doping, and the following comments were noted:

- There needs to be consistency across each country. If German athlete has to do something, Russian and African athletes should be held to the same standard. (DE)
- Need to improve practicability of ADAMS. Should be better for athletes, more user friendly. For example, if they could have an App on their phones. (DE)
- Need to make sure ADAMS is secure too, as any information security issues can be negative for athletes. (DE)
- Limited resources is an issue, particularly for smaller NADOs. (EE)
- Regarding TUE applications and decisions, there are some sensitive data that should not be uploaded in ADAMS because it is possible that, for example, medical information is against the Data Protection Law in respective country. That kind of information could be sent in protected form when requested from WADA or IF. In other words, the NADO could send detailed information to WADA upon request, rather than having to translate and upload lots of technical medical documents. This would ensure better protection of personal data of athletes, and would reduce translation burden for NADO, without compromising the anti-doping practice. (FI)
- ADAMS should be used as a secure system for exchange of data whenever possible, but other platform separate from ADAMS should exist for transfer of information concerning TUEs etc, but this may require investment (HR)
- ADAMS should be better – the team whereabouts function is not ideal. (HR)
- With respect to data protection, sport needs to be treated in a specific way. (IT)

## 5.12 Conclusions

On the basis of the interviews conducted with the NADOs, Data Protection Authority, World Rugby, WADA and EU Athletes, the following conclusions can be drawn.

As already mentioned on the basis of the desk research in the Member States, there is variety in eligibility criteria for inclusion in testing pools. At the top-level all athletes are part of the Registered Testing Pool and subjected to the whereabouts program and intensive testing. Still this results in significantly different numbers of athletes. For instance, Poland has 80-100 athletes in the testing pool, whereas the UK has 445 athletes, even though the UK has less than twice the population of Poland.<sup>173</sup> At the same time, the UK has a lot more world class athletes than Poland, and the level of performance of a country is a relevant factor when establishing testing pools.

The personal data processed in the context of anti-doping primarily concerns whereabouts information and information based on urine samples. Blood samples are more exceptional, certainly in-competition. Another data source arose during the interviews: social media. Some NADOs remarked that they actively use social media to collect or corroborate data about athletes, performance, events, location etc. Athletes are informed through various channels of the fact that they are part of a testing pool, the data processing involved and their rights. Whether the information provided is adequate and actually understood by the athletes is unknown. Athletes have to provide their consent to the processing of various types of information (e.g., upon selection for RTP, using ADAMS, by signing doping control forms). There is no freedom not to sign, if the athlete wishes to continue participation in the sport.

With regards to the legal basis for the processing of athletes' personal data (processing ground), a very blurry picture emerged. Most NADOs interviewed mentioned consent as a/the processing ground that legitimizes the processing of athletes' personal data in their view. In most cases, also other grounds are mentioned, including contract (art 7 b), legal obligation (art. 7 c), public interest (art. 7 e), and legitimate interests of the controller (art. 7 f). Vital interest of the data subject is absent from the list. In other words, there is no consensus on the basis of which processing ground data may/should be processed. With regards to the processing of sensitive personal data the image is even blurrier; here many uncertainties and differences between the NADOs and Member States exist. The issue of legitimate processing will be explored further in chapter 6. Data are retained by NADOs according to the rules set out by the WADA.

Data are being shared between ADOs within Europe and in many cases ADAMS is used as the platform for sharing data. With regards to sharing data with third countries, a diverse picture emerges from the interviews, with some NADOs noting that no difference is made between EU and third countries, or that there is no disclosure of data (other than name and sample number) to countries that offer no adequate level of protection, or that contracts are used in all cases of sharing. Both MS where the interview participants from the NADOs noted that no difference is made between sharing inside and outside the EU were small MS (EE, HR). It should be noted that it is uncertain whether the interviewed participant had all the data regarding the actual practices of the NADO in relation to this issue, since we were not able to obtain any further details. Some noted reliance on comfort letters from WADA (in relation to ADAMS). Also with respect to sharing data with law enforcement agencies differences exist. These are largely based on differences in legislation.

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<sup>173</sup> Not only the different selection criteria adopted by the NADOs plays a role here, but also the total number of athletes in a country. No data were collected on this point.



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

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

Suggestions made by the NADOs include: improving consistency across NADOs, improving usability and security of ADAMS, changing the way WADA processes TUEs (taking them out of ADAMS), treating sport as a specific case with respect to data protection.

## 6. Potential Tensions with the General Data Protection Regulation

### 6.1 Introduction

In this chapter, an analysis is provided of some of the issues that came to the surface in the desk research and field study, as well as the literature review we conducted.

In three landmark cases,<sup>174</sup> the CJEU has admitted that sports law can be subject to the EU Treaties, and that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.<sup>175</sup> However, until now, the Court has not faced a case concerning privacy and data protection; the aforementioned cases dealt with market aspects, such as freedom of movement and competition.

In literature, privacy is almost always raised when discussing testing in anti-doping,<sup>176</sup> especially in relation to the whereabouts rule.<sup>177</sup> Besides the physical intrusion entailed by the collection of samples, an individual's privacy in terms of nudity is also impacted when collecting urine samples.<sup>178</sup> Gender verification tests have been condemned as violating human rights, not only in terms of privacy, but also discrimination.<sup>179</sup> The imposition of the whereabouts requirements brought about a wave of criticism from international organisations, NGOs and scholars.<sup>180</sup> It is sometimes framed as if it were a 'Sport Panopticon'. Some empirical studies have been conducted, which concluded that this is not the case for all athletes.<sup>181</sup> In the study conducted from the perspective of Dutch athletes by Valkenburg et. al,<sup>182</sup> almost one in three athletes considered that the whereabouts system has a negative influence on the pleasure they experience in being an elite athlete; almost half stated that they occasionally forget to provide their whereabouts. However, more than three in four athletes have confidence in the technical aspects. It must be noted that in the Netherlands, the whereabouts are not (yet) included in ADAMS.

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<sup>174</sup> Case T-313/02 David Meca-Medina and Igor Majcen v Commission of the European Communities (Judgment, 30 September 2004) II – 3294; and Case 519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities (Appeal, 19 July 2006) I-06991. Case C- 309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten (Judgment, 19 February 2002) I-01577. Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman (Judgment, 15 December 1995) I-04921; S Weatherill, *European Sports Law* (2nd edition, Springer, 2014), Chapter 11; J Halt, 'Where is the Privacy in WADA's "Whereabouts" Rule?' (2009) 20(1) *Marquette Sports Law Review* 267, 280.

<sup>175</sup> Case 519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities (Appeal, 19 July 2006) I-06991 [27].

<sup>176</sup> A J Schneider, 'Privacy, Confidentiality and Human Rights in Sport' (2004) 7(3) *Sport in Society* 453; Benedikt Buchner, *Der gläserne Sportler, DuD Datenschutz und Datensicherheit*, 8 | 2009, pp. 475-479.

<sup>177</sup> S Teetzel, 'Respecting privacy in detecting illegitimate enhancements in athletes' (2007) 1(2) *Sports, Ethics and Philosophy* 159.

<sup>178</sup> D C Malloy, D H Zakus, 'Ethics of drug testing in sport – an invasion of privacy justified?' (2002) 7(2) *Sport, Education and Society* 203, 210.

<sup>179</sup> R Saleem, 'The Olympic meddle: the International Olympic Committee's intrusion of athlete's privacy through the discriminatory practice of gender verification testing' (2010) 28 *J of Comp & Inf Law* 50.

<sup>180</sup> J Halt, 'Where is the Privacy in WADA's "Whereabouts" Rule?' (2009) 20(1) *Marquette Sports Law Review* 267, 272, citing Ohuruogu CAS 2006/A/1165.

<sup>181</sup> D Valkenburg, O de Hon, I van Hilvoorde, 'Doping control, providing whereabouts and the importance of privacy for elite athletes' (2014) *International Journal of Drug Policy* 212, 216; D V Hanstad, S Loland, 'Elite athletes' duty to provide information on their whereabouts: Justifiable anti-doping work or an indefensible surveillance regime?' (2009) 9(1) *Eur. J. of Sport and Medicine* 3.

<sup>182</sup> D Valkenburg, O de Hon, I van Hilvoorde, 'Doping control, providing whereabouts and the importance of privacy for elite athletes' (2014) *International Journal of Drug Policy* 212, 216.

There is an extensive body of literature on the topic of anti-doping rules, generally, as well as the WADA system.<sup>183</sup> Little comprehensive literature addressing the requirements of data protection and privacy under EU law in relation to anti-doping practices seems to exist.<sup>184</sup> There are some studies on the situation in particular Member States. For instance, McCann FitzGerald Corporate Group asserted that the Irish Anti-Doping Rules adopted in 2009 were incompatible with data protection.<sup>185</sup>

Below, an assessment is provided of the anti-doping measures in terms of gathering, storing, sharing and using (sensitive) personal data, as found in chapter 3 (WADA structure), chapter 4 (national legislation) and chapter 5 (field study), in light of the GDPR. The focus will lie on the legitimate ground for processing personal data, the ground for processing sensitive data, the ground for sharing personal data with parties based in countries outside the EU, on the duties of the data controller and the rights of athletes.

## 6.2. Legal grounds for processing personal data

There are six grounds for legitimate processing of personal data in the Directive, as well as the GDPR. Some of these also apply to sensitive data, and these will be discussed below. The grounds that can only be invoked with respect to sensitive data are discussed in the next sub-section.

### 6.2.1 Consent (Art. 7(a) DPD and Art. 6(1)(a) jo. Art. 7 GDPR)

Much of the anti-doping measures have been based on the consent of the data subject, i.e. the athlete. This has been described in section 4.3.3 of this report and in section 5.5.2. Under the EU data protection framework, consent must be freely given, specific, informed and it must be an unambiguous indication of the data subject's agreement to the processing of personal data.<sup>186</sup> However, in cases when there is a clear power imbalance between the data subject and the controller, particularly when the controller is a public authority,<sup>187</sup> consent is not considered freely given. The Article 29 Working Party has issued two opinions on the relationship between anti-doping measures and data protection, one in 2008, and one in 2009. With respect to consent, the Working Party has stressed, inter alia, that the athletes' consent is usually not freely given, because if they refuse to consent, they may be subject to harsh sanctions, such exclusion from professionally participating in sport events and organisations.

WADA distanced itself from these and other points made by the Working Party, which will be discussed later. Commenting on the first opinion of the Working Party, a legal expert suggested, inter alia, that for years, German athletes had been subjected to anti-doping checks and thus to a processing of specific data on the basis of their consent.<sup>188</sup> Also, WADA sees issues in view of the GDPR: 'WADA supports the use of an "explicit consent",

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<sup>183</sup> S Gardiner et al, *Sports Law* (4th edition, Routledge, 2012), Chapter 8; RCR Siekmann, *Introduction to International and European Sports Law: Capita Selecta* (Springer, 2012) Chapter 9; JAR Nafziger, SF Ross, *Handbook on international Sports Law* (Research Handbooks in International Law, Edward Elgar, 2011) Chapter 6.

<sup>184</sup> The work of Jacob Kornbeck has been most influential to the conceptualization of this chapter. In addition, mention should be made of: D Cooper, K van Quathem, 'Europe: Anti-doping in the new era of the EU data protection reform' (2013) 10(5) *Data Protection Law and Policy*.

<sup>185</sup> McCann FitzGerald Corporate Group, 'Data Protection Issues Regarding the Irish Anti-Doping Rules' (2009) <http://www.mccannfitzgerald.com/McfgFiles/knowledge/3678-Data%20Protection%20-%20Anti%20Doping.pdf>

<sup>186</sup> Recital 32 GDPR.

<sup>187</sup> Recital 43 GDPR.

<sup>188</sup> T Giesen, 'Expert opinion on Opinion 3/2008 issued by the "Article 29 Data Protection Working Group" of the European Commission regarding the Draft of an International Data Protection Standard of the World Anti-Doping Code dated 1 August 2008' 7 [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_ISPP\\_German\\_Legal\\_Opinion\\_EN.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_ISPP_German_Legal_Opinion_EN.pdf)

but if regulators were to conclude that athletes and sports bodies are not in a “balanced” relationship – whatever that means – then the consequences for sport would be dire.<sup>189</sup>

WADA still relies on the athlete’s consent on a number of points, such as with respect to the doping control form, the processing of personal data in ADAMS and when athletes join clubs or competitions, they are required to consent to being subjected to the anti-doping rules as set out by WADA. In addition, a number of Member States require consent for the processing of personal data throughout the doping testing and monitoring process; still, most of them considered this to be inadequate and in many countries were this was the case, national laws were being drafted to find another ground for processing personal data.

Both because consent is not given freely by athletes and because data subjects are not able to withdraw their consent at any time, consent relied on in anti-doping practices is generally not valid as a processing ground. Consent will only be valid in situations where not giving such consent will have no negative repercussions for the data subject. For example, when consent is asked for further research on samples, it may be valid, since the athlete is truly free to deny it. In conclusion, consent does not constitute a valid processing ground in the context of anti-doping, except on some particular points.

### **6.2.2 Performance of a contract (Art. 7(b) DPD and Art. 6(1)(b) GDPR)**

The second processing ground is when processing is necessary for the performance of a contract to which the data subject is party, or in order to take steps at the request of the data subject prior to entering into a contract. Throughout their career, athletes have to sign several contracts which may include anti-doping clauses, or include the athlete in an organization which falls under the structure of WADA. For instance, this would be the case when joining national/international federations, when joining competitions or the Olympic games, or entering into a sponsorship contract. Because of the different layers of sports structures and ADOs, when joining a local club, an athlete will come within the scope of WADA if the club is affiliated to the national federation, which had adopted the WADC; there may be an additional layer, when the national federation is part of an international federation which has adopted the Code. Hence, when joining a local club, an athlete will find him/herself subject to worldwide set rules most of the times, because almost all sports and even recreational activities such as cheerleading can fall under the WADA structure. As indicated in section 4.3.3, UK and FI NADOs mentioned this ground.

With respect to contract as a legitimate ground for processing personal data, basically the same problems exist as those discussed under consent. The signing of a contract must similarly be freely given and it must be possible for athletes to withdraw from the contract without facing harsh sanctions. The WP29 stresses: ‘Consent is also a notion used in other fields of law, particularly contract law. In this context, to ensure a contract is valid, other criteria than those mentioned in the Directive will be taken into account, such as age, undue influence, etc. There is no contradiction, but an overlap, between the scope of civil law and the scope of the Directive: the Directive does not address the general conditions of the validity of consent in a civil law context, but it does not exclude them. This means, for instance, that to assess the validity of a contract in the context of Article 7(b) of the Directive, civil law requirements will have to be taken into account. In addition to the application of the general conditions for the validity of consent under civil law, the consent required in Article 7(a) must also be interpreted taking into account Ar-

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<sup>189</sup> Comments to the Proposed EU Data Protection Regulation, AGENDA ITEM # 5.1 ATTACHMENT 1, at the meeting of the Monitoring Group (T-DO) of the CoE Anti-Doping Convention at the 28th T-PD plenary meeting (Strasbourg, 19-22 June 2012) Item\_5\_1\_Attach\_1\_WADA\_Comments\_to\_DP\_Regulation-EU\_Presidency\_FINAL. This position was upheld at the WADA Executive Committee and Foundation Board (Montreal, 17-18 November 2012).

title 2(h) of the Directive.<sup>190</sup> The GDPR confirms this approach in clearly defining the interaction between consent and performance of a contract. If consent is a condition for the performance of a contract, although the processing is not necessary for such performance, consent is not considered valid (Art. 7(4), Recitals 43-44).

In another opinion,<sup>191</sup> the Working Party stressed that the provision (art. 7(b) Directive) must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but unilaterally imposed on the data subject by the controller. Furthermore, the fact that some data processing is covered by a contract does not automatically mean that it is necessary for the contract. In any case, according to the Working Party, fraud prevention may be considered as going beyond what is necessary for the performance of a contract, in which case other grounds may legitimize the processing. This is important, especially since in some states such as Austria and Germany, benefiting financially from doping and competing is considered fraud.

The necessity of personal data processing for the performance of each contract in the anti-doping context will have to be assessed on a case-by-case basis, including both data protection legislation as well as the specific civil law requirements of each Member State. But because under contract law, consent to a contract must also be free and informed, generally, the same problem seems to apply as previously discussed.<sup>192</sup> This is also affirmed by the phrasing of Article 7 of the GDPR, which holds that when the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language and that when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. In conclusion, like consent, a contractual agreement does in general not constitute a valid ground for processing personal data in the context of anti-doping, except on some particular points, where there is free consent and the possibility to withdraw from the contractual agreement in a meaningful way.

### **6.2.3 Compliance with legal obligation to which the controller is subject (Art. 7(c) DPD and Art. 6(1)(c) GDPR)**

WADA has also referred to the existence of a legal obligation as a potential legitimate ground for processing personal data, referring to the UNESCO Convention against doping in sport and the Council of Europe Anti-Doping Convention.<sup>193</sup> The Working Party did approach the applicability of this ground in the context of anti-doping in positive terms.<sup>194</sup> Still, it needs to be assessed to what extent the international documents indeed lay down enforceable rights and obligations themselves. It seems that thus far, both the UNESCO Convention and the Convention of the Council of Europe have not been granted direct effect.

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<sup>190</sup> Article 29 Data Protection Working Party, Opinion 15/2011 on the definition of consent, 01197/11/EN WP187, 13 July 2011.

<sup>191</sup> Article 29 Data Protection Working Party, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC' (WP217, 9 April 2014) 16 <[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf)> accessed 9 November 2016.

<sup>192</sup> [https://www.trans-lex.org/400200/\\_/pecl/#head\\_0](https://www.trans-lex.org/400200/_/pecl/#head_0) [https://www.trans-lex.org/918000/\\_/freedom-of-contract/](https://www.trans-lex.org/918000/_/freedom-of-contract/) [https://www.trans-lex.org/920000/\\_/contractual-consent/](https://www.trans-lex.org/920000/_/contractual-consent/)

<sup>193</sup> WADA, 'Legitimacy of Anti-Doping' (17 June 2009) 1 [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Legitimacy\\_of\\_AntiDoping\\_20090617.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Legitimacy_of_AntiDoping_20090617.pdf)

<sup>194</sup> WP 29, Opinion 3/2008, WP156, p. 5.

A less ambiguous option would be for countries to incorporate anti-doping rules in their national laws. Here, it is important in terms of legitimacy and democratic oversight, that the national law not merely incorporates the WADA rules or refers to those rules in order to declare them applicable, but sets out specific rules on collecting, storing, sharing and using personal data in view of anti-doping. In particular, the national legislator must make amendments to the WADA rules when this is required in terms of necessity, proportionality, subsidiarity and effectiveness under the right to privacy and data protection (Article 8 ECHR, Article 7 and 8 CFR). Several countries have adopted (or are in the process of adopting) a law regulating the NADO and specifying that it has a legal duty to process data on athletes in the course of anti-doping activities. The Finish NADO referred explicitly to the applicability of this ground.

#### **6.2.4 Vital interest of the data subject (Art. 7(d) DPD and Art. 6(1)(d) GDPR**

Besides the legal obligation, WADA has referred to the vital interests of the data subject as a potential legitimation for data processing, referring to the health of the athletes that may be compromised by substantial doping abuse and to the fundamental right of the athlete to partake in a clean sport. 'At the end of the day, our common goal is to protect the fundamental right of every athlete to compete in clean sport'.<sup>195</sup>

However, it seems that the latter interest has so far not been recognized as a fundamental right in Europe. Although an athlete has an obvious interest in partaking in a level playing field, e.g. not losing a gold medal to a dooper, the 'vital interest' under the Regulation must presumably be interpreted more narrowly. This also counts for the athlete's health. Recital 46 of the GDPR provides: 'Processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis. Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters.'

Although doping usage by athletes could result in their death, this legal ground is primarily applicable when the data subject is unaware of the risk he/she subjects him/herself to, such as in the case of an emergency situation or a disaster. If this is not the case, then other processing grounds should be found. Although it can be debated to which extent athletes are aware of the dangers of doping abuse, it can equally be argued that only in rare case has such a doping abuse lead to severe health risks. That is why this ground seems unsuitable as a general processing ground for the data processing that takes place in the anti-doping context.

#### **6.2.5 Task carried out in the public interest or in the exercise of official authority (Art. 7(e) DPD and Art. 6(1)(e))**

A number of NADOs (BE, HR, PL and UK) and WADA have asserted that processing personal data in the anti-doping context may be regarded as necessary in the public interest, in particular in the interest of a clean sport environment. WADA also refers to the fact that it cooperates with INTERPOL and combats crime and suggests that the doping problem 'has changed from being a problem restricted to sports to one of public-health concern'.<sup>196</sup>

<sup>195</sup> WADA, 'WADA and its Partners Keep the Spotlight on Clean Sport at 2016 SportAccord Convention' (27 April 2016) <https://www.wada-ama.org/en/media/news/2016-04/wada-and-its-partners-keep-the-spotlight-on-clean-sport-at-2016-sportaccord>

<sup>196</sup> WADA, 'Does Anti-Doping Serve a Public Interest?' (17 June 2009) 1 [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Does\\_AntiDopingServePublicInterest\\_20090617.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Does_AntiDopingServePublicInterest_20090617.pdf) citing F

The GDPR specifies that processing of personal data may be legitimate when 'processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'. Recital 45 of the GDPR specifies: 'Where processing is carried out in accordance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law. This Regulation does not require a specific law for each individual processing. A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient. It should also be for Union or Member State law to determine the purpose of processing. Furthermore, that law could specify the general conditions of this Regulation governing the lawfulness of personal data processing, establish specifications for determining the controller, the type of personal data which are subject to the processing, the data subjects concerned, the entities to which the personal data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or Member State law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or, where it is in the public interest to do so, including for health purposes such as public health and social protection and the management of health care services, by private law, such as a professional association.'

The CJEU accepted that a general objective of anti-doping rules includes 'the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport'.<sup>197</sup> The most recent addition to this argument is the inclusion of a reference to doping in recital 112 of the GDPR correspondent to derogations for data transfers: 'Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.'

The Working Party 29 seems to look favourably towards this ground: 'The Working Party is of the opinion that article 7 (e) of Directive 95/46/EC might provide a legal basis for processing, to the extent that ADOs have public status, including a clearly defined national public mission authorising them under national law to process the necessary data to fulfil this mission observing the prescriptions of the Directive as transposed into national law.'<sup>198</sup>

Consequently, the public interest could serve as a legitimation ground for the processing of data. It is further necessary that, notwithstanding whether a NADO is a public or private body, it is governed by public law. For instance, an anti-doping law may mandate a private NADO to carry out tasks in public interest (i.e. fight against doping). It should be stressed again that the principles of necessity, proportionality, subsidiarity and effectiveness as set out under the human rights framework should be respected. Obviously, not all anti-doping measures should be considered in the public interest, merely because WADA or another private organisation claims it to be. If there is a less intrusive measure

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Sjöqvist, M Garle, A Rane, 'Use of doping agents, particularly anabolic steroids, in sports and society' (2008) 371, 1872 [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(08\)60801-6.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(08)60801-6.pdf)

<sup>197</sup> Court of Justice, David Meca-Medina and Igor Majcen v. Commission of the European Communities, Case C-519/04, 18 July 2006, ECLI:EU:C:2006:492.

<sup>198</sup> WP 29, Opinion 4/2009, WP162, 11.

which achieves the same objective, then the necessity requirement is not fulfilled, and the processing is not legitimate. The Article 29 Working Party has, for example, raised doubts over the proportionality of the whereabouts system: 'The Working Party considers it to be proportionate to require personal data in regards to the specific 60-minute time slot and to require filling in the name and address of each location where the athlete will train, work or conduct any other regular activity (as only related to the athlete's regular routine, see article 11.3 of the International Standard for Testing). The examples given indicate that, apart from the 60-minute time slot and residence, information about four hours a day is considered proportionate.'

### 6.2.6 Legitimate interest of the controller (Art. 7(f) DPD and Art. 6(1)(f) GDPR)

Finally, for ground (f) of Article 7 of the Directive and Article 6(1) of the Regulation to apply, the interests of the data controller should outweigh those of the data subject. The Directive stresses that the processing of personal data is legitimate when it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject. The Regulation basically uses the same wording, but adds that the latter will particularly be the case if the person is a child. It also states that this ground shall not apply to processing carried out by public authorities in the performance of their task.<sup>199</sup>

WADA does not appear to rely on this ground,<sup>200</sup> nor did most of the NADOs (except of the UK). Furthermore, the Working Party 29 is quite resolute about the inapplicability of this processing ground, as the gravity of privacy intrusions as a result of the fight against doping should weigh heavily in this context.<sup>201</sup> Consequently, this ground seems unsuitable for legitimatising the data processing in the anti-doping context, also in view of the fact that some of the NADOs are public bodies.

### 6.3. Specific grounds for processing of sensitive personal data

Under the DPD, sensitive data are data relating to racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or sex life. Data related to offences, criminal convictions or security measures are also subject to a special regime. The GDPR adds biometric data (for the purpose of uniquely identifying a natural person) and genetic data to the list of sensitive data. The GDPR gives the following definitions: 'genetic data' means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question; 'biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data; 'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.<sup>202</sup>

An additional issue arises from the processing of data relating to offences, criminal convictions or related to security measures. Article 10 of the GDPR specifies: 'Processing of personal data relating to criminal convictions and offences or related security measures

<sup>199</sup> Article 6 GDPR.

<sup>200</sup> Article 29 Data Protection Working Party, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC' (WP217, 9 April 2014) 15.

<sup>201</sup> Second opinion 4/2009 on the World Anti-Doping Agency.

<sup>202</sup> Article 4 GDPR.



based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.’ This ground comes into discussion because (1) according to the WP29, information on sanctions due to doping falls under the scope of this ground, (2) doping is classified as a criminal offence in some countries, or (3) in case a prohibited substance falls under the criminal law realm. Therefore, national law should provide a ground for processing of data related to doping offences, in order to legitimize the processing of such data by ADOs. This law should also take into account that disciplinary files are likely to contain data relating to offences, criminal convictions or security measures. Without such a law, it is unsure whether ADOs can either process or publish the sanctions.

### 6.3.1 Substantial public interest

Consequently, it seems that many data processed in the anti-doping context will regard sensitive data, either because they can be seen as biometric data, or because they reveal medical or genetic information or because they may be used for criminal law sanctions and law enforcement purposes. The data protection framework lays down stricter rules for the processing of sensitive personal data than for ‘normal’ personal data. In principle, it is prohibited to process such data, except where certain conditions apply. These conditions are to some extent the same as the grounds listed for legitimate processing of personal data. Instead of consent, ‘explicit consent’ is required; instead of a public interest, the processing should be in a ‘substantial public interest’. Article 9 of the GDPR does not contain a legitimate ground for processing of sensitive data when this follows from a legal obligation resting on the data controller. This means that this ground can be invoked with respect to processing personal data, but not with respect to processing sensitive data.

What is meant by ‘substantial public interest’ is not made explicit in the GDPR, and it is thus unclear whether processing sensitive data for anti-doping purposes should be considered as a ‘substantial public interest’. At first sight, it seems at odds with the examples given by the GDPR in its recitals, such as: ‘Where in the course of electoral activities, the operation of the democratic system in a Member State requires that political parties compile personal data on people’s political opinions, the processing of such data may be permitted for reasons of public interest, provided that appropriate safeguards are established.’<sup>203</sup> Recital 112 GDPR qualifies the fight against doping in sport as an ‘important public interest in the area of public health’ in terms of transferring personal data to countries outside the EU, but whether ‘substantial public interest’ is the same as ‘important public interest’ and whether the interests served by processing sensitive data and those served by transferring personal data to countries outside the EU is unsure. Member States have discretion to decide what qualifies as a ‘substantial public interest’ in their national law. It is unsure to what extent the ‘substantial public interest’ could be invoked by Member States to legitimize the processing of sensitive data in the anti-doping context.

### 6.3.2 Employment law

However, the GDPR mentions additional grounds that could apply in the anti-doping context, four of such will be discussed below. For example, it specifies that the processing of sensitive personal data may be considered legitimate when the ‘processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective

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<sup>203</sup> Recital 56 GDPR.

agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject’.

WADA has indeed drawn parallels between the anti-doping context and fields of employment law. ‘Even the consequences of a free decision could only give rise to legislative rules if the results of the consequences would be unethical. This is certainly not the case in the area of combating doping, as is demonstrated by the following comparable considerations: these consequences could not be considered unacceptable or even unethical, for example, in the freedom to choose an occupation or in the social sector: if one considers the effects of job loss if the employed persons would not agree to considerable restrictions of their personal freedom when those restrictions are required for a successful exercising of their occupation: breach of confidence, violations of attendance obligations, establishment, objectivity or financial rules and incompatibility regulations are prerequisites for a denial of practicing a profession. Only the surrender of considerable freedom of rights enables the practice of a profession. Other examples: pilots must submit to a rigorous health check; bus and truck drivers must adhere to strict rest periods; celibacy is the prerequisite to bindingly work as a Catholic priest for the Catholic church. This list could be continued.’<sup>204</sup> None of the NADOs relied on this ground.

According to the WP29’s opinion on processing data in employment context, this ground can have wide effect, however, it is dependent on what the Member State sets out regarding the obligations and the rights of the employees in employment law, as well as a matter of custom and practice. This does not include obligations arising out of anti-doping law, as it is not part of employment law. Although athletes might sign employment contracts, the inclusion of an anti-doping law compliance clause in such contract would be outside the scope of this processing ground. Therefore, sensitive personal data processing for the purpose of fight against doping cannot be legitimated on this ground in our view. In addition, a very small minority of the athletes are subjected to employment contracts.

### 6.3.3 Occupational medicine and public interest in the area public health

A number of grounds contained in the Regulation may be of relevance, in addition to the ‘substantial public interest’ already discussed, due to their link with public interest and health. The GDPR specifies that processing of sensitive personal data may be considered legitimate when: ‘(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject; (h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3; (i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy.’<sup>205</sup>

<sup>204</sup> T Giesen, ‘Expert opinion on Opinion 3/2008 issued by the “Article 29 Data Protection Working Group” of the European Commission regarding the Draft of an International Data Protection Standard of the World Anti-Doping Code dated 1 August 2008’ 2 [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_ISPP\\_German\\_Legal\\_Opinion\\_EN.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_ISPP_German_Legal_Opinion_EN.pdf)

<sup>205</sup> Article 9 GDPR.

As discussed, it is unsure whether ground (g) is a one-size-fits-all in the anti-doping context. It is, however, clear that ground (h) would usually only apply when, for example, the sports physician tests an athlete who is employed by a sports federation. From the interviews discussed in chapter 5, it was evident that this is the case only in a very limited number of circumstances. Consequently, ground (h) may potentially be invoked to legitimize the processing of sensitive data, but even if it applied, it would only legitimize a fraction of the processing of sensitive data in the anti-doping context.<sup>206</sup>

It is questionable to what extent ground (i) can be invoked.<sup>207</sup> Only the UK NADO made explicit reference to this ground. According to Recital 54 of the GDPR: 'In that context, 'public health' should be interpreted as defined in Regulation (EC) No 1338/2008 of the European Parliament and of the Council, namely all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers or insurance and banking companies.'

Recital 112 of the GDPR specifies with regard to the lawfulness of transferring personal data to countries outside the EU: 'Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.'

Consequently, the transfer of personal data to reduce and/or eliminate doping in sport may be considered lawful when for reasons of public interest in the area of public health (ground i). With respect to processing sensitive personal data for reasons of public health, the GDPR stresses that there should be a serious threat. It is unsure whether this is reached in the fight against doping.

Public health might be regarded as being under a *serious threat* if significant quantities of amateur sport persons would consume doping substances on a large scale, affecting their health. However, no evidence for such a pandemic was found during the study of the WADA documents (chapter 3), of the regulatory situation in the 28 EU Member States (chapter 4) or during the field research conducted (chapter 5). Although the use of certain steroids and anabolic steroids in gyms is indeed high, the more problematic usage of doping is mostly limited to a small group of international top athletes.

More generally, in 2008, the Working Party 29 seemed sceptical about the processing of sensitive personal data in the context of anti-doping measures, stressing that it 'has very serious doubts as to the relevance of processing several of these categories of information, in particular if these data are to be included in the ADAMS database', and inviting explicitly WADA to re-examine the relevance of possible processing of such data.<sup>208</sup> Since then, the GDPR has extended the category of sensitive data including now biometric and genetic data, which are the basis of identifying anti-doping rules violations.

<sup>206</sup> See also: Article 9 para. 3 GDPR.

<sup>207</sup> Recitals 52-54 GDPR.

<sup>208</sup> WP29, Opinion 3/2008, WP156, 6.

## 6.4. Territorial scope and transferring personal data to third Countries

Besides the question of a possible processing ground, there is the point of territorial scope of the Regulation and the legitimacy of international data flows. Transmission of personal data within the EU benefits from free flow of data. The same does not hold true for transfers outside the EU, which are discussed in this section. With respect to applicability, the GDPR stresses that it applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. Perhaps more importantly in this context, the Regulation also applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to either (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.<sup>209</sup>

It follows that a NADO, event organizer or a sport federation based on EU territory will have to comply with the data protection rules contained in the Regulation. This also applies when data is processed by those parties on foreign athletes. Also, if, for example, the Dutch NADO asks the Brazilian NADO to conduct a doping investigation on its behalf, the Dutch NADO will be considered the controller and has to comply with the EU data protection rules and ensure that the Brazilian NADO does too. Vice versa, if the Brazilian NADO sends a similar request to the Dutch NADO, the latter would presumably have to comply with many of the data protection rules as contained in the Regulation because it can be qualified as the data processor.

The primary responsibility for abiding by the principles and obligations under the GDPR lie on the controller, who is described as 'the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law'. In addition, the processor has a number of obligations under the Regulation. The processor is defined as the 'natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.'

An interesting question is whether WADA is also directly bound by the Regulation, either because it offers goods or services (e.g. the ADAMS system) or because it monitors the behaviour of data subjects in the European Union. On the one hand, the latter seems the case, as the whereabouts and blood/urine values of a select number of European athletes are monitored. WADA has designed ADAMS, through which this monitoring takes place, and has set the rules from which the monitoring follows. In addition, it has direct access to all profiles and has the ability to make profiles itself.

On the other hand, a recital to the Regulation seems to suggest that this principle particularly concerns profiling activities on the Internet.<sup>210</sup> It is questionable whether ADAMS system is directly offered to athletes, or rather to NADOS, in which case the GDPR does not apply. In addition, WADA seldom actively monitors athletes themselves, but does so through other ADOs. Consequently, it is unclear to what extent the WADA itself will also be bound by the Regulation. This matter shall remain undiscussed here, instead focusing the attention on the transfer of personal data to countries outside the EU.

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<sup>209</sup> Article 3 GDPR.

<sup>210</sup> Recital 24 GDPR.

The GDPR, in article 44 holds: 'Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.'

The term 'transfer of personal data' has not been defined in the Directive nor the GDPR. However, the CJEU made the first step in defining the term in the judgment of *Bodil Lindqvist*,<sup>211</sup> where it had to answer, *inter alia*, whether posting on an internet page personal data, which can be accessible from other countries constitutes transfer to third country. It concluded that there 'is no transfer [of data] to a third country within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.'

This reasoning only applies in a limited number of cases. It does not apply, for example, when a controller uploads information on an online platform which may be accessible by parties from non-adequate countries on the deliberate authorization of the controller. In the light of these issues, the European Data Protection Supervisor has issued a position paper asking for a clear definition of the notion of 'transfer'.<sup>212</sup> According to the EDPS, the term should normally imply "communication, disclosure or otherwise making available of personal data, conducted with the knowledge or intention of a sender subject to the Regulation that the recipient(s) will have access to it".

While direct transfers from one ADO to another one definitely fall under the definition (the use of ADAMS is not mandatory under the WADA system),<sup>213</sup> uploading data by a NADO on a platform and granting access to another NADO is not as clear. The Article 29 Working Party in this context, referring to ADAMS, spoke of the 'transfer of data to the ADAMS Database in Canada and to other countries outside the EU'. Hence, it appears that uploading personal data on ADAMS, which is based in Canada, constitutes transfer within the scope of the EU data protection regime. In the same line, it should be presumed that when data are downloaded from ADAMS by an ADO in another country outside the EU, this constitutes transfer.

Within the European Union, there is a free flow of personal data, which means that subject to the requirements GDPR, personal data may be transmitted between ADOs without further requirements. Notwithstanding, the data must have been collected and processed legitimately up to that point, i.e. according to a processing ground. The transfer of personal data to countries outside the EU can be legitimate in three instances: (1) when there is an adequacy decision, (2) when adequate safeguards exist and (3) when a derogation applies.

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<sup>211</sup> Court of Justice, *Bodil Lindqvist*, case C-101/01, 6 November 2003, ECLI:EU:C:2003:596.

<sup>212</sup>

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07\\_EDPS\\_Reform\\_package\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07_EDPS_Reform_package_EN.pdf)

<sup>213</sup> List of organizations who use ADAMS <https://www.wada-ama.org/en/list-of-organizations-using-adams>

### 6.4.1 Transfer pursuant to an adequacy decision

Transfers to third countries which are the subject of an adequacy decision pursuant to article 45 GDPR benefit from the same regime of free flow of personal data as within the EU. Paragraph 1 of that articles specifies: 'A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.'

Currently, there are adequacy decisions with respect to only 12 countries in the world, including for Canada and Switzerland.<sup>214</sup> These two countries are particularly important for this study as WADA is a private organisation based in Switzerland, with its headquarters in Canada. ADAMS is run on Canadian soil, and is accessed by WADA from both Switzerland and Canada.

While the adequacy decision in relation to Switzerland relates to the entirety of the data protection system, with respect to Canada, the Commission has adopted an adequacy which only applies to processing operations which are covered by the Canadian Personal Information Protection and Electronic Documents Act (PIPED Act or PIPEDA). This law has a limited scope, as it does not apply to government organisations to which the Federal Privacy Act applies or to non-profit and charitable organisations, unless they engage in activities of a commercial nature such as the bartering and selling of donors lists.<sup>215</sup> Pursuant to the amendment in the Economic Action Plan 2015, PIPEDA applies to WADA as well.<sup>216</sup> This amendment has now entered into force, meaning that WADA has been included under the scope of the adequacy decision.<sup>217</sup> It must consequently be assumed that the sharing of personal information with WADA, *inter alia* through ADAMS meets the conditions for international transfer under GDPR. This holds true for the transfer of personal data within the scope of all adequacy decisions; one must bear in mind that an adequacy decision for a certain country does not necessarily mean that all sectors are covered; for instance, the US Privacy Shield only applies to the commercial sector and is on a voluntary basis.

### 6.4.2 Transfers to third countries without an adequacy decision and establishment of appropriate safeguards

It will not always be clear in advance which of the data provided by EU based organisation and uploaded via ADAMS, will eventually be transferred to third countries. For instance, if an athlete is part of both the national registered testing pool as well as the international one, IFs may have access to the athlete's personal data or profile. If an athlete participates in an international competition, the IF may provide data to the MEO, in

<sup>214</sup> [http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm)

<sup>215</sup> [http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/third-countries-faq/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/third-countries-faq/index_en.htm)

<sup>216</sup> Division 13 of Part 3 amends PIPEDA to establish that the Act applies to WADA's international and inter-provincial collection, use and disclosure of personal information. Specifically, section 4 of PIPEDA (which sets out the application of the Act) is being amended to provide that the Act applies to organizations listed in Schedule 4, in respect of the personal information that is referred to in the Schedule. The amendment creates Schedule 4 and includes WADA in respect of personal information that the organization collects, uses or discloses in the course of its inter-provincial or international activities. The amendment also gives the Governor in Council the authority to amend the Schedule by Order. Department of Finance Canada, 'Bill C-59 - Economic Action Plan 2015 Act, No. 1 - Part 3: Various Measures' <http://www.fin.gc.ca/pub/c59/03-eng.asp> See also: Letter from Privacy Commissioner of Canada to Joseph A. Day, Senator and James Rajotte, M.P. (1 June 2015) [http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD7992837/412\\_FINA\\_C-59\\_Briefs%5COfficeOfThePrivacyCommissionerOfCanada-e.pdf](http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD7992837/412_FINA_C-59_Briefs%5COfficeOfThePrivacyCommissionerOfCanada-e.pdf)

<sup>217</sup> Consolidation: Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5) Schedule 4 <http://laws-lois.justice.gc.ca/eng/acts/P-8.6/page-14.html#h-29>

which case there will be a case of onward transfer if the IF has already been the recipient of data. In the context of anti-doping, almost all countries in the world may be relevant because most countries have a NADO, national athletes participating in sport events and/or host large sport events.

The question of legitimacy of transborder data flows is more difficult to answer with respect to the data transfer to third parties in non-EU countries for which there is no adequacy decision.<sup>218</sup> Under the GDPR, such transfers are still possible if the controller or processor has provided appropriate safeguards.<sup>219</sup> This may be the case, under certain conditions, if the European Commission's adopted standard data protection contractual clauses<sup>220</sup> are used, or when standard data protection clauses have been adopted by a supervisory authority and approved by the Commission.<sup>221</sup> WADA has issued a standard agreement for the sharing of information between different parties in the anti-doping context, using the ADAMS system<sup>222</sup> and has set out its own privacy standards in the ISPPPI. But as such, it seems unlikely that these would as such qualify as appropriate safeguards, because they provide a significantly lower level of protection than the GDPR. In addition, there also seems to be no approved code of conduct,<sup>223</sup> nor does an approved certification mechanism seem to apply in this case.

Consequently, the most appropriate way for legitimate transfer of data outside the EU seems to be contractual clauses or agreements.<sup>224</sup> Subject to authorisations from the competent supervisory authority, appropriate safeguards may be achieved through contractual clauses between the controllers and/or processors, or through provisions inserted into administrative arrangements between public authorities or bodies which include enforceable data subject rights.

However, WADA seems to reject the use of contractual clauses for the establishment of appropriate safeguards stressing that there are simply too many parties involved and too many data flows. 'The suggestion that data transfer contracts could be applied to the thousands of data transfers, involving multiple parties, that arise in the anti-doping context lacks any grounding in reality. Personal data on individual athletes may need to be shared with anti-doping authorities in any country where the athlete trains or participates in competitions. As a result, the number of contracts between all European and non-European anti-doping authorities and laboratories would number in the thousands. Given that non-European authorities are often public authorities, there is little likelihood that they would agree to such contracts. As a result, insisting on the use of transfer contracts would completely paralyze anti-doping efforts worldwide.'<sup>225</sup>

### 6.4.3 Derogations

When there is no adequacy decision of the Commission and when there are no appropriate safeguards in place, data transfer to third countries outside the EU may still be deemed compliant when a derogation can be invoked.<sup>226</sup> Such grounds are the

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<sup>218</sup> Article 45 GDPR. 29 Working Party, 'Working Document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995' (WP114, 25 November 2005).

<sup>219</sup> Article 46(1) GDPR

<sup>220</sup> Such as the ones in Article 93(2) GDPR. Pursuant to art. 46.2.c GDPR.

<sup>221</sup> Article 46(2)(d) GDPR.

<sup>222</sup> Agreement for the Sharing of Information (13 July 2016) [https://wada-main-prod.s3.amazonaws.com/resources/files/wada\\_adams\\_user\\_agreement\\_ado\\_version\\_2015.pdf](https://wada-main-prod.s3.amazonaws.com/resources/files/wada_adams_user_agreement_ado_version_2015.pdf)

<sup>223</sup> Article 40 GDPR.

<sup>224</sup> Article 42 GDPR.

<sup>225</sup> WADA Comments on Article 29 Working Party Second Opinion [3.4] [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Comments\\_WP29\\_FullVersion.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Comments_WP29_FullVersion.pdf)

<sup>226</sup> WADA, 'WADA Statement About the Opinion of European Working Party on Data Protection' [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Statement\\_WP29\\_EN.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Statement_WP29_EN.pdf)

(a) consent of the data subject, (b) performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request, (c) for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person, (d) necessary for important reasons of public interest, (e) necessary for the establishment, exercise or defence of legal claims, (f) necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent, and (g) transfer made from a register. This section will only discuss the most relevant grounds for the study.

When the data subject has explicitly consented to the data transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards, or there exists a contract, a derogation to the data transfer prohibition may apply. However, it seems that the same conclusion must be drawn here as with respect to consent as a legitimate ground for the processing of personal data.<sup>227</sup> Therefore, in the present context, consent cannot be invoked as a valid ground for derogation.

As stressed in section 5.9.3, most NADOs rely on contractual agreements. Indeed, a derogation may apply when 'the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request'. According to the Working Party, 'In case there is, for example, a (labour) contract between an athlete competing at international level and an ADO dealing with training and competition, this could provide a basis for the transfer of the personal data that are necessary to compete and train internationally, including whereabouts information, to specific involved parties in third countries. However, the exemption should be interpreted restrictively. No more personal data should be exchanged than strictly necessary for the purposes of the contract, and no other than the directly involved parties should receive those data. The necessity test requires a close and substantial connection between the data subject and the purposes of the contract. For these reasons, in the given example, transmission to WADA as a "clearing house" and the use of ADAMS for the transmission of data to other parties, though facilitating the transmission of data, would not be considered a necessity to fulfil the contract between the athlete and the ADO. Neither would the use of ADAMS by an ADO falling under EU law for processing whereabouts information in its own jurisdiction fall under this exemption.'<sup>228</sup>

In addition, there is a derogation for the situation in which the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent.<sup>229</sup> Again, the same considerations apply as discussed earlier with respect to the grounds for legitimate processing, leading to the conclusion that this ground is inappropriate.

There is a ground stressing: 'Where a transfer could not be based on a provision in Article 45 or 46 [adequacy decision or appropriate safeguards], including the provisions on binding corporate rules, and none of the derogations [mentioned above] for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is

<sup>227</sup> WADA, 'Anti-Doping and International Transfers' (17 June 2009) [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_AntiDopingInternationalTransfers\\_20090617.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_AntiDopingInternationalTransfers_20090617.pdf)

<sup>228</sup> Article 29 Working Party, 'Second opinion 4/2009 on the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on related provisions of the WADA Code and on other privacy issues in the context of the fight against doping in sport by WADA and (national) anti-doping organizations' (9 April 2009) [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2009/wp162\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2009/wp162_en.pdf).

<sup>229</sup> Article 49 GDPR.



not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.<sup>230</sup> This basically echoes the 'balancing' ground as contained in Article 6(1)(f), which was held not applicable in the anti-doping context.

That leaves open the option to invoke the ground stressing that data transfer is legitimate when 'the transfer is necessary for important reasons of public interest'. As recital 112 stresses: 'Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.'

The Regulation mentions explicitly that the important public interest must be recognized in Union law or in the law of the Member State. 'The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.'<sup>231</sup> Previously, referring to the DPD, the Working Party was sceptical about the applicability of this ground: 'It would be very difficult to apply the derogation of article 26(1), (d) for the transfer of data on "important public interest ground". A simple public interest justification would not suffice; it must be a question of an important public interest.'<sup>232</sup> However, given Recital 112, it seems clear that the European legislator considers that anti-doping may be recognised in Union or Member State legislation as an important public interest.

There is an additional question with respect to applying this derogation. The GDPR, both in its recitals and in its operative text stress that the derogations only apply to 'specific situations'. It is clear that this may cover the occasional transfer of data between, for example, one NADO to another one on a specific request, but it is unsure whether it can serve as a ground structurally legitimising the cross-border data flow in the anti-doping context in general.<sup>233</sup>

The Article 29 Working Party recommended, then still referring to the Data Protection Directive, 'that transfers of personal data that could be qualified as mass, repeated or structural should not be based on the derogations. It is also stressed that each transfer, concerning each athlete and for each purpose, would need a justification under article 26 (1) if this provision were to be used, which would be very complex to assure. In conclusion, ADOs are required to ensure an appropriate legal framework for all international transfers of personal data taking place under the aegis of the World Anti-Doping Code. Particularly in light of the implications for the right to privacy of data subjects, the structural character of international data transfers, and the limitations to the use of the derogations of article 26 (1) of the Directive, ADOs should preferably, make use of additional safeguards such as contractual clauses, as provided by Article 26(2), in which case the authorization of the Member State will be necessary.'

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<sup>230</sup> Article 49 (1) GDPR.

<sup>231</sup> Article 49 (4) GDPR

<sup>232</sup> WP 29, Opinion 4/2009, WP162, 14.

<sup>233</sup> See recitals 111, 112 and 113 GDPR.

## 6.5 Controller's obligations

### 6.5.1 Controller(s) and processor(s)

Before outlining the obligations of ADOs arising from the EU data protection framework, some notions have to be clarified. For instance, it is pivotal to establish the role ADOs play, in terms of qualifications as controllers and processors. As a preliminary remark, the WP29 already considered as controllers in the EU several actors involved in anti-doping: NADOs, (national and international) sports federations and Olympic Committees. These are responsible for processing personal data in compliance with the data protection framework. However, as the Article 29 Working Party has already stressed, it remains mostly unclear in the WADA documents who has which responsibility in which circumstances.<sup>234</sup>

National laws of EU Member States may do more in this respect to create clarity and specify in greater detail which organisation has which type of obligations, for example in relation to the GDPR. This may also be easier to do on national level, because the situation is less complex and the NADO seems the most obvious candidate.

### 6.5.2 Data security

It goes beyond the scope of this study to discuss all rights and obligations under the Regulation in the anti-doping context. Instead, a few principles will be touched upon briefly below. This involves firstly the requirement of secure and confidential data.<sup>235</sup> Recently, the ADAMS system was successfully hacked several times. On one occasion, data of 26 athletes from 10 countries were released, as announced by WADA on September 19, 2016;<sup>236</sup> at another occasion, it regarded data of 41 athletes from 13 countries, as reported by WADA on September 23, 2016.<sup>237</sup> These hacks were presumably the work of a Russian collective, which operates under the illustrious name of Fancy Bear. Apparently, the released information had to prove that not only Russian athletes used doping and that a double standard is applied by WADA.<sup>238</sup>

A number of TUEs from 'western athletes' were released, which would demonstrate that where Russian athletes are accused of doping usage, western athletes are granted exemptions for such usage. The Russian Embassy in the United Kingdom responded enthusiastically to the leaked information: 'Wada hacking: There should be nothing private about doping files of participants of Olympics, which are a very public affair. Some are more equal than others?'<sup>239</sup>

Still, it seems that access to ADAMS seemed to regard a very limited data breach. In addition, WADA has taken extra security measures after the attacks occurred. Also, during

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<sup>234</sup> See also on this point: Article 29 Data Protection Working Party, 'Opinion 1/2010 on the concepts of "controller" and "processor"', 00264/10/EN WP 169, 16 February 2010.

<sup>235</sup> Article 5(f) GDPR.

<sup>236</sup> WADA, 'Cyber Hack Update: Data leak concerning 26 athletes from 10 countries and 12 sports' (19 September 2016) <https://www.wada-ama.org/en/media/news/2016-09/cyber-hack-update-data-leak-concerning-26-athletes-from-10-countries-and-12>

<sup>237</sup> WADA, 'Cyber Hack Update: Data leak concerning 41 athletes from 13 countries and 17 sports' (23 September 2016) <https://www.wada-ama.org/en/media/news/2016-09/cyber-hack-update-data-leak-concerning-41-athletes-from-13-countries-and-17>

<sup>238</sup> S Ingle, 'Wada cyber attack: Williams sisters and Simone Biles targeted by Russian group' (*The Guardian*, 13 September 2016) <https://www.theguardian.com/sport/2016/sep/13/wada-russian-cyber-attack-espionage-group>

<sup>239</sup> A Luhn, 'Fancy Bears origins unclear but Russia seizes chance to put boot into Wada' (*The Guardian*, 15 September 2016) <https://www.theguardian.com/sport/2016/sep/15/fancy-bears-hackers--russia-wada-tues-leaks>

the interviews conducted for the field study, all parties agreed that ADAMS was generally considered safe.

Some additional doubts about the sample collection and transfer have been casted. For example, the Daily Online reported the following with respect to the sample transfer during the Olympic Games in London: 'Serious questions were raised over the London 2012 anti-doping process last night as it emerged that van drivers stored their sandwiches and soft drinks in the same refrigerator as athletes' blood and urine samples. One expert called the arrangements 'bizarre' and said athletes would be angered to discover their samples were being treated so casually. Astonishingly, however, the firm which transports the samples said no rules had been breached.'<sup>240</sup> To what extent this incident compromised the samples is unclear.

More in general, it seems that WADA's guidelines and protocols are very strict when it comes to maintaining the level of security of the data and samples. In addition, a number of NADOs have taken supplementary security measures, as described in section 5.8.2, namely AT, BE, DE, CY, EE, ES, FI, IT, NL, PL and UK. In general, at this point, there is no reason to believe that additional measures should be taken in MSs national laws to ensure respect for the data security principle.

### 6.5.3 Data Retention

In addition, there has been some discussion about the retention periods adopted by WADA. Relatively long periods are used for the storage of sensitive personal data; 10 years is the standard for some data, a term which may be extended when deemed necessary, for example when there is an ongoing investigation. All NADOs seemed to follow these rules, as described in section 5.8.2. Such long-term data retention may conflict with the data minimisation principle, as contained in both the Directive and the Regulation, from which it follows that data must 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed'.<sup>241</sup>

The Article 29 Working Party has been critical of the terms used by WADA, even when the retention periods were shorter than those used now by WADA: 'The Working Party therefore invites WADA to determine, taking into account the experience gained in that field, more reasonable maximum retention periods for the various categories of personal data. It also advises WADA to ensure that the ADOs are obliged to adhere to these retention times.'<sup>242</sup> In addition, the DPA that was interviewed and EU Athletes were critical in particular on the point of the retention dates, finding that they are overly long and do not differentiate to a significant extent between different types of data and reasons for retaining them.

### 6.5.4 Purpose Limitation

Furthermore, reference can be made to the purpose limitation principle, which is also referred to by the Working Party 29.<sup>243</sup> Purpose specification sets limits to the processing of personal data by controllers, and is a necessary precondition to identify which data protection safeguards should be applied. Prior to, or at the moment of collection, the purpose must be identified, and be clear enough to determine what kind of processing is and is not included. The WP29 provides as counter-examples 'improving users' experi-

<sup>240</sup> <http://www.dailymail.co.uk/news/article-2187147/London-2012-Questions-Olympic-anti-doping-blood-urine-samples-stored-fridge-food.html>

<sup>241</sup> Article 5 (e) GDPR.

<sup>242</sup> WP 29, Opinion 4/2009, WP162, 16.

<sup>243</sup> WP 29, Opinion 4/2009, WP162, 15.

ence', 'marketing purposes', 'IT-security purposes' as not being specific enough. 'The fact that the information must be precise does not mean that longer, more detailed specifications are always necessary or helpful. Indeed, a detailed description may at times even be counter-productive. This may particularly be the case if the written, detailed specifications of purpose are overly legalistic and provide disclaimers rather than helpful information to data subjects and other stakeholders.'<sup>244</sup> After the collection of personal data for specified, explicit and legitimate purposes, they should not be further processed in a manner that is incompatible with those purposes.

In the anti-doping system, there is a plurality of purposes, each being comprised under an umbrella purpose, which may be formulated as 'fighting anti-doping in sport'. When data are shared between different ADOs, the purpose of the processing will mostly be the same. The situation is different for the sharing of information with law enforcement agencies. Data shared about athletes or their team members, regarding potential offences, with the police or customs, may be processed by those organisations for different purposes than for which they were collected. The data might be used for criminal prosecution by an enforcement agency, rather than the enforcement of sport rules and standards.<sup>245</sup> A number of NADOs were identified that share data with law enforcement organisations (AT, BE, CY, DE, EE, ES, FI, IT, HR and UK), for the compliance with a legal obligation established under national law. It seems that this would not violate the purpose limitation principle if done in the public interest.<sup>246</sup>

### 6.5.5 Data Protection Impact Assessment and Data Protection Officer

One of the new obligations introduced by the GDPR is the data protection impact assessment (DPIA).<sup>247</sup> If the processing of personal data is likely to result in high risk to the rights and freedoms of natural persons, the controller shall carry out an assessment of the impact of the processing. This is in particular required, inter alia, when there is a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects are based, or similar decisions which significantly affect the natural person, as well as when there is a processing on a large scale of special categories of data, or data related to criminal convictions and offences. Recital 75 includes additionally situations when location or movements are analysed or predicted. Circumstances may make it more reasonable and economical for the DPIA to include more than one project, for instance when several controllers plan to introduce a common application or processing environment across an industry sector or for a widely used horizontal activity. This applies also to public authorities or bodies.<sup>248</sup>

DPIAs can be conducted by each controller individually or by a Member State when it enacts or amends anti-doping legislation. If ADAMS is used as the central information sharing platform, it seems that one DPIA can be conducted by all controllers for the impact of the whole ADAMS system. In case the DPIA results in a high risk in the absence of measures taken by the controller to mitigate the risk, the controller should consult the supervisory authority prior to the processing.<sup>249</sup>

Given the sensitivity of personal data processed in the anti-doping context, a DPIA may be considered necessary under the GDPR. The Article 29 Working Party has issued guide-

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<sup>244</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf) page 16

<sup>245</sup> Article 29 Data Protection Working Party, 'Opinion 03/2013 on purpose limitation', WP203, 2 April 2013.

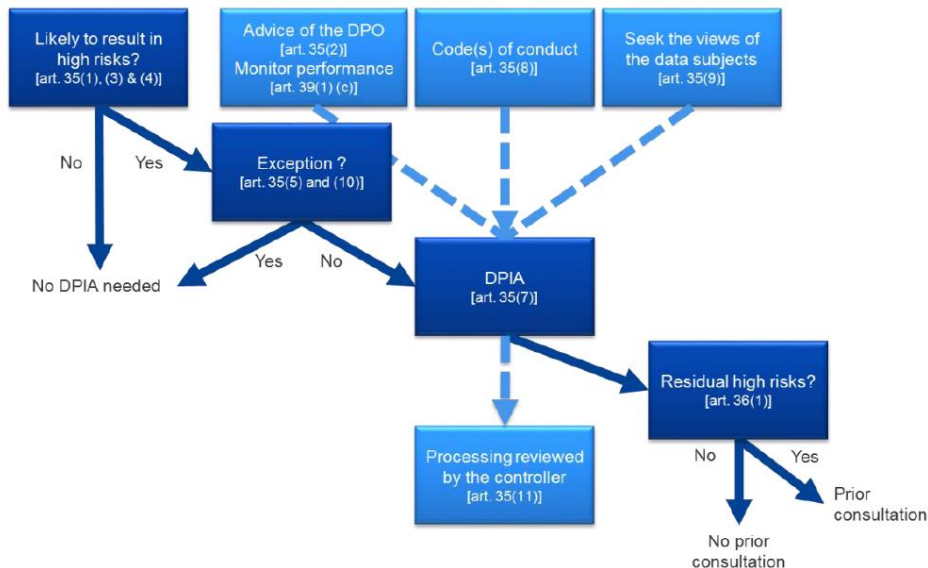
<sup>246</sup> Recital 50 GDPR.

<sup>247</sup> Art. 35 GDPR.

<sup>248</sup> Recitals 92-93 GDPR.

<sup>249</sup> Article 36 GDPR.

lines on the DPIA, and determining whether processing is likely to result in high risk,<sup>250</sup> which will be useful to ADOs. The document includes an explanation of the regulation, as well as examples of existing EU DPIA frameworks as well as criteria for an acceptable DPIA. The requirement to carry out a DPIA applies to processing operations meeting the criteria in Article 35 and initiated after the GDPR becomes applicable on 25 May 2018. The WP29 provides a useful graph illustrating the interactions between actors and the relevant provisions for the purpose of conducting a DPIA.



In addition, when the processing is carried out by a public authority or body, when the core activities require regular and systematic monitoring of data subjects on a large scale, or large scale processing of special categories of data, as well as data relating to criminal convictions and offences, the controller and the processor must designate a data protection officer. Furthermore, when the controller/processor is a public authority or body, a single DPO may be designated for more such bodies, however, it is unclear whether a single DPO may be designated when the bodies are from different Member States. In any case, it is clear that processing in the anti-doping context is of such nature that the core activities fulfil the criteria for the obligation of appointment of a DPO.<sup>251</sup> ADOs should take note of the Guidelines on the Data Protection Officers,<sup>252</sup> recently issued by the Article 29 Working Party.

The WP29 recommends that the controller should seek the advice of the DPO, inter alia, on the following issues: whether or not to carry out a DPIA, what methodology to follow when carrying out a DPIA, whether to carry out the DPIA in-house or whether to out-source it, what safeguards (including technical and organisational measures) to apply to mitigate any risks to the rights and interests of the data subjects, whether or not the data protection impact assessment has been correctly carried out and whether its conclusions (whether or not to go ahead with the processing and what safeguards to apply) are in compliance with the GDPR. If the controller disagrees with the advice provided by the

<sup>250</sup> Article 29 Working Party 'Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk for the purposes of Regulation 2016/679"' (WP248, 4 April 2017)

<sup>251</sup> Article 35 GDPR.

<sup>252</sup> Article 29 Working Party 'Guidelines on Data Protection Officers ('DPOs)'' (WP243, adopted 13 December 2016, revised 5 April 2017)

DPO, the DPIA documentation should specifically justify in writing why the advice has not been taken into account.<sup>253</sup>

## 6.6 Rights of the data subject

Data subjects, in this case athletes, have a number of rights under the GDPR. A number of these will be briefly assessed in light of the anti-doping context. A preliminary point is the fact that athletes are obliged to waive their property right over their tissues and assign it to the anti-doping agency. It is unsure whether this is necessary and proportionate in light of the right of the data subject to control personal data, such as biometric data.

### 6.6.1 Information

As explained in section 5.5.1, most NADOs primarily rely on the doping control forms and other general communication with respect to providing relevant information about data processing to athletes. During the interviews, some NADOS (BE, CY, DE, EE, HR and IT) also explicitly mentioned the role of the DCO in providing the athlete with adequate information.

Article 13 GDPR includes the list of information that the controller shall provide to the data subject: 'the identity and the contact details of the controller and, where applicable, of the controller's representative; the contact details of the data protection officer, where applicable; the purposes of the processing for which the personal data are intended as well as the legal basis for the processing; where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party; the recipients or categories of recipients of the personal data, if any; where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing: the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period; the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability; where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal; the right to lodge a complaint with a supervisory authority; whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data; the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject'.<sup>254</sup>

<sup>253</sup> Article 29 Working Party 'Guidelines on Data Protection Officers ('DPOs')' (WP243, adopted 13 December 2016, revised 5 April 2017)

<sup>254</sup> Article 13.1 and 13.2 GDPR.

While most are self-explanatory, it is worth mentioning a few aspects to which controllers in anti-doping should pay attention to. The starting point considered is the Sample Athlete's Information Notice provided by WADA. If EU controllers make use of it, some adaptations may be necessary. For instance, under art. 13(1)(c), the legal basis for processing shall be indicated. During our research, it appeared that this is often lacking. Furthermore, reference to the appropriate or suitable safeguards, and the means by which to obtain a copy of them and where they are available. While in the sample information notice, the purposes are generally defined, the purpose of 'to fulfil obligations under the code' may not pass the specificity requirement mentioned above. In case data are not collected from the data subject, the controller shall have regard to the requirements laid down in Article 14 GDPR. This will be the case when athlete's personal data is shared between actors, for instance when his/her profile is shared with an event organizer, or when an ADO gathers intelligence via third parties or open sources, which most NADOs in fact do, as explained in section 5.4.4.

More in general, the field study has revealed that rather limited information is provided as to why an athlete is included in the registered testing pool, subjected to whereabouts requirements, to a biological passport or why he/she is tested in particular circumstances. In addition, when intelligence is gathered through open sources, the interviews conducted during the field study yielded that in general, the athlete is not informed of this fact, not even when the athlete was not considered to have violated that anti-doping rules on the basis of the intelligence gathered. Although there are exceptions to the right to information, it is questionable whether they apply in this specific case. When the personal data are not obtained from the data subject him/herself, an exception to the information requirement applies when: '(a) the data subject already has the information; the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available; obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.'<sup>255</sup> Neither of these grounds seem to apply in the anti-doping context.

Finally, as has been stressed before, WADA has developed around 200 relevant documents consisting of more than 4000 pages of rules, guidelines and best practices. The level of detail and the large number of relevant documents means that it will be very difficult for a layperson, such as an athlete, to understand and grasp the applicable rules and guidelines. National laws and doping agencies may need to do more in this respect to provide athletes with meaningful and comprehensible information about the data that are being processed about them. In addition, more clarification may need to be given about choices that are being made, for example in relation to prohibiting certain substances and others not. No reasoning is generally provided why certain substances are put on the Prohibited List and others not, nor is evidence provided about the sport enhancing effect of drugs or of their potential damage to athletes. On these points, more may need to be done in order to respect the rights of the athletes in a meaningful way.

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<sup>255</sup> See: Article 14.5 GDPR.

### 6.6.2 Right to rectification, erasure and object

The data subject has the right to access his/her personal data, to obtain rectification regarding inaccurate personal data, including the completion of incomplete data.<sup>256</sup> Furthermore, the data subject has the right to obtain erasure from the controller of his/her personal data and the right to object. Article 21 GDPR specifies: 'The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.'

Ground (e) of Article 6(1) refers to the 'public interest', and was one of the two grounds which were considered potentially appropriate for legitimatizing the processing of personal data in the anti-doping context. This means that at least when this ground is used, the right to object of data subjects should be taken very seriously. It is questionable in how far athletes currently have a meaningful right to object. On a number of points, WADA's regulations addressed at athletes specify explicitly that: 'You understand that if you object to the processing of your data, it still may be necessary for your Custodian Organization and WADA to continue to process (including retain) certain of your data to fulfill obligations and responsibilities arising under the Code. You understand that objecting to the processing, including disclosure, of your data may prevent you, your Custodian Organization, WADA or other ADOs from complying with the Code and relevant WADA International Standards, in which case such objection could constitute an anti-doping violation.'<sup>257</sup>

### 6.6.3 Automated individual decision-making, including profiling

Art. 22 GDPR includes the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning the data subject, which produces legal effects concerning him or her or similarly significantly affects him or her. This shall not apply in case the decision is necessary for entering into, or performance of a contract between the data subject and the data controller, is authorized by Union or Member State law, which lays down suitable safeguards, or is based on the data subject's explicit consent. Decisions shall not be based on special categories of data under art. 9(1), unless points 9 (a) or (g) apply, subject to suitable safeguards. As has been stressed in section 5.7.2, ground (g) could potentially apply in the anti-doping context and is in fact referred to by NADOs (HR and EE).

The most obvious issue when this article comes into the anti-doping context is the Athlete Biological Passport, which implies constructing an athlete profile on the basis of biometric data. Hence, decisions which significantly affect the athletes shall not be taken solely on this profile. The Athlete Biological Passport Operating Guidelines issued by WADA<sup>258</sup> provide for a review of any atypical finding in the passport, before deciding whether the anomaly is due to doping.

While most ADOs use the ABP to inform targeted testing, it seems that a very small number of anti-doping violations have been established on the basis of ABP, however, after having it thoroughly reviewed by the APMU; therefore, such decision is not based

<sup>256</sup> Article 16 GDPR

<sup>257</sup> [https://www.wada-ama.org/sites/default/files/resources/files/sample\\_athlete\\_information\\_notice\\_english.pdf](https://www.wada-ama.org/sites/default/files/resources/files/sample_athlete_information_notice_english.pdf) <https://www.wada-ama.org/en/adams-privacy-policy-archive>

<sup>258</sup> [https://www.wada-ama.org/sites/default/files/resources/files/guidelines\\_abp\\_v6\\_2017\\_jan\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/guidelines_abp_v6_2017_jan_en.pdf)



on *solely* automated means. Presumably, the article on automatic decision making therefore does not apply.

#### 6.6.4 Right to erasure and to be forgotten

The WADC prescribes that the identity of an athlete *asserted* to have committed a violation may be disclosed by the NADO only after the athlete or other person concerned, and the applicable ADOs have been notified. The word 'may' provides discretion to NADOs, which allows them to treat the matter confidentially.<sup>259</sup> Notwithstanding, no later than 20 days after a final decision has been delivered, the ADO must publicly report the sport, the rule violated, the name of the athlete and other person committing the violation, the prohibited substance/method, as well as the consequences involved, unless the athlete is a minor.<sup>260</sup> In case the decision does not involve a violation, the publishing of the decision may only take place with the consent of the athlete.<sup>261</sup>

In 2009, the Article 29 Working Party has expressed concerns regarding the publishing of CAS arbitral awards, as constituting an 'interference with the right to respect of privacy and to personal data protection'. It further stated that such an interference is valid if there is a reasonable link of proportionality between the consequences of the measure for the person involved and this legitimate purpose, and that there are no other, less intrusive means available to obtain the purpose.' WADA has indeed made amendments on this point, and for disputes brought after 1 January 2016, the CAS requires the consent of both parties in order to publish the arbitral award.

During the Inception Phase and Field Study, it became clear that in a number of countries, this practice was prohibited in light of the right to privacy and data protection (eg BE and DE). In the GDPR, the right to be forgotten is introduced, after it had already been partially accepted by the Court of Justice. This means that there are even more arguments to object to the publication of names and sanctions on open sources such as the internet.

#### 6.7 Necessity and proportionality

The question of necessity and proportionality is of particular importance when assessing the legitimacy of the data processing and transfer to third countries. Linked to this is the matter of effectiveness of the measures and whether there are other less infringing means that could be used that are equally effective. The principles of legitimacy and proportionality play an important role in relation to restrictions to the right to privacy, as enshrined in the European Convention on Human Rights, as well as in the Charter of Fundamental Rights of the European Union.

About the effectiveness of anti-doping measures, WADA has put out two different documents. One regards the anti-doping testing figures, the most recent being about 2015,<sup>262</sup> the other is a report about Anti-Doping Rule Violations, the most recent being about 2014.<sup>263</sup> What becomes clear is that more than half of the ADRVs are found in 5 sports (athletics, bodybuilding, cycling, weightlifting and powerlifting) and more than 2/3 are found in 10 sports, while this does not follow solely from the number of tests conducted in those sports. What is surprising is how few blood samples taken actually indicated an Atypical Finding or an Adverse Analytical Finding. Below some statistics from the reports.

<sup>259</sup> Article 14.3.1 WADC.

<sup>260</sup> Articles 14.3.2 and 14.3.6 WADC.

<sup>261</sup> Article 14.3.3 WADC.

<sup>262</sup> [https://www.wada-ama.org/sites/default/files/resources/files/2015\\_wada\\_anti-doping\\_testing\\_figures\\_report\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2015_wada_anti-doping_testing_figures_report_0.pdf)

<sup>263</sup> <https://www.wada-ama.org/sites/default/files/resources/files/wada-2014-adrv-report-en.pdf>

7. Year to year comparison of the 2014 data vs. 2013 data:

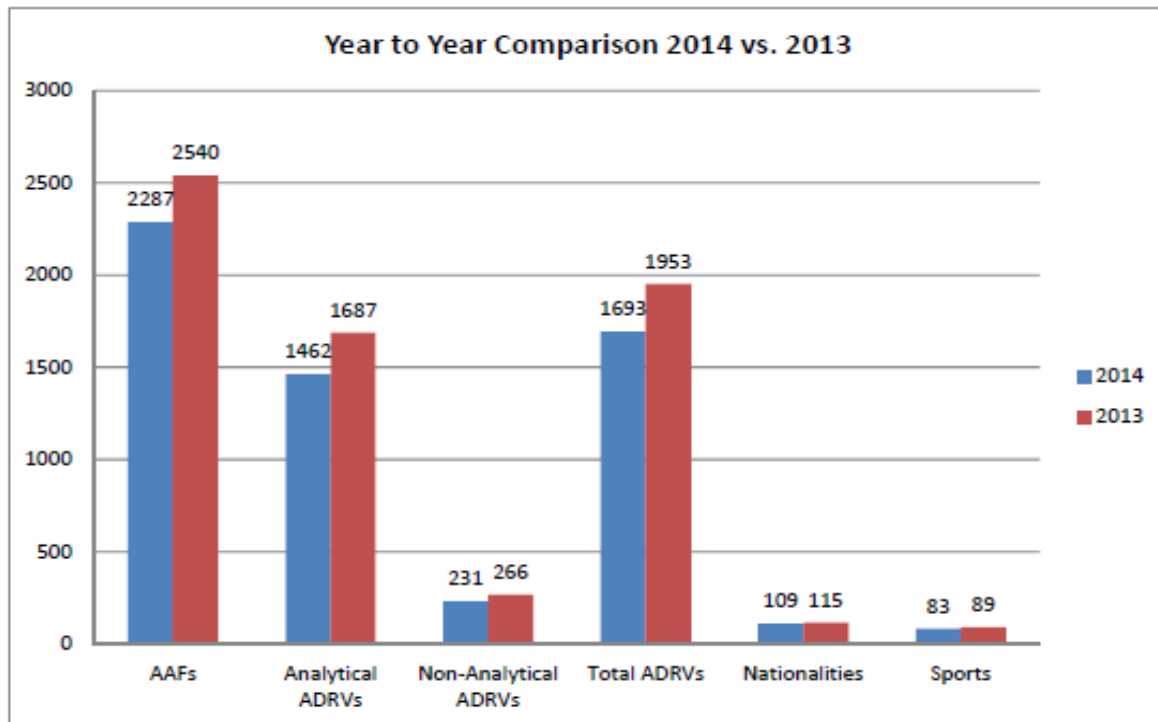


Figure 4: Year to year comparison

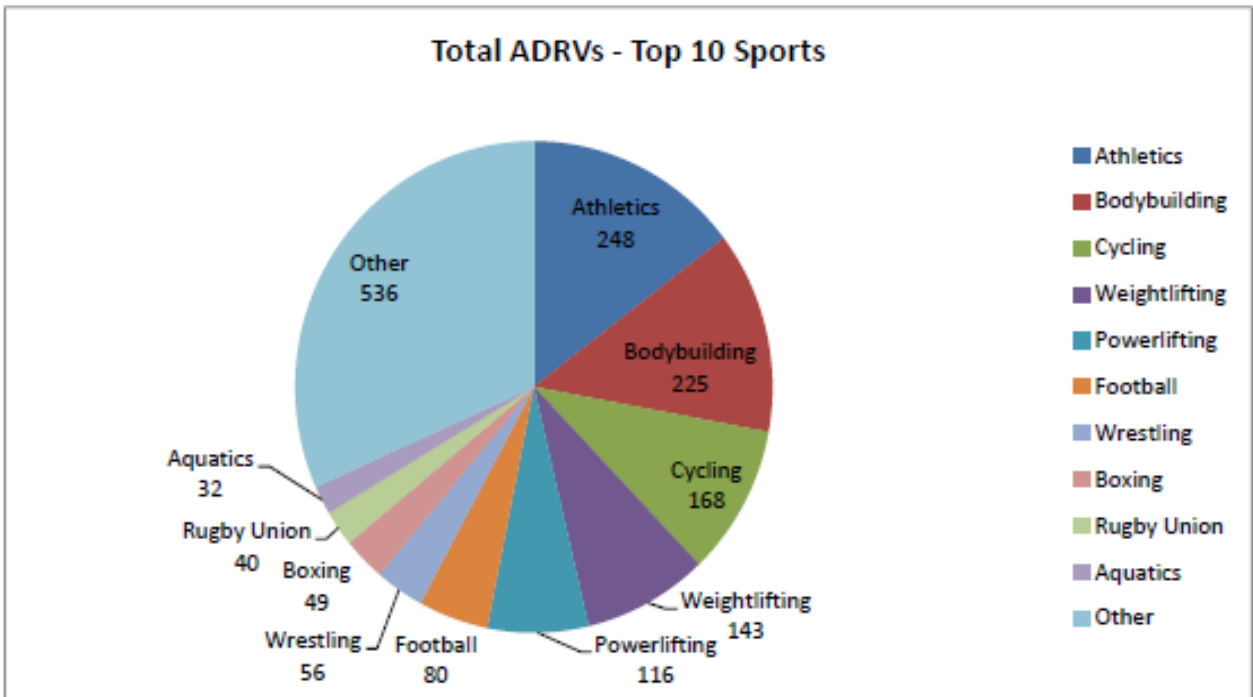
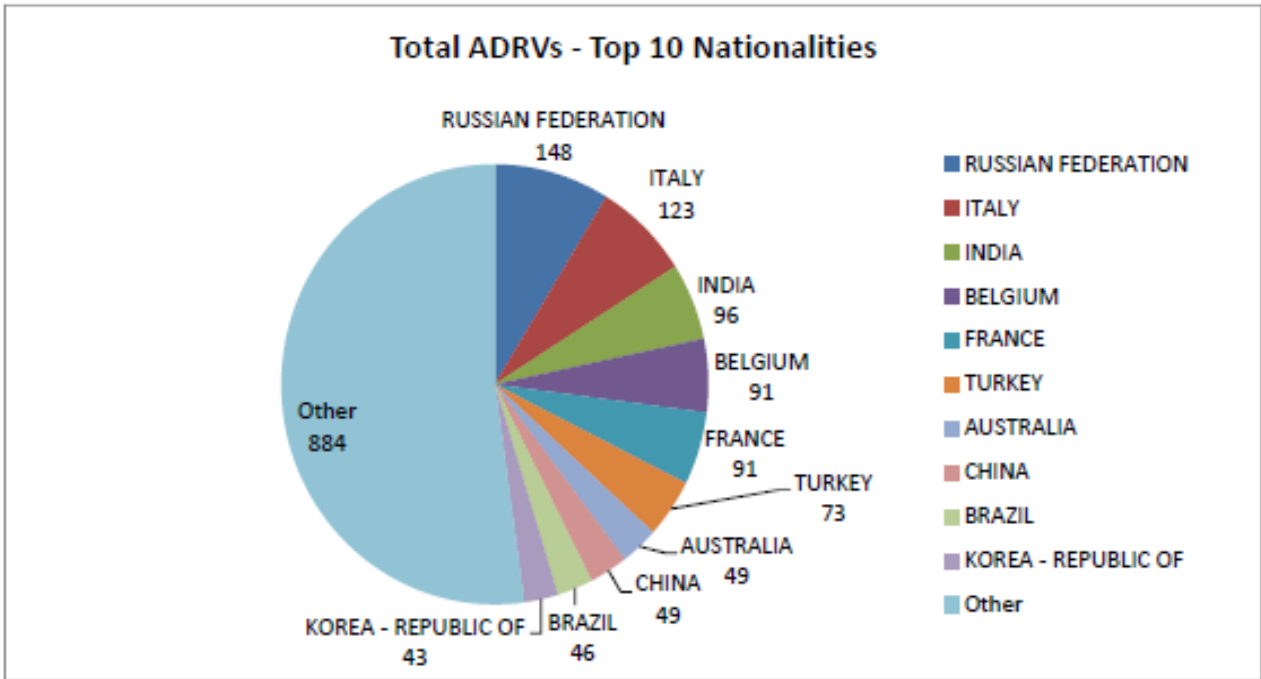


Figure 5: Total ARDVs Nationalities & Sports

**Table 4: Non-Analytical ADRVs by Type of Violation-Athletes and Athlete Support Personnel (ASP)**

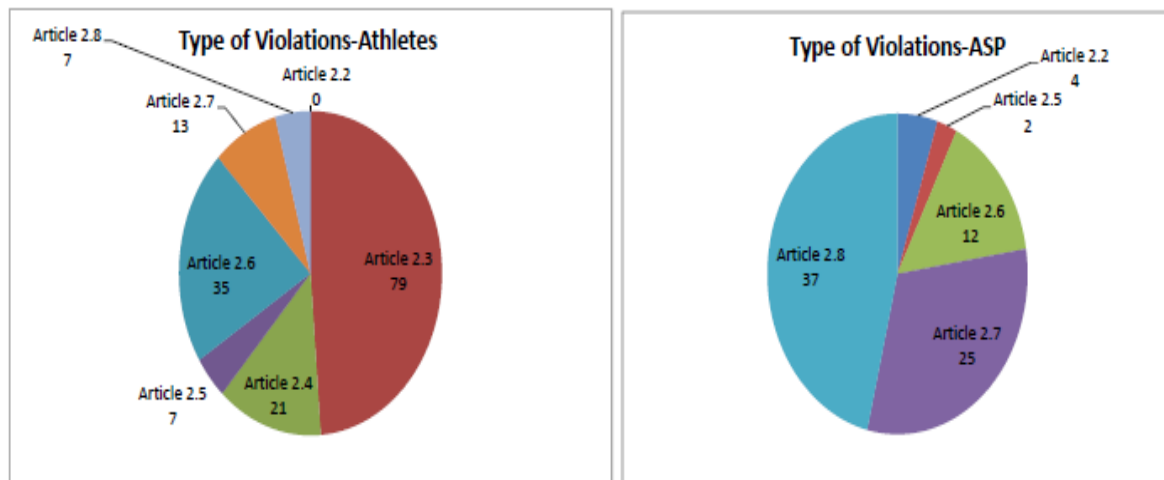
Type of Violations according to Code Articles*	Occurrences** -Athletes	Occurrences** -ASP
Article 2.2 - Use or attempted use	61***	4
Article 2.3 - Refusing, failing without compelling justification or evading	79	0
Article 2.4 - Whereabouts violations****	21	0
Article 2.5 - Tampering or attempted tampering	7	2
Article 2.6 - Possession	35	12
Article 2.7 - Trafficking or attempted trafficking	13	25
Article 2.8 - Administration, attempted administration or assisting, encouraging, aiding, abetting, covering up, etc	7	37
<b>Grand Total</b>	<b>162</b>	<b>80</b>

\* Seven cases were recorded in 2014 in relation to Article 10.10.2 of the 2009 World Anti-Doping Code - Violation of the prohibition of participation during ineligibility.

\*\* Cases that are classified under multiple Code article violations are calculated as single occurrences for each type of violation. Therefore, the number of total occurrences is larger than that of non-analytical ADRV cases listed in Table 1, Table 2 and Table 3 of this section.

\*\*\* Including 18 ADRVs that were a direct result of Athlete Biological Passport (ABP).

\*\*\*\* Three missed tests and/or filing failures within 18 months.



*Figure 6: Type of Violations Athletes & ASP*

The testing report from 2015 shows:

**Table 3: Summary - Total Samples Analyzed**

	Samples	ATF	AAF
ADAMS Urine Total	213,966	1,897	2,517
ADAMS Blood Total	15,446	8	5
ABP Total <sup>1</sup>	25,012	-	-
non-ADAMS Urine Total	68,227	198	1,287
non-ADAMS Blood Total	5,730	-	-
	<b>328,381</b>	<b>2,103</b>	<b>3809</b>

<sup>1</sup> ABP total in Table 3 includes the ABP samples analyzed by the WADA-approved laboratories in Copenhagen, Auckland and ICAC Tokyo (refer to ABP Report)

*Figure 7: Total Samples Analysed*

Below, some aspects which need to be determined in light of the principle of necessity and proportionality are discussed.

### 6.7.1 Out of competition testing and biological passports

The principles of necessity, proportionality and subsidiarity should be respected when it comes to the out-of-competition testing, especially in the whereabouts system. While the one-hour time-slot may be proportionate, it is unclear to what extent the rest of the whereabouts information required from athletes is indeed necessary. In this regard, the Article 29 Working Party refers to the Anti-Doping Convention of the Council of Europe, which suggests to introduce, on an effective scale, doping controls not only at, but also without advance warning at any appropriate time outside, competitions, such controls to be conducted in a way which is equitable for all sportsmen and sportswomen and which include testing and retesting of persons selected, where appropriate, on a random basis.<sup>264</sup> However, the Explanatory Memorandum to the Convention explains explicitly that out-of-competition controls should not unreasonably interfere with the private life of the athletes.<sup>265</sup> In addition, the whereabouts requirement and the out-of-competition tests were described by some interviewees as highly privacy intrusive, while they were seen as only of limited value in terms of establishing anti-doping rule violations.

In similar vein, the biological passports were seen as having a big impact on the privacy of athletes, because their blood or urine values are profiled longitudinally. At the same time, there is little data showing the effectiveness of the passports in terms of providing direct evidence of anti-doping rule violations; their principal effect identified by interview partners was the potential deterrent effect and the intelligence obtained through the passports.

### 6.7.2 Blood and urine samples

It is clear from the statistics provided by WADA that the gathering of blood samples is in general only limitedly effective in terms of establishing anti-doping rule violations in comparison to the collection of urine samples. In addition, both the gathering of blood (for which the body of the athlete needs to be entered by a needle) and the gathering of urine (during which the athlete's genitalia are closely watched by the Doping Control Officer) can be seen as the two most privacy-invasive ways of gathering human tissues. Anti-doping agencies that relied on alternatives such as saliva or hair were not identified during the field study. WADA has indicated to assess the potential value of saliva collection, which may be considered less privacy intrusive.

### 6.7.3 Testing authority

It was questioned by some respondents whether it is necessary and/or proportionate to apply the anti-doping rules to all sports alike, while in reality, the majority of the anti-doping rule violations are found with a handful of sports. In addition, testing authority is claimed by anti-doping agencies and can be as high as 1/4 or 1/3 of the population of a country; this means that it is at the discretion of the NADO how to use its powers and who to subject to tests.

It is questionable whether subjecting other individuals than top athletes should be regarded as legitimate, in the light of the necessity criterion.<sup>266</sup> The Article 29 Working Par-

<sup>264</sup> Article 7.3(a) Anti-Doping Convention.

<sup>265</sup> Explanatory Report to the Anti-Doping Convention (16 November 1989, ETS no. 135)

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb349>

<sup>266</sup> The Article 29 Working Party had stated: 'The Privacy Standard does not distinguish between the various categories of persons subject to it (athletes, supporting staff, third party). However, the application of the proportionality principle will depend on the category to which the person belongs. Consequently, the Privacy Standard should be modified in this regard.' WADA's reaction is: 'Here, the Working Party's request, like the one below, is unrealistic. The correct application of the proportionality principle will vary on a case-by-case

ty has drawn attention to this issue already in its first opinion, emphasising that ‘the application of the proportionality principle depends on the category to which the person belongs’. WADA has coined this remark as ‘unrealistic’, and advocates for applying the proportionality principle on a case-by-case basis, taking into account a number of other factors ‘such as the purpose of the processing, the current state of anti-doping technologies and testing techniques and, potentially, factors unique to each ADO and its applicable legal regime’.<sup>267</sup> Still, this means a high level of discretionary authority is granted to ADOs, with little or no judicial oversight or democratic control on how this discretion is used.

Finally, during the interviews, the question arose to what extent all items contained on the prohibited substance list by WADA are necessary and/or proportionate. For example, recreational drugs are prohibited while these seem neither sport enhancing, nor can they be used as masking agents. It should also be noted that many of the substances on the prohibited list of WADA do not directly increase sports performance themselves, but could potentially be used to hide sports performance enhancing substances in blood or urine. Again, the question is to what extent it is necessary and proportional to bring the use of these kinds of substances on the same line as sport performance enhancing substances. Finally, it should be noted that WADA does not provide elaborate scientific support for the actual sports performance-enhancing effect of the substances that are prohibited for their presumed sport-enhancing effect, so that even with respect to these substances, the question remains whether it is necessary to prohibit them.<sup>268</sup>

#### 6.7.4 Investigation and sanctions

It is clear from the interviews that most efforts by anti-doping agencies go to the detection of prohibited substances in athlete’s samples. Some interviewees suggested that an alternative could be to focus on other anti-doping rules violations, for example the possession or trafficking of prohibited substances, which does not require the gathering of human tissues.

From the field study, it became apparent that test distribution is primarily based on general risk assessments, while a minority of the tests were intelligence based. On the other hand, intelligence based-tests were described as significantly more effective, which could have an effect on the evaluation of the anti-doping measures in terms of necessity and proportionality.

The sanctions applied to athletes found in violation of the anti-doping rules were considered high and disproportionate by some. In any case, criminalization of doping use in sport was considered undesirable by many, including WADA.

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basis, taking into account not only the “category” of participant (e.g., athlete, trainer, medical personnel or other) but also a number of other factors, such as the purpose of the processing, the current state of anti-doping technologies and testing techniques and, potentially, factors unique to each ADO and its applicable legal regime. It would be totally unrealistic for the Standard to attempt to define precisely what the principle permits or forbids in the multitude of different contexts in which ADOs process personal data. In short, WADA believes that this is an area where some flexibility within the Standard is unavoidable and appropriate.’

<sup>267</sup> WADA Comments on Article 29 Working Party Second Opinion [3.4] [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_Comments\\_WP29\\_FullVersion.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_Comments_WP29_FullVersion.pdf)

<sup>268</sup> A Dutch Phd shows, for example, that it is unsure whether EPO and blood doping in fact have a significant sport-enhancing effect on cycling performances: <http://www.2010uitgevers.nl/wp-content/media/9789490951177.pdf>. See also the recent study published in the Lancet: in the Lancet [http://www.thelancet.com/journals/lanhae/article/PIIS2352-3026\(17\)30105-9/fulltext?elsca1=tlpr](http://www.thelancet.com/journals/lanhae/article/PIIS2352-3026(17)30105-9/fulltext?elsca1=tlpr)

## 6.8 Conclusions

In this chapter, a legal analysis of the most prominent data protection issues in anti-doping discovered in the field work, is provided.

A core issue is the legal ground for processing the athletes' personal data. The survey of the Member States shows that is often unclear what legal ground the Member State permits for processing and many NADOs are uncertain in this respect. The GDPR in its article 6 provides six grounds that may be used to legitimize the processing of personal data. In summary, the following conclusions can be drawn regarding the suitability of the various grounds:

- a) 6(1)(a) consent is problematic because consent has to be freely given and informed. Athletes hardly have a choice but to consent – refraining from doing so could mean exclusion of sport –, and hence consent is not freely given;
- b) 6(1)(b) performance of a contract is an option if it can be shown that the processing of data is necessary for monitoring an essential element of the contract, which would most likely be 'engaging in clean and fair competition'. However, for a contract to be valid, free and informed consent of the athlete is a requirement as well, which seems lacking in the anti-doping context.
- c) 6(1)(c) compliance with a legal obligation of the controller is an option, provided that ADO is under a legal obligation that requires it to process personal data of athletes and the athletes have a legal obligation to cooperate with ADO. For this ground to be applicable, detailed national legislation would be required.
- d) 6(1)(d) vital interest of the data subject is unsuitable because it requires a close link between the (effects of) data processing and the vital interests of the data subject. Although doping may affect the health of athletes, the harm seems too distant to warrant an 'emergency' kind of legitimation, certainly if more suitable grounds are available.
- e) 6(1)(e) public interest or execution of public authority is a potentially suitable ground if anti-doping is defined as a public interest in law and/or NADOs are provided with a clearly defined national public mission authorizing them under national law to process the necessary data to fulfil this mission.
- f) 6(1)(f) legitimate interest of the controller is unsuitable because it is excluded as a processing ground for public authorities (and many EU NADOs are public authorities), and the gravity of privacy intrusions likely outweighs the interest of the controller in fighting doping.

The data to be provided by the athletes in the fight against doping does contain sensitive personal data, either because they can be seen as biometric data, or because they reveal medical or genetic information or because they may be used for criminal law sanctions and law enforcement purposes. With regards to the processing of sensitive data stronger justification needs to be provided to make the processing of such data legitimate; instead of consent, 'explicit consent' is required; instead of a public interest, the processing should be in a 'substantial public interest'. This is covered in article 9 GDPR. Regarding the 10 grounds listed in art 9, the following conclusions are drawn.

- a) 9(2)(a) explicit consent suffers from the same defect as consent for other personal data in this context; the consent is not freely given, there is no choice but to consent.
- b) 9(2)(b) necessary for an employment contract seems unsuitable because not all athletes have an employment contract and anti-doping is generally not part of labour law in the Member States, nor of collective labour agreements.
- c) 9(2)(c) vital interest of the data subject. The same problem as is highlighted in relation to personal data applies.

- d) 9(2)(d) legitimate activities of a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim is unsuitable because sports federations do not qualify as such.
- e) 9(2)(e) processing relates to personal data which are manifestly made public by the data subject: is unsuitable because most data used in the anti-doping context are not made manifestly public by the athletes.
- f) 9(2)(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity: is clearly unsuitable.
- g) 9(2)(g) necessary for reasons of substantial public interest may be unsuitable, because it requires the public interest to be 'substantial' and it is questionable whether this is indeed the case for anti-doping. In any case, in order for this ground to be invoked, the public interest has to be defined in Union or Member State law and measures will have to be defined to safeguard the rights of the athletes.
- h) 9(2)(h) necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, is unsuitable because the aim of the processing is not to establish working capacity, but rather to detect doping. Besides, the general scope of this provision targets entirely different contexts.
- i) 9(2)(i) necessary for reasons of public interest in the area of public health may be unsuitable given the scope provided in the provision itself and recital 54, which goes well beyond the (individual) risks in sport as a result of doping.
- j) 9(2)(j) archiving purposes in the public interest is clearly unsuitable.

Article 10 GDPR, pertaining to processing of personal data relating to criminal convictions comes into the picture because doping in some Member States is defined as a criminal offence, and hence national law should provide a ground for processing of data related to doping offences, in order to legitimize the processing of such data by ADOs.

Transfer<sup>269</sup> of personal data to other countries is a core issue in the domain of anti-doping because sport events take place all over the world and most countries are outside the EU. Data transfer within the EU is permitted, and so is data transfer to countries with an adequacy decision. Data transfer to ADAMS (in Canada) are deemed unproblematic now that WADA is within scope of the Canadian PIPEDA. WADA and many IFs are in Switzerland, to which an adequacy decision applies as well. Transfer to third countries without an adequacy decision requires adequate safeguards to be in place protecting the rights of data subjects (athletes) and these safeguards will have to be legally binding, for instance by incorporating them in contractual clauses, agreements approved code of conduct or certification mechanism. When there is no adequacy decision of the Commission and when there are no appropriate safeguards in place, data transfer to third countries outside the EU may still be compliant when a derogation can be invoked. Such grounds are the consent of the data subject, necessity for the performance of or entering into a contract with a data subject, the protection of the vital interest of the data subject and important reasons of public interest. The most feasible ground is processing for important reasons of public interest. This requires that the public interest be recognized in Union law or in the law of the Member State. Furthermore, the GDPR and recitals restrict application of this ground to 'specific situations'.

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<sup>269</sup> The meaning of the term 'transfer' in article 44 GDPR is not entirely clear. For instance, a point that remains to be clarified is whether uploading data to ADAMS always necessarily implies transfer.



The data retention periods imposed by the WADA seem excessive in view of the GDPR, it is unclear why retention of 10 years is necessary. The nature, type and scope of processing of athletes' data and the risks to the rights and freedoms of the athletes involved may warrant a Data Protection Impact Assessment to be conducted.

It is questionable whether the information provided to the athletes meets the requirements set out by the GDPR. As noted, it is not always clear why certain athletes are included in testing pools, biological passport or why they are tested, nor why particular substances are prohibited, while their use does affect the rights of those involved. The right to object to the processing of personal data seems to be restricted to a disproportional extent under the WADA code. The 'new' right to be forgotten may present reasons for concern in cases where sanctions following violations are published on the internet, where the identity of the athlete is disclosed directly or indirectly.

The processing of athletes' personal data needs to respect the principles of necessity and proportionality. The anti-doping scheme has a high impact on the private sphere (whereabouts), body (blood samples) and incorporates sensitive personal data. Given the available anti-doping testing figures, it is questionable whether the entire system meets the requirements of proportionality and necessity. Points that should be taken into account are necessity and proportionality of the testing authority claimed by ADOs, the inclusion of recreational athletes under the testing authority, the inclusion of recreational drugs on the prohibited list, the application of the anti-doping rules to all sports, the gathering of blood and urine samples, OOC tests and the whereabouts system, biological passports, the focus on sample testing and risk based testing and the sanctions applied to athletes being found guilty of an ADRV.

## 7. Recommendations

Different possibilities can be explored to address the issue of the protection of personal data in the current system of anti-doping. The task of this study was to explore the possibility to address this issue by Member States and therefore, certain recommendations are provided below.

### 7.1 Clear legislative basis for the NADO and its data processing activities

The GDPR requires that there should be a lawful ground for processing personal data. It exhaustively lists six grounds in Article 6 GDPR: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

The current situation in the 28 EU Member States shows a scattered picture. The country reports show no uniform approach to the ground used to process athletes' personal data in the context of anti-doping. In addition, the respondents interviewed for this report varied in their response regarding the processing of these data by their organizations. Most NADOs mentioned consent as a legal basis for processing personal data. Two respondents also mentioned the necessity of the performance of a contract to which the data subject is party as a possible legal basis. Compliance with a legal obligation was mentioned by several NADOs, while some others pointed to the protection of the public interest, and one respondent referred to ground (f), the balancing of interests.

Legal analysis has shown that most of the six grounds enlisted by the GDPR cannot be used in the anti-doping context, or only to a limited extent. Consent cannot be used, because a condition for legitimate consent is that it is freely given by the data subject provides. As the Article 29 Working Party already pointed out, athletes cannot be considered to give 'free' consent in the anti-doping context, inter alia because if they refuse to consent, they are simply ousted from sport practice or face other harsh consequences. Similar concerns exist regarding performance of a contract as the basis for data processing, because contractual consent too must be freely given to be considered valid. Ground (d), the protection of the vital interests of data subjects does not apply, because this ground is primarily intended for instances in which the data subject is unaware of the risk they face, such as in the case of an emergency situation or a disaster. Finally, as already underlined by the Article 29 Working Party, ground (f) is inapplicable because of the gravity of privacy intrusions as a result of the fight against doping should weigh heavily in this context. This leaves open grounds (c), the legal obligation, and (e), the public interest.

The GDPR specifies that grounds (c) and (e) should be laid down in Union law or Member State law to which the controller is subject. The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e), shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

The legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing. In order for the ground (e) to apply, the fight against doping would need to be clearly defined as a public interest in national law and/or the NADO should have a clearly defined authority vested in law.

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*Member States are advised to ensure that the processing of personal data in the anti-doping context takes place only in so far this is necessary for compliance with a legal obligation to which the controller is subject or when processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.*

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With respect to both grounds, Member States should keep in mind the following.

When relying on ground (c), the question is what type of legal obligation is incorporated into the law. If there is a general obligation for the NADO to implement or enforce the WADA rules, a concern is how such an obligation relates to the principles of legality and democratic control, as WADA is a private law body (foundation) based in Switzerland, with headquarters in Canada, that sets the anti-doping rules.

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*When relying on ground (c), Member States are advised to specify why, and to what extent, there is a legal obligation on an ADO to ensure that the rules of a private, international foundation are applied and enforced.*

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When relying on ground (e), the question is whether, and to what extent, the processing of personal data in the anti-doping context is a matter in the public interest, and which public interest is being served. Member States should formulate in their law or explanatory memorandum to those laws what specific public interest is at stake and which types of data processing are deemed necessary in light of that public interest. Not all anti-doping measures should be considered in the public interest just because they follow from the World Anti-Doping Code.

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*When relying on ground (e), Member States are advised to formulate in their law or explanatory memorandum what particular public interest is at stake and which types of data processing are deemed necessary in light of that public interest.*

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## **7.2 Clear legislative basis for processing sensitive data**

The GDPR requires a legitimate basis for the processing of sensitive data. Sensitive data are personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. It is clear that most data collected under the anti-doping context could fall under this category, as they

can be seen as genetic or biometric data, can reveal medical information or other sensitive data. In principle, the GDPR specifies that processing such data shall be prohibited, but also lays down exceptions.

Article 9 of the GDPR exhaustively lists the grounds that may be used to legitimize the processing of such data: (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition may not be lifted by the data subject; (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject; (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent; (d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects; (e) processing relates to personal data which are manifestly made public by the data subject; (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity; (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject; (h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards; (i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy; (j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Again, the current situation in the 28 EU Member States shows a diverse picture regarding the justification for processing sensitive data in the context of anti-doping. Also, the respondents interviewed for this report varied in their views as to which grounds were most appropriate in the anti-doping context. Some referred to the explicit consent of the data subject (a), others referred to the substantial public interest (g). In one country, the NADO specified that under its data protection law, it needs to send a request to the DPA, setting out the purpose of data collection and how data will be processed. This is then approved by the DPA. Other respondents relied on the public interest in the area of public health (i).

The legal analysis has revealed that most grounds listed in the GDPR are inappropriate justifications in the anti-doping context or can only be used in specific circumstances on-

ly. Consent cannot be deemed 'free' (ground a), processing cannot be deemed necessary in relation to rights or obligations in the field of employment and social security and social protection law (ground b), as discussed above, controllers cannot rely on the protection of the vital interest of the data subject (ground c), the ADOs cannot be considered a not-for-profit body with a political, philosophical, religious or trade union aim (ground d), the data have not been made manifestly public by the data subject (ground e), very few data in the anti-doping context are processed in relation to legal claims or by courts acting in their judicial capacity (ground f) and the data are not collected for archiving purposes (ground j). Ground (h) would only apply when, for example, the sports physician tests an athlete who is employed by a sports federation. This leaves open grounds (g) and (i).

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*Member States are advised to allow for the processing of sensitive data in the anti-doping context only in so far as this is necessary for reasons of substantial public interest or public interest in the area of public health.*

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With respect to both grounds, however, Member States should keep in mind a number of points.

First, the text of the GDPR does not give a precise account of the term 'substantial public interest' and to what extent processing sensitive data for anti-doping purposes should be considered a 'substantial public interest'. At first sight, it seems at odds with the examples given by the GDPR in its recitals relating to the processing of sensitive data, such as: 'Where in the course of electoral activities, the operation of the democratic system in a Member State requires that political parties compile personal data on people's political opinions, the processing of such data may be permitted for reasons of public interest, provided that appropriate safeguards are established' (recital 56). Though anti-doping is specifically mentioned as within scope of the public interest in the context of data transfer (recital 112), it is not mentioned in the context of legitimate grounds for processing personal data and sensitive personal data. It is up to Member States to define what they see as 'substantial' public interests. When Member States rely on this ground, they should make clear why this ground applies in the anti-doping context and to what extent it legitimates the processing of sensitive data.

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*When relying on ground (g), Member States are advised to make clear what is the substantial public interest which renders this ground applicable in the anti-doping context and to what extent it legitimates the processing of sensitive data.*

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Second, with respect to the protection of public health (ground i), recital 54 of the GDPR specifies: 'In that context, 'public health' should be interpreted as defined in Regulation (EC) No 1338/2008 of the European Parliament and of the Council, namely all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers or insurance and banking companies.' During this study, no evidence was found that would support the claim that current doping use in EU Member States forms a serious threat for public health. Alt-

though the use of certain steroids and anabolic steroids in gyms is indeed high, the more problematic usage of doping is mostly limited to a small group of international top athletes. Consequently, if Member States rely on ground (i) for processing sensitive personal data, they should make clear which threat doping use poses to public health, and to what extent it is necessary to process which type(s) of data of what type(s) of athletes.

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*When relying on ground (i), Member States are advised to make clear which threat(s) doping use in sport poses to public health and to what extent it is necessary to process which type(s) of sensitive data about what type(s) of athlete.*

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### 7.3 Conditions for the transfer of personal data to 3<sup>rd</sup> countries

Within the EU, personal data may be shared across borders. For data transfer from the EU to countries outside the EU, however, conditions apply. The GDPR makes clear that any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if one of the following three situations apply to the transfer: (1) there is an adequacy decision, (2) there are appropriate safeguards or (3) a derogation applies.

An important consideration is that giving a third country access to data via ADAMS can, under circumstances, be considered transfer of data, not only to Canada (where ADAMS is hosted), but also to that third country. The GDPR lays down requirements to ensure that the level of legal protection in the EU is not undermined in cases of onward transfers, i.e. from the recipient in third country or international organization to controllers/processors in the same or another third country or international organization (Recital 101 GDPR). Article 44 holds: 'Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.' Therefore, the requirements for transfer of data to a third country have to be complied with correspondingly for onward transfers.

In the context of anti-doping, almost all countries in the world may be relevant because most countries have a NADO, have national athletes participating in sport events and/or host large sport events. Data transfer generally takes place via ADAMS, the information clearing house developed by WADA, which allows ADOs to upload and share personal data with other ADOs, all around the world. Other information systems, however, also exist and ADOs can also transfer personal data via other means, such as e-mail, telephone or fax. WADA itself is incorporated in Switzerland, with its headquarters in Canada. ADAMS is operated on Canadian soil. Many International Sport Federations are based in Switzerland. For both Switzerland and Canada, an adequacy decision by the European Commission exists (ground 1), which means that transferring personal data in the anti-doping context to these countries can be considered lawful. There are relevant adequacy decisions for a limited number of other countries around the world, for which the same applies.

For most countries outside the EU, however, no adequacy decision exists. From the interviews with ADOs it appeared that most ADOs rely on contracts with their counterparts

in other countries for the transfer of personal data. This mechanism falls within ground 2, appropriate safeguard. Safeguards are deemed appropriate when there are: legally binding and enforceable instruments between public authorities or bodies; binding corporate rules; standard data protection clauses adopted by the Commission, standard data protection clauses adopted by a supervisory authority and approved by the Commission; an approved code of conduct; an approved certification mechanism. In addition, appropriate safeguards may be provided by (a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation or (b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights. Both are subject to the authorisation from the competent supervisory authority.

It seems advisable that Member States, in the absence of an adequacy decision, promote ADOs to implement appropriate safeguards through binding contractual clauses and let them be authorised by the supervisory authority, as this seems the most viable path forward in the anti-doping context. Finding appropriate safeguards through other means, such as certification mechanisms, binding corporate rules or standard data protection clauses are realistic alternatives, but would require more effort and time investment.

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*Member States are advised to ensure that the transfer of personal data to countries outside the EU (for which there are no adequacy decisions) are based on appropriate safeguards established in contractual clauses or administrative arrangements, subject to authorization by the competent supervisory authority.*

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For specific and incidental data transfers to third countries, for example when there is a specific request of an ADO from a third country to an EU-based ADO to share concrete information about a specific athlete, a derogation might be invoked. Derogations cannot be used for the more common and structural data sharing practices. The GDPR again exhaustively lists the grounds which can be used as derogations, which echo to a large extent the grounds listed with respect to the processing of personal data. Most relevant in this respect is ground (e), transfer in the public interest, as recital 112 to the GDPR makes clear: 'Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.' In so far as a specific and non-structural data transfer is necessary in the public interest, an ADO can legitimately transfer personal data to a country outside the EU, in compliance with the conditions set in Chapter V GDPR.

#### **7.4 Purpose, purpose limitation & storage limitation**

Article 5 of the GDPR regulates, in short, that personal data should be processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'), should be collected for specified, explicit and legitimate purposes and not processed further in a manner that is incompatible with those purposes ('purpose limitation'), should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation'), should be accurate and, where necessary, kept up to date ('data accuracy'), should be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for

which the personal data are processed ('storage limitation'); and should be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

The study of the relevant laws pertaining to sports and anti-doping of the 28 EU Member States and the interviews with the various ADOs has shown that in the anti-doping system, there is a plurality of purposes, each of which can be subsumed under an umbrella purpose, which may be formulated as 'fighting anti-doping in sport'. Different categories of data are collected and processed for different purposes such as: planning in/out-of-competition testing (whereabouts), issuing TUEs (medical file/health data), identifying doping (sample analysis and processing of data arising out of samples), establishing an anti-doping rule violation (it seems that under this purpose, all data may be processed). The GDPR requires specifying all purposes for which personal data are being processed in a clear, explicit and specified manner.

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*Member States are advised to make clear which data may be gathered, by whom and for what purposes. The purpose for processing may vary per processing activity, but should preferably be more specific than 'the fight against doping in sport' or similar phrasings.*

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This would also allow for a more careful scrutiny with respect to the purpose limitation principle, as it can easily be reviewed whether data are being processed for other reasons than for which they were collected or shared with third parties who may pursue other goals. Finally, developing a more granular set of goals (purposes) and associated data(types) for data processing within the context of anti-doping facilitates Member States to conform national anti-doping practices to the storage limitation principle. Currently, WADA sets blanket terms for the retention of (sensitive) data – these may run up to 10 years. The Article 29 Working Party already stressed that such long data retention periods for sensitive personal data may conflict with the data minimisation and storage limitation principle under the EU data protection framework (WP 162). In such case, Member States may determine what retention terms can be deemed in accordance with the GDPR. A granular set of processing purposes allows a granular approach to the data retention terms, specifying per purpose and per type of data how long those data may be stored and under which conditions.

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*Member States are advised to lay down a granular approach to the retention of (sensitive) personal data in the anti-doping context, specifying per purpose and per type of data how long those data may be stored and under which conditions.*

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In addition, the publications by ADOs of the anti-doping rule violations, the sanction and the identity of the athlete, which is currently mandated by WADA, with the exception to minors, may conflict with the principles of necessity and proportionality, the data minimisation principle and rights of athletes, such as the 'right to be forgotten'. This is especially the case where publication is done through open channels, such as the internet. An alternative may be creating a central database (with restricted access), which is not indexed by search engines, thus promoting access to such data on a 'need to know' basis, rather than through 'serendipitous' finds.



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*Member States are advised to specify whether and if so, when and under which conditions, decisions on anti-doping rule violations and sanctions taken thereupon may be disclosed in a form through which the athlete may be identified, either directly or indirectly.*

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## **7.5 Determination of data controllers and their obligations**

The GDPR lays down requirements for the 'data controller', defined as the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. In addition, the GDPR lays down rules for the 'processor', which is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

In the anti-doping context, there are many parties involved with norm-setting, data collection, processing, sharing and storing and the application of the rules, inter alia, WADA, the International Sport Federations, the National Anti-Doping Organisations, the Regional Anti-Doping Organisations, the National Sport Federations, the laboratories, the Major Event Organisers, etc.

The Article 29 Working Party has stressed that this variety of players and the variety of roles they play makes it difficult to determine who has what obligations under which circumstances. Member States could easily bring clarity when they would indicate one primary data controller, the most obvious candidate being the NADO.

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*Member States are advised to ensure that the law indicates one primary data controller, for example the NADO.*

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The GDPR specifies a number of obligations for data controllers and processors, such as obligations related to transparency, security of personal data, keeping documentation of the data processing initiatives and ensuring that organisational measures are implemented. All of these apply in the anti-doping context, and ADOs should conform to them. In particular, the obligation to be transparent should be mentioned. WADA has developed around 200 relevant documents consisting of more than 4000 pages of rules, guidelines and best practices. The level of detail and the large number of relevant documents means that it will be very difficult for a layperson, such as an athlete, to understand and grasp the applicable rules and guidelines. The GDPR requires that the data subject is informed in full about the data processing that takes place 'in a concise, transparent, intelligible and easily accessible form, using clear and plain language'. Member States could bring clarity on this point in their national laws or regulations.

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*It should be ensured in practice that athletes are provided with information about the data processed about them in a concise, transparent, intelligible and easily accessible form, using clear and plain language, as required by the GDPR. National DPAs may wish to investigate whether relevant provisions on transparency are being respected.*

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There are two additional duties introduced by the GDPR which may be of relevance. When the NADO is a public authority, or there is a systematic monitoring of data subjects or large scale processing of special categories of data, the GDPR specifies that data controllers must appoint a Data Protection Officer within their organization. NADOs are very likely to fall within the scope of this obligation. When appointing a DPO, ADOs should take note of the Guidelines on the Data Protection Officers, recently issued by the Article 29 Working Party (WP 243).

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*Member States are advised to ensure that NADOs appoint a Data Protection Officer.*

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In addition, it is recommended that the data controller conduct a Data Protection Impact Assessment (DPIA) of its activities, unless such a general impact assessment was already executed when the relevant anti-doping law was adopted or amended. The GDPR specifies that a DPIA is required where a type of processing, in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons. As it seems likely that data processing in the anti-doping context poses a high risk to the rights and freedoms of athletes, Member States are advised to ensure that a Data Protection Impact Assessment is executed by the NADO, taking into account the guidelines by the Article 29 Working Party (WP248) and the explanation provided in chapter 6. The impact assessment concerns specifically the nature, type and scope of processing of athletes' data and the risks to the rights and freedoms of the athletes involved as well as measures to mitigate those risks.

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*Member States are advised to ensure that NADOs conduct a Data Protection Impact Assessment to explore, document and mitigate risks to the rights and freedoms of the athletes.*

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## 7.6 Rights of athletes

The GDPR lays down a number of rights of data subjects, such as the right to be forgotten, the right to data portability, the right to access, the right to rectify, the right to object and the right not to be subject to a decision based solely on automated processing, including profiling. ADOs should ensure that those rights are respected.

It should be pointed out that, although the right not to be subject to a decision based solely automated individual decision-making, including profiling, is often mentioned with respect to the anti-doping context, it does not seem to apply, because the formal conditions set out in art. 22 GDPR are not met. Art. 22 GDPR includes the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning the data subject, or similarly significantly affects him or her. This shall not apply in case the decision is necessary for entering into, or performance of a contract between the data subject and the data controller, is authorized by Union or Member State law, which lays down suitable safeguards, or is based on the data subject's explicit consent. Decisions shall not be based on special categories of data under art. 9(1), unless art. 9(a) or art. 9 (g) apply, subject to suitable safeguards. Central to Article 22 GDPR is the notion of 'a decision based solely on automated processing'. In the anti-doping context, human involvement in decision making is always present. (Whether the definition of 'profiling' under the GDPR broadens this scope remains to be seen.)

Two data subject rights are of special relevance in the anti-doping context. First the right to information of the data subject. Article 13 of the GDPR specifies that where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information: (a) the identity and the contact details of the controller and, where applicable, of the controller's representative; (b) the contact details of the data protection officer, where applicable; (c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing; d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party; (e) the recipients or categories of recipients of the personal data, if any; (f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available. In case data are not collected from the data subject, the controller should have regard of Article 14 GDPR, which lists similar information to be provided to the athlete as listed above for art. 13 GDPR. This will be the case when athlete's personal data is shared between actors, for instance when his/her profile is shared with an event organizer.

The field study has revealed that rather limited information is provided as to why an athlete is included in the registered testing pool, subjected to whereabouts requirements, to a biological passport or why he/she is tested in particular circumstances. In addition, when intelligence is gathered through open sources, the interviews conducted during the field study yielded that in general, the athlete is not informed of this fact, not even when the athlete was not considered to have violated anti-doping rules on the basis of the intelligence gathered. The athlete is not always informed when his data are shared between ADOs and/or other organisations. On these points, the current provisioning of information to athletes falls short of what the GDPR requires and more needs to be done in order to respect the rights of the athletes in a meaningful way.

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*It should be ensured in practice that data controllers in the anti-doping context inform athletes in a detailed manner about when personal data are gathered about them, why, by which means and to whom they are disclosed, as required by the GDPR. National DPAs may wish to investigate whether relevant provisions on providing information are being respected.*

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In addition, Article 21 GDPR specifies: 'The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) (public interest) or (f) (legitimate interest of the controller) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.' Article 6(1)(e) (public interest) is one of the two grounds which were considered potentially appropriate for legitimatizing the processing of personal data in the anti-doping context, and hence the right to object to processing seems open to athletes if this processing ground would be chosen to warrant the processing of personal data in the anti-doping context. In case of processing of data based on a legal obligation (ex art 6(1)(c)) the right to object is not open to athletes.

WADA restricts the rights of athletes to object to the processing of their personal data. On a number of points, WADA's regulations addressed at athletes specify explicitly that the athlete's objection will be overruled, such as: 'You understand that if you object to the processing of your data, it still may be necessary for your Custodian Organization and WADA to continue to process (including retain) certain of your data to fulfil obligations and responsibilities arising under the Code. You understand that objecting to the processing, including disclosure, of your data may prevent you, your Custodian Organization, WADA or other ADOs from complying with the Code and relevant WADA International Standards, in which case such objection could constitute an anti-doping violation.' On other points, objection to provide data may lead to sanctions. The GDPR specifies that a data controller can no longer process the personal data of a data subject upon such an objection unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject. This requires a case by case assessment.

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*Member States are advised to ensure that data controllers in the anti-doping context do not automatically overrule the athlete's right to object nor automatically attach negative consequences to objects of athletes.*

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## 7.7 Necessity and proportionality

It is recommended that Member States take careful consideration of the principles of necessity and proportionality, including the notions of subsidiarity and effectiveness in regulating the processing of personal data in the context of anti-doping. Those principles are engrained in the jurisprudence of the European Court of Human Rights when interpreting the European Convention on Human Rights and of the European Court of Justice when interpreting, among other instruments, the Charter of Fundamental Rights of the European Union. There are a number of questions to be raised from this perspective that may challenge some of the core characteristics of WADAs anti-doping framework. This study advises Member States on what they can do to ensure consistency with the European Fundamental Rights Framework, and the recommendations below are formulated accordingly. An alternative could be that the EU Member States endeavour to ensure consistency through discussion with WADA, which may lead to adjustments or exemptions to the WADC and/or the five international standards.

Inter alia, the necessity and proportionality principles play a role in terms of the whereabouts requirements and out-of-competition testing. Athletes under whereabouts requirements are required to indicate per day where they are and where they sleep. If they are not at the indicated place at the indicated time, this is considered an error, three of which in a year will lead to an Anti-Doping Rule Violation. All athletes, not only those having to provide their whereabouts, may be tested out-of-competition, meaning at home, when training or on vacation, 24/7. These are far reaching limitations on the right to privacy and data protection of athletes. WADA leaves room for ADOs to determine the scope and application of such requirements. Member States are advised to make use of this discretionary space to formulate a proportionate implementation of the WADA requirements.

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*Member States are advised to ensure that whereabouts requirements and out-of-competition testing is implemented only in so far as this is*

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*necessary, proportionate and effective in light of the fundamental rights framework.*

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In addition, a biological passport is made of a limited number of athletes, through which their blood or urinal profile is monitored and profiled longitudinally. Again, this is a significant limitation of the athlete's right to privacy and data protection. At the same time, such biological passports seldom lead to Adverse Analytical Findings; rather, they are used to signal 'red flags' (biological passports do reveal Atypical Findings) to investigate suspicious results further. WADA leaves room for ADOs to determine the scope and application of such requirements. Member States are advised to make use of this discretionary space to formulate a proportionate implementation of the WADA requirements.

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*Member States are advised to ensure that biological passports are developed only in so far as this is necessary, proportionate and effective in light of the fundamental rights framework.*

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In general, the samples taken from athletes concern either their blood or their urine. Both methods can be seen as limiting athletes' privacy, in particular the bodily integrity of athletes to a large extent. In order to extract blood, the athlete's body is entered with a needle, which is an intrusion on their bodily integrity. With respect to urine, the Doping Control Officer has direct sight of the genitalia of the athlete, which again is an intrusion of their privacy. No evidence was found during this study on whether and to what extent alternative tissues, such as hair or saliva, the gathering of which is far less intrusive, can provide reasonable alternatives. WADA has indicated that it is investigating such options and Member States are advised to do so as well.

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*Member States are advised to explore, either alone or jointly or in collaboration with WADA, whether and if so, to what extent alternatives can be found to gathering athlete's blood or urine.*

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In addition, test figures show that the gathering of blood rarely leads to a relevant finding. WADA's 2015 Anti-Doping Testing Figures, in which the number of samples analyzed and reported by accredited laboratories in ADAMS is revealed, shows that of the more than 21.000 blood samples analyzed, only 8 Atypical Findings were found and only 5 Adverse Analytical Findings. WADA has pointed to the potential deterrent effect of such means, but has also made clear that where its rules conflict with the laws prevailing in countries, the latter have priority. Considering the low numbers, Member States should consider, whether and in how far gathering blood samples can be deemed in conformity with the fundamental rights framework.

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*Member States are advised to assess whether gathering blood samples of athletes can be deemed in conformity with the fundamental rights framework.*

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Under the World Anti-Doping Code, there are 10 so called Anti-Doping Rule Violations, such as possession of prohibited substances or methods, trafficking them, liaising with people put on a black list by WADA, avoiding tests or tampering with them and of course, using prohibited substances or methods or having traces of those substances or methods in their body. Only for the latter ADRV is it necessary to interfere with the athlete's pri-

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vate life and bodily integrity. Other ADRVs can be found through gathering intelligence. ADOs seem to focus their attention and efforts mainly on discovering traces of prohibited substances in athletes, even though WADA allows for a different focus. Member States are advised to explore in how far it is possible for ADOs to focus their investigations and collection of data on other ADRVs than those for which testing athletes is necessary.

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*Member States are advised to assess to what extent ADOs can focus their primary attention on detecting ADRVs that do not require gathering human tissues.*

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Under the World Anti-Doping Code, ADOs are allowed to conduct intelligence based testing, that is, conducting more invasive tests when they have concrete suspicion that a certain athlete is using prohibited substances or methods. Most of the testing that takes place, however, is risk-based. ADOs even have the authority to conduct random tests. Given the impact of the tests on the athletes' privacy, Member States are recommended to clarify in their national regulation whether, and if so, under what conditions ADOs are allowed to conduct random and risk-based tests.

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*Member States are advised to clarify in their national regulation whether, and if so, under what conditions ADOs are allowed to conduct random and risk-based tests.*

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Means and methods may be prohibited by WADA if certain criteria are met. However, WADA has sole discretion to decide whether these criteria are met. Athletes cannot challenge such decisions. WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List, the classification of substances into categories on the Prohibited List, and the classification of a substance as prohibited at all times or In-Competition only, is final and shall not be subject to challenge by an athlete or other person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport. Doubts have been raised by various scholars and scientists on whether the substances on WADA's prohibited list indeed have a sport enhancing effect. When Member States either make it a legal obligation or a public interest to gather data to detect such substances through tests, they are using state power to enforce the prohibited list on athletes. In light of the necessity and proportionality requirement, Member States should be mindful that athletes may object under their national laws when they are tested or sanctioned for taking substances the effects of which on their efforts is unsubstantiated by scientific evidence.

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*Member States are advised to ensure that ADOs only test and sanction athletes for substances and methods in so far as that is necessary and proportionate in light of the fundamental rights framework and the stated goals of anti-doping.*

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Besides the general effect of a substance or method, the particular effect of a substance or method on an athlete's efforts or the competition in which they have been performing is not analyzed under the current anti-doping context. Evidence of such an effect is not required to sanction an athlete. Rather, with respect to the burden of proof, a 'strict liability' regime is used, which means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs when-

ever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. This means that when a small amount of a prohibited substance, which in itself would not have any concrete effect on an athlete's performance, enters the athlete's body unintendedly, for example through eating meat which contains traces of such a substance, they can be deemed in violation of the anti-doping rules all the same. Such a practice may come into conflict with the right to privacy, as protected under Article 8 of the European Convention on Human Rights, in combination with the right to a fair trial, as protected under Article 6 of the European Convention on Human Rights. Member States are advised to consider whether and on what grounds it is necessary and proportionate to use such a burden of proof under their national legal system.

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*Member States are advised to assess when and under what conditions traces of prohibited substances and methods should be deemed sanctionable and which burden of proof should be used in light of the fundamental rights framework.*

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The WADA list of prohibited substances and methods, not only contains sport enhancing substances and methods, but also substances that can be used to cover sport enhancing substances and methods in the athlete's body. Though they provide no direct evidence that the athlete has taken sport enhancing substances or methods, athletes can be sanctioned when such concealing substances are found in their body. In addition, the lists contain recreational drugs, like marijuana, which do not seem to have a sport enhancing effect. For other substances on the list, there is no conclusive evidence that they either have a sport enhancing effect or do significant harm to an athlete's health. In this sense, sanctioning athletes for taking such substances and subjecting them to privacy intrusive tests in order to track down such substances in the athlete's body may come into conflict with the right to privacy, as protected under Article 8 of the European Convention on Human Rights, in combination with the right to a fair trial, as protected under Article 6 of the European Convention on Human Rights. Subjecting athletes to tests, in order to find substances in the athlete's body, while there is no conclusive evidence that those substances either have a sport enhancing effect or have a significant negative effect on the athlete's health, may come into conflict with the necessity and proportionality requirement.

The testing authority claimed by NADOs can be as high as 1/4 or even 1/3 of the population of a country. This means that it is at the discretion of the NADO how to use its powers and to decide who to subject to tests. ADOs determine a test distribution plan through which they limit their testing to a limited number of athletes. Still, they are authorised to diverge from the test plan when they believe that to be necessary. WADA explicitly states that an athlete may not refuse to submit to sample collection on the basis that such testing is not provided for in the ADO's Test Distribution Plan or that the athlete does not meet the relevant selection criteria for testing or otherwise should not have been selected for testing. This means that ADOs can subject any athlete under its presumed testing authority to tests when they believe this to be necessary, without having an obligation to justify such decision either to an athlete, before a judge or to another organization. Member States are advised to consider limiting the testing authority of NADOs, in order to ensure consistency with the fundamental rights framework, in particular in light of the necessity and proportionality principle.

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*Member States are advised to consider limiting the testing authority claimed by ADOs to the level that is necessary and proportionate.*

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Under WADA's anti-doping structure, ADOs not only have testing authority over athletes, but also over their coaches, trainers, medical staff, etc. It is unsure whether subjecting other individuals than top athletes should be regarded as legitimate, in the light of the necessity and proportionality principle. The support staff of an athlete may not have any formal relation with ADOs or sport organisations.

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*Member States are advised to assess whether and if so, under which conditions persons other than athletes may fall under the testing authority of the ADO.*

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In addition, Member States are advised to make clear whether and under which conditions minors can be subjected to tests. Although WADA has some additional safeguards for testing and sanctioning minor athletes, minors can still be subjected in full to the testing authority of ADOs. The rights to privacy, data protection and fair trial may necessitate further limiting the authority of ADOs with respect to minors.

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*Member States are advised to assess whether and if so, under which conditions minors may be considered to fall under the testing authority of the ADO and subject to sanctions.*

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Under WADA's anti-doping structure, the rules for prohibited substances and methods and the testing of athletes takes place for all sports subjected to its authority, although the test distribution plan should assign a larger number of tests to sports and athletes that have a higher risk of doping use. Still, chess and cycling, cheerleading and kettlebell lifting, all fall under the same rules. WADA's test results from 2015 show that more than half of all ADRVs are found with respect to only 5 sports and more than 2/3 of all ADRVs are found in 10 sports. In light of the necessity and proportionality principle, Member States are recommended to consider restrictions on testing in certain sports. For example, they could decide to allow only intelligence based testing in most sports, while limiting the risk-based testing to 10 or 20 sports.

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*Member States are advised to consider further restrictions on testing in certain sports that are not doping prone.*

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Finally, the position of athletes during trials and hearings can be considered weak, inter alia, because interpreting test results and biological passports requires an expertise most athletes lack, because of the shift in the burden of proof, because sport results may be annulled for a period of 10 years or longer, because the athlete is forced to transfer the ownership of his blood and urine to the ADO, because WADA unilaterally sets rules and standards for prohibited substances and methods, because the large number of documents provided by WADA containing rules and standards and the limited information athletes receive about why they are tested, etc. At the same time, the athlete can be sanctioned financially or be declared ineligible for sport practice for years or even a life-time when they are a repeat offender. Ineligibility may include, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the



organization and an ineligible athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an ineligible athlete may not compete in a non-signatory professional league either. Because of the far reaching consequences, and the limited means for athletes to protect their interests, such a practice may come into conflict with the right to privacy, as protected under Article 8 of the European Convention on Human Rights, in combination with the right to a fair trial, as protected under Article 6 of the European Convention on Human Rights. Member States are advised to assess in how far it is necessary to lay down in their laws additional safeguards to ensure that the right to a fair trial of the athlete, in combination with their right to privacy, is adequately protected.

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*Member States are advised to ensure that the athlete's position during trials and hearings is in conformity with the right to privacy and the right to a fair trial.*

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# Annex I – Template Country Reports

Please state your name:

Please state the name of the country:

## Q1 – Landscape of Anti-Doping regulation

(a) Is there a separate Anti-Doping Act in your country, or are anti-doping rules embedded in or integrated with other legislation?

Title of the measure (in original language)	Title of the measure (in English). Please include a hyperlink where available.	Type of instrument (e.g. Act of parliament, lower regulatory instrument such as a bye-law or ministerial decree etc)	How would you categorise the instrument? (delete as appropriate)
			Sports governance instrument? Criminal law instrument? Mixed? Other? Please specify

(b) Are there any other legal rules or instruments in your Member State which play a role in anti-doping in sport? If so, please indicate below:

Title of legal rule/instrument	Categorisation of instrument? (e.g. criminal law, sports governance instrument etc)	Legal nature of rule of instrument? (e.g. statute, regulation, bye-law, decree etc)	Brief summary of the role the instrument plays in regulating anti-doping in sport.

## Q2 Background of Anti-Doping Act

(a) What was said about the goals and grounds for the regulation of anti-doping activities during the drafting process in the memorandum or preamble to the law?

(b) Many governments cannot be legally bound by a non-governmental document such as WADA's **World Anti-Doping Code**. Accordingly, governments prepared the **Copenhagen Declaration on Anti-Doping in Sport**, a political document through which they signaled their intention to formally recognize and implement the Code through an international treaty. The Copenhagen Declaration was finalized in 2003. Pursuant to the Code, governments subsequently **drafted an international convention under the auspices of UNESCO**, the United Nations body responsible for education, science, and culture, to allow formal acceptance of WADA and the Code. In addition, the Council of Europe has adopted the **Anti-Doping Convention** (Strasbourg, 16.XI.1989). What is the relation of your national anti-doping regulation to these documents? For example, is the WADA code transposed into sports law or criminal code, is it transposed via the UNESCO Convention, does it refer to the Convention of the Council of Europe, etc:

### Q3 Status and role of the NADO

(a) **National Anti-Doping Organizations (NADOs) are Government-funded organizations responsible for testing national athletes in- and out-of-competition, as well as athletes from other countries competing within that nation's borders; adjudicating anti-doping rules violations.**

	Relevant provision	Text of provision (English)
<b>Role:</b> What are the official objectives of the NADO in your country, either in the law (when public organization) or in its statutes (when private organization)?		
<b>Legal Status:</b> Has a NADO been installed in your country and if so, is it a private or a public law organization?		
<b>Legal Basis:</b> What is the legal basis for the establishment and functioning of the NADO?		
<b>Mandate:</b> Please specify the mandates in bullet points.		

(b) Has the NADO of your country issued any relevant opinion or statement on the relationship of anti-doping measures and privacy and data protection rules?

#### Q4 Anti-Doping and criminal law

- (a) The WADA has **adopted a list** of prohibited substances for athletes, which it updates on a yearly basis. This list is a part of the WADA Code. National Anti-Doping Organizations are responsible for enforcing the Code and monitoring Athletes intakes of potentially prohibited substances. In addition, the Council of Europe has also adopted **a list of prohibited substances**. How has your country adopted or referred to the WADA prohibited substances list in its regulations? Is a link made to the list of substances prohibited via criminal law (hard drugs, soft drugs, etc)?
- (b) Are there provisions in the criminal (procedural) code or Narcotics regulation that confer powers to the NADO in view of these codes/laws?
- (c) WADA has released **guidelines to help Anti-Doping Organizations enhance their cooperation and intelligence sharing with law enforcement agencies on a global scale, among others in relation to drugs trafficking**. Have these rules been implemented in or referred to the national anti-doping law. Are there official programs under which the Anti-Doping Agency cooperates with the police or other law enforcement organizations (for example, reporting the presence of prohibited substances or gathering evidence during investigations):

**Q5 Anti-Doping Act and gathering personal data**

- (a) Which material provisions exist in the anti-doping regulation of your country in relation to who is subjected to the monitoring activities by the National Anti-Doping Agency, e.g. who qualifies as a professional athlete? Also, what are the conditions for a sportsperson to be included in the Registered Testing Pool (RTP), the National Testing Pool (NTP) and the General Testing Pool (ATP)?
- (b) The purpose of the WADA **International Standard for Testing and Investigations (ISTI)**, which is seen as an integral part of the Code, is to plan for effective testing and to maintain the integrity and identity of samples, from notifying the athlete to transporting samples for analysis. There are different approaches in the Member States as to the implementation of the ISTI or regulating the gathering of whereabouts of the athletes, taking samples and analyzing those data. Are there any material provisions in the anti-doping regulation of your country in relation to when data may be gathered, which data, how and by whom? What is the basis of this regulation, e.g., does it directly refer to ISTI? What is the status of the regulation, e.g. (sports/criminal/etc.) law, statutes of NADO, etc.?

<b>Title of document</b>	
<b>Translation of title in English</b>	
<b>Legal basis</b>	
<b>Status of the document</b>	

	<b>Provision in original language</b>	<b>Translation in English</b>
<b>Collecting Whereabouts</b>		
<b>Collecting blood/urine samples</b>		
<b>Data analysis</b>		

Additional

remarks:

- (c) The World Anti-Doping Code contains provisions on privacy and confidentiality. Does your national anti-doping regulation contain material provisions on this point? Please provide the information below regarding the points mentioned in the table.

	<b>Relevant provision</b>	<b>Text of provision (English)</b>
<b>Doping Control Information</b>		

Clearing House (ADAMS system)		
Collection, storing, processing or disclosure of personal information by Anti-Doping Organisations		

■

(d) Does the anti-doping law contain an explicit reference to your national Data Protection Act? If so, in what context?

(e) The World Anti-Doping Code **International Standard for the Protection of Privacy and Personal Information (ISPPPI)** is a mandatory *International Standard* developed as part of the World Anti-Doping Program by the WADA. It contains numerous rules on data collection, retention periods, legitimate grounds for processing, etc. Does your national anti-doping regulation contain similar rules or are they materially different? Please provide a copy of those rules and a summary of the differences in English.

ISPPPI	National provision	Summary in English
6.1 <i>Anti-Doping Organizations</i> shall only Process Personal Information: - on valid legal grounds, which can include compliance with legal obligations, fulfillment of a contract or to protect the vital interests of the <i>Participant</i> and other <i>Persons</i> ; or - where permitted, with a <i>Participant's</i> or other <i>Person's</i> informed consent, subject to the exceptions in Article 6.2.b, 6.3 and 6.4 of this <i>International Standard</i> .		
6.2 Where <i>Anti-Doping Organizations</i> Process Personal Information with consent, <i>Anti-Doping Organizations</i> shall, in order to obtain an informed consent, ensure that adequate information is furnished to the		

<p><i>Participant</i> or <i>Person</i> to whom the Personal Information relates as described more fully in Article 7. a. <i>Anti-Doping Organizations</i> shall inform <i>Participants</i> of the negative <i>Consequences</i> that could arise from their refusal to participate in <i>Doping Controls</i>, including <i>Testing</i>, and of the refusal to consent to the Processing of Personal Information as required for this purpose. b. <i>Anti-Doping Organizations</i> shall inform <i>Participants</i> that regardless of any refusal to grant or subsequent withdrawal of consent, the Processing of their Personal Information by <i>Anti-Doping Organizations</i> still may be required, unless otherwise prohibited by applicable law, where necessary to enable <i>Anti-Doping Organizations</i>: - to commence or pursue investigations involving suspected anti-doping rule violations relating to the <i>Participant</i>; - to conduct or participate in proceedings involving suspected antidoping rule violations relating to the <i>Participant</i>; or - to establish, exercise or defend against legal claims relating to the <i>Anti-Doping Organization</i>, the <i>Participant</i> or both.</p>		
<p>6.3 Where <i>Anti-Doping Organizations</i> Process Sensitive Personal Information with consent, the express and written consent of the <i>Participant</i> or <i>Person</i> to whom the Personal Information relates shall be obtained. The Processing of Sensitive Personal Information shall occur in accordance with</p>		



<p>any specific safeguards or procedures established under applicable data protection laws and regulations.</p>		
<p>6.4 In cases where a <i>Participant</i> is incapable of furnishing an informed consent by virtue of age, mental capacity or other legitimate reason recognized in law, the <i>Participant's</i> legal representative, guardian or other competent representative may furnish consent on the <i>Participant's</i> behalf for purposes of this <i>International Standard</i>, as well as exercise the <i>Participant's</i> rights arising under Article 11 below. <i>Anti-Doping Organizations</i> shall ensure that obtaining consents under such circumstances is permitted by applicable law.</p>		

■

- (f) **The World Anti-Doping Code International Standard for Testing and Investigations (ISTI)** contains rules on the property of the samples taken from the athletes. Have these rules been implemented in the national anti-doping law, have material changes been made? Please provide a copy of the legislation and a summary of the differences in English.

■

ISTI	National Provision	Summary in English
<p>10.1 <i>Samples</i> collected from an <i>Athlete</i> are owned by the <i>Testing Authority</i> for the <i>Sample Collection Session</i> in question.</p> <p>10.2 The <i>Testing Authority</i> may transfer ownership of the <i>Samples</i> to the <i>Results Management Authority</i> or to another <i>Anti-Doping Organization</i> upon request.</p>		

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## Q6 Landscape of Privacy and Data Protection law

(a) Please provide the text of the provision(s) in your country's constitution, if any, regarding privacy and data protection, in particular in relation to bodily integrity.

(b) The EU has adopted the **Data Protection Directive 95/46/EC**. EU members are obliged to implement these rules in their national jurisdiction. Please provide additionally a reference to the Data Protection legislation which corresponds to the implementation of the Directive. In your State, has the Directive been implemented in a separate act or merged with existing legislation? If the latter is the case, please specify the nature of that existing act.

(c) Are there any additional laws or by-laws that relate to the protection of personal data in the course of anti-doping activities which have not been mentioned in the answers to the previous questions?

**Q7 Does your national law provide a higher level protection than the Directive?**

- (a) **The Data Protection Directive, article 7, gives six grounds for legitimate data processing, namely consent, contract, legal obligation, vital interests of the data subject, public interest or the weighing of the different interests. In comparison to the wording of the Directive, does your national Data Protection Act choose materially different phrasing? If so, please specify below:**
- (b) **The Data Protection Directive, article 8, gives five grounds for the legitimate processing of sensitive data: explicit consent, necessity in terms of employment law, vital interests of the data subject, legitimate activities of non-profit organisations and if the data have already been made public. In comparison to the wording of the Directive, does your national Data Protection Act choose materially different phrasing? If so, please specify below:**
- (c) **In Article 8 of the Directive, additional protection is provided to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. In comparison to the wording of the Directive, does your national Data Protection Act choose materially different phrasing and/or are additional categories of data provided additional protection?**
- (d) **The Data Protection Directive contains no explicit additional protection for minors. Has your country adopted any special provision(s) regarding minors whose personal data are processed? Please provide the legal provision and a summary in English.**
- (e) **Article 25 and 26 of the Data Protection Directive regard the transfer of personal data. Does your national Data Protection Act choose materially different phrasing? If so, please specify below:**

**Q8 Relevant decisions**

(a) Has the DPA of your country issued any relevant opinion or statement on the relationship of anti-doping measures and data protection rules? If so, what is the gist of the opinion?

(b) Has a court of law in your country handled any relevant cases on the relationship of anti-doping measures and data protection rules?

▪

**Q9 Final remarks**

Do you have any final remarks?

## **Annex II - Fact Sheets Anti-Doping & Data Protection**

## 1. Austria

### (1) Relevant laws and by-laws:

- Anti-doping legislation (ADBG 2007): the basis of the Austrian anti-doping regulation, also incorporates rules on the NADO.
- Criminal Code (STGB): § 147 classifies doping in sport as a serious fraud and is threatened with up to ten years' imprisonment.
- Federal Sports Promotion Act (BSFG 2013): Strengthening and supporting anti-doping is a key objective of the Austrian Federal Sports Promotion Act.
- Medicines Act (AMG): The Austrian Drug Law regulates the fact that drugs containing prohibited drugs must be labeled.
- Prescription law: The Austrian prescription law prohibits the prescription of prohibited drugs for the purpose of doping in sport.

### (2) Transposition of international documents:

The basis of the worldwide anti-doping work is the world anti-doping code. In Austria the "International Convention against Doping in Sport" entered into force in 2007 (BGBl. III No. 108/2007). In addition, Austria has also ratified the Anti-Doping Convention of the Council of Europe (1991) and its Additional Protocol (2004). ADBG 2007 § 4 (7) states that NADA Austria has to take the WADA regulations into account to the extent these are compatible with Austrian law.

### (3) Status of the NADO:

The National Anti-Doping Agency was founded on July 1, 2008 as a Limited Liability Company (GmbH) based in Vienna. It is a non-profit, independent anti-doping organization.

### (4) Criminal Law:

There is no link with prohibited substances in criminal law (Strafgesetzbuch - StGB) or narcotics law (Arzneimittelgesetz – AMG). The list based on the Anti-doping Convention seems to be the only applicable list in Austria.

"The amended ADBG supports these efforts and focuses on the development of cooperation between law enforcement agencies and NADA Austria. For example, NADA Austria has the obligation to notify the law enforcement authorities of the breaches of anti-doping rules, if there is a suspicion of a criminal offense. The public prosecutors are, in turn, required to provide NADA Austria with all information after completion of the investigation procedure if there is a suspicion that a sporting anti-doping rule has been breached. In addition, it was clarified that NADA Austria has a well-founded legal interest in file inspection in criminal proceedings for a criminal offense under Section 22a of the ADBG ( "possession, trading or distribution of prohibited substances") and Section 147 (1a) of the Penal Code ( "sports fraud")." (Jahresbericht NADA Austria 2015)

More formally:

- ADBG 2007 § 4 (6) determines that the NADA may hand over personal data to law enforcement of persons under doping investigation
- ADBG 2007 § 4 (6) Without prejudice to the provisions of Article 22c (1), the Independent Doping Control Body may in exercising its duties, transmit to the courts and authorities personal data, except for health data, in the event of justified requests and as far as the data contribute to the legally foreseen task and the transfer is foreseen by federal or state law. The Independent Doping Control Agency shall comply with the Data Protection Act 2000, in particular with regard to data protection and data secrecy, including the training of employees.
- ADBG 2007 § 22c. (1): The independent doping control authority shall notify the law enforcement authorities of the decisions notified to it in respect of which an anti-doping rule violation has been established and the minutes of the hearing, including the other procedural documents, upon request if there is reasonable suspicion that a criminal offense to be prosecuted has occurred
- The public prosecutor has an obligation to provide the NADA with personal details about the person under investigation once completed. (§22c (2)).

Also, international collaboration is important according to NADA Austria: "In line with developments in recent years, a focus has been put on the implementation of efficient control and investigation facilities. In addition to quality assurance by WADA in the selection of the target groups and analytical methods, cooperation between the anti-doping organizations and the criminal investigations bodies is to be further developed and intensified." (Jahresbericht 2013).

#### **(5) Processing of personal information included in:**

ADBG 2007.

#### **(6) Selection of athletes:**

The ADBG 2007 § 5 defines the national test pool. It delegates the enactment of the testpool to the NADA and the sports federations. Given the delegation to the NADA and the fact that the Austrian NADA is bound by the WADA Code, the standard WADA requirements hold. ADBG 2007 does not distinguish between RTP, NTP and GTP. The National Testpool has 2 categories: topsegment and basissegment. The testing requirements for the topsegment are higher (including the whereabouts requirements § 19 of the ADBG 2007).

Athletes are defined in the ADBG 2017 in §1a (21) 21. Athletes: Persons A. who are members or licensees of a sporting organization or an organization thereof, or were, or are apparently intending to become, a potential violation of anti-doping rules, or B. who participate in competitions organized by a sports organization or by an organization which is associated with it, or sponsored by federal sports sponsorship C. who have otherwise committed themselves to comply with anti-doping rules;

**(7) Additional/different privacy and data protection regime:**

The Austrian Data Protection Act contains more and more elaborate grounds for processing sensitive data, such as when the obligation or authorisation to use the data is stipulated by laws, insofar as these serve an important public interest.

**(8) Other relevant documents/decisions:**

Not identified.



## 2. Belgium

### (1) Transposition of international documents:

Belgium ratified the UNESCO Convention by depositing its instrument of ratification on 19 June 2008.

Council of Europe Anti-Doping Convention entered into force in Belgium on 1 January 2002.

Agreement of Cooperation of 9 December 2011 between the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission on the fight against doping in sport

### (2) De-centralised anti-doping governance

In Belgium, anti-doping is not a federal matter but a Community one. It should be noted that because of the administrative complexity of Communities and Brussels, in Belgium, a total of four NADOs have been founded, one for each linguistic community and one in the bilingual Region of Brussels Capital city. This includes the Dutch speaking community (NADO Vlaanderen or NADO Flanders), French Community (ONAD), German (NADO-DG) and Brussels Capital Region (the Joint Community Commission). Because anti-doping is a personal matter, the responsibility falls on the Communities authorities within the branches of government that are responsible for sports (or in the case of Brussels, the Minister for Health).

The Cooperation Agreement between the Flemish Community, the French Community, the German Community and the Joint Communities Commission on preventing and combating doping in sport aims to harmonize and coordinate the anti-doping policy among the regions, in accordance with the Wada Code. This includes different common terms and procedures.

### (3) Belgian privacy law

The grounds for processing personal data under the Belgian Privacy Law reflect the ground set out in Article 7 of Directive 95/46/EC. In respect of sensitive personal data, the Belgian Privacy Law transposes the optional provision of Article 8(4) of the Directive, providing that the processing of personal data (is lawful) if it is authorised by an act, decree or ordinance for another reason of substantial public interest.

### (4) Relevant cases / decisions

The Privacy Commission's yearly report of 2012-13 stated that on the topic of anti-doping they are still very active. They have closely followed and given advice on the reworks of the national anti-doping legislation. Overall they noted that the newer rules have more focus on the protection of privacy and less athletes are stuck to the whereabouts-regime. There were still challenges as WADA changes rapidly. The Privacy Commission stressed the importance of providing relevant information on protection of privacy to the athletes.

## **(Flanders)**

### **(1) Relevant laws and by-laws:**

Decree of May 25th 2012 concerning the prevention and control of doping in sport is the main regulation on anti-doping.

Decree of May 7th 2004 concerning the internally privatized agency with legal personality 'Sport Flanders'.

### **(2) Status of the NADO:**

National Anti-Doping Organization Flanders is the administration of the Flemish community that has the authority to exercise the anti-doping policy. The NADO Flanders resides under the sports administration of the Flemish government.

### **(3) Criminal Law:**

Article 47 of the Anti-Doping Decree states that taking substances from their list in the context of sports will solely lead to a disciplinary action. However, there have been several cases where criminal law has been used on top of those sanctions as well.

These substances can be relevant for the law of April 12th 1974: 'The royal decree concerning certain operations pertaining to materials with hormonal, anti-hormonal, anabolic, beta-adrenergic, anti-infectious, anti-parasite and anti-inflammatory use' or the more general drug legislation of February 24th 1921: 'Law concerning the selling of toxins, sleep medication and sedatives, psychotropic substances, antiseptics and substances that can be used for the illicit fabrication of drugs and psychotropic substances'. These laws do not reference NADO and are applied separately as a federal matter.

Article 15 of the Anti-doping decree states that 'To execute its tasks NADO Flanders will be using any possible information and research methods available to them, including information in ADAMS, cooperation with the other anti-doping committees, law enforcement agencies, magistrates ... this includes information that NADO Flanders has received from the police or from an authorized magistrate with the approval to use this information for the disciplinary punishment of doping in sports.'

Article 19 of the Anti-doping decree § 3. States: 'After given authorization by an investigative judge, provided to him by the prosecutor, a certified control doctor, possibly assisted by one or more chaperons, can enter residential premises to locate helpful evidence.' § 4. States that 'The certified chaperons and control doctors can request the assistance of a local or federal police officer at any time that they are performing their duties.'

There is a cooperation protocol between NADO Flanders and the federal police based on an older piece of legislation (21 November 2000).

### **(4) Processing of personal information included in:**

Anti-Doping Decree.

## **(5) Selection of athletes:**

Article 2 of the Anti-Doping Decree defines:

The national target group (NTP) as: the group of elite athletes that have been pointed out by NADO Flanders to be subjected to targeted doping tests, both in and out of competition, in the context of the test-distribution plan of NADO Flanders, and whom are obligated to share their whereabouts.

International target group (RTP) as: the group of athletes of the highest priority that have been appointed by an international sports federation to be subjected to targeted doping tests, both in and out of competitions, in the context of the test distribution plan of the international sport federation and who is obligated to share their whereabouts as stated in article 5.6 of the Code.

Article 20 of the Anti-doping Decree (on the topic of whereabouts), categorizes the elite athletes into 4 groups depending on the type of sport, the training locations and the degree of risk. A-group is seen as the highest risk group and is required to supply the most information on whereabouts, they form the national target group (NTP). B-group requires less information. C-group are team-sports. D-group are not considered high risk and do not need to provide any whereabouts.

Testing can be done on both elite and recreational athletes at any time. For recreational athletes this is mostly limited to gyms and sport events.

## **(6) Other relevant documents/decisions:**

There were three reports on June 1, 2015 filed by NADO Flanders and received by the Commission for the Protection of Privacy.

Implementation by the public administration of the anti-doping decree in the Flemish Community, which requires the processing of personal data in the course of investigations, the disciplinary handling of doping practices and violations of the anti-doping rules and the registration and implementation of sanctions;

Implementation by the public administration of the anti-doping decree in the Flemish Community, which is the processing of personal data required for the purposes of granting by athletes applied for therapeutic use exemption on the basis of a decision of a TTN committee consisting of three physicians;

Implementation by the public administration of the anti-doping decree in the Flemish Community, which requires processing of personal data in the context of the planning, organization, implementation and administrative handling of doping controls in and out of competition and the biological passport for athletes.

There is a case of prejudicial question pending before the Constitutional Court of Belgium, questioning the principle of article 47 of the Anti-Doping Decree, as described above. The Court of Appeal of Ghent put forward the question whether the difference made between an athlete and a non-athlete (the former being subjected to disciplinary sanctions, the latter to criminal sanctions) is in line with the Belgian Constitution. A decision has not yet been made by the Constitutional Court of Belgium so far.

(case number 6528 - <http://www.const-court.be/> )

## **(Wallonie)**

### **(1) Relevant laws and by-laws:**

Decree regarding the fight against doping (Docu 37256, 20 October 2011) last amended 19 March 2015

Order of the Government of the French Community Implementing the Decree of 20 October 2011 regarding the fight against doping (Docu 41956, 21 October 2015)

Ministerial Order Establishing the List of Substances and Prohibited Methods for 2017 (Docu 43105, 8 December 2016)

Decree Regarding the Organization and Subsidizing of Sport in the French Community (Docu 31614, 8 December 2006)

### **(2) Status of the NADO:**

The Directorate of Anti-Doping of the Ministry of the French Community constitutes the NADO of the French Community, Signatory of the Code, in accordance with Article 23.1.1 of the Code. (Article 5 of the Decree regarding the fight against doping).

### **(3) Criminal Law:**

According to article 22 of the Decree regarding the fight against doping as modified by D. 19-03-2015, it is punished with imprisonment of 6 months to 5 years and with a fine of 5 to 50 euro, or one of the two, the violation of provisions in article 6, para. 6(2) to para. 10:

- The possession of any of the prohibited substances and methods, by a member of the supporting personnel of the athlete, in competition, as well as the possession out of competition by a member of the supporting personnel of the athlete of prohibited substances or methods out of competition;
- Traffic or attempted traffic of a prohibited substance or method;
- The administration or attempted administration to an athlete in-competition of any prohibited substance or method, or administration out of competition, of substances and methods prohibited out of competition;
- The intentional complicity of another person than the athlete with regard to a violation of anti-doping rules or a violation of article 10.12.1 of the WADC;
- The association between an athlete or another person subject to the authority of an anti-doping organisation with a member of the athlete support staff who:
  - (a) is serving a period of suspension,
  - (b) has been convicted or has been recognised to have a behaviour which constitutes a violation of the anti-doping rules, if these rules were applicable to him/her, or
  - (c) if the person acts as an intermediary for a person as described in (a) and (b).

### **(4) Processing of personal information included in:**

Decree regarding the fight against doping, article 10 (relating to the principles of the confidentiality of the data and the respect and application of the Belgian law concerning Privacy and data Protection)

Order of the Government of the French Community Implementing the Decree of 20 October 2011 regarding the fight against doping, articles 3 (relating to the different possible objectives of the

different uses, the different possible users and the necessary need of respecting the proportionality principle) and 58 and annex 1 (for the duration of the conservation of the data)

#### **(5) Selection of athletes:**

The testing pool of the French Community consists of elite athletes identified by ONAD by reason of their affiliation to a sports organization falling exclusively under the competence of the French Community, or by reason of their principal residence being on the territory of the French-speaking region, in case they are affiliated to a sport federation at a national level, and who are subject to both in competition and out of competitions tests and are obliged to transmit their whereabouts. (article 1 (33) Decree of 20 October 2011).

Only the elite athletes of categories A to C, included in the testing pool of the NADO of the French Community, are subject to the whereabouts obligations (art 18 of the decree).

But all the athletes, including the amateurs, are potentially subject to an eventual antidoping test (art 5, al 2 of the decree + art 22, § 1er, al 3, 1°, and 24, §1er, al 1er, 2°, of the Order of the Government of 21 October 2015) and to the other obligations of the decree.

For the elite athletes, sports disciplines are divided into categories from A to D; the last version of the list can be found in the annex 2 of the of the Order of the Government of 21 October 2015. In the French community, the registered testing pool is only formed from elite athletes in category A, which is defined as an elite athlete at a national level, who practices an individual sport as included in the annex 2 of the Order of the Government of 21 October 2015. (article 1 (33) and (68), Decree of 20 October 2011). This category includes: Athletics (grandes distances – 3000 meters and more), triathlon, duathlon, cyclo-cross, Cycling (indoor, on road and mountainbike).

The difference between the elite athletes of category A and the other categories (B and C) is relating to the strength of the whereabouts obligations. There is thus a gradation of the strength of the obligations in function of the category.

The main difference between these categories is that only the elite athletes of category A are obliged to communicate a quotidian time-slot of 60 minutes, in which they are absolutely obliged to be at the disposition of the antidoping authority for an eventual antidoping test.

The elite athletes of categories B and C have to communicate mainly their sports activities, competitions, regular activities and their night accommodation.

The elite athletes of category D have no whereabouts obligations.

The main difference between the elite athletes of category D and amateurs athletes is relating to the TUE rules. The elites athletes (all categories included) have to ask in advance, before the competition or other sport activity, the TUE. On the other hand, the amateurs athletes can ask a TUE after the test, retroactively.

Article 1 (64)-(72) define the different types of athletes (amateur, elite, national and international level, elite categories A-D).

#### **(6) Other relevant documents/decisions:**

No

## **(Brussels Capital Region)**

### **(1) Relevant laws and by-laws:**

Order of the Joint Committee of 14 July 2016 establishing the list of sports disciplines corresponding to categories A, B, C and D

Ordinance of 21 June 2012 on the promotion of health in the practice of sport, the prohibition of doping and its prevention

Order of the Joint Committee of 10 March 2016 implementing the Ordinance of 21 June 2012 on the promotion of health in the practice of sport, the prohibition of doping and its prevention

Ministerial Order of 27 June 2016 establishing remuneration for medical doctors and chaperones

### **(2) Status of the NADO:**

The Joint Community Commission draws its competences from the Special Law of 8 August 1980 for institutional reforms and is essentially competent for the personal matters 'health' and 'assistance to persons'; it is part of the executive. The Joint Community Commission has a NADO, which is the administrative service responsible for the fight against doping.

### **(3) Criminal Law:**

There are no criminal powers for the Joint Communities Commission included in the anti-doping legislation.

Article 36 of the Ordinance of 12 June 2012 mentions that prohibited substances and objects used to apply prohibited methods are, when a criminal offence is committed, seized, confiscated and put out of use.

### **(4) Processing of personal information included in:**

Ordinance of 21 June 2012 on the promotion of health in the practice of sport, the prohibition of doping and its prevention.

### **(5) Selection of athletes:**

The Joint College (College réuni) establishes the list of sports disciplines in categories: A, B, C and D.

There are 2 testing pools: national and registered. The Registered target group is a group of high-priority elite athletes identified by an international federation or a NADO as being subject to both in-competition and out-of-competition controls and are obliged to transmit the location data referred to in Article 5.6 of the Code and the International Standard for Control and Investigation. In the Joint Community Commission, the registered target group corresponds to the elite category A athletes. National Target Group of the Joint Community Commission is a group of elite athletes in categories A, B and C identified by the NADO of the Joint Community Commission by reason of their place of residence in the territory of the Bilingual Region of Brussels-Capital, which are subject to targeted controls both in competition and out of competition under the control program of the Joint Community Commission and which are obliged to transmit their location data. All national teams are also under the authority of the Joint Community Commission, independently of residence.

**(6) Other relevant documents/decisions:**

The Privacy Commission issued Opinion no. 09/2014 of 5 February 2014, in relation to the draft Order of the Joint Committee of the Joint Communities Commission of 24 April 2014 implementing the Ordinance of 21 June 2012 on the promotion of health in sport, the prohibition of doping and its prevention.<sup>270</sup>

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<sup>270</sup>[https://www.privacycommission.be/sites/privacycommission/files/documents/avis\\_09\\_2014.pdf](https://www.privacycommission.be/sites/privacycommission/files/documents/avis_09_2014.pdf)

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## **(German-speaking Community)**

### **(1) Relevant laws and by-laws:**

Decree on the combatting of doping in Sport – 22 February 2016

Regulation of the Government for the Execution of the Decree on the combatting of Doping in Sport - 17 March 2016

Bilateral Agreement between the German-speaking Community and the French Community executing the Agreement of Cooperation of 9 December 2011 between the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission on the fight against doping in sport (21 April 2017)

### **(2) Status of the NADO:**

It is a public body. The Sport Department of the Ministry of the German speaking Community operates as NADO for the German speaking Community (NADO-DG), as explained in Article 4 of the Decree on Combatting of Doping in Sport.

### **(3) Criminal Law:**

NADO is responsible for the implementation of the tasks listed in the Decree and in the executive documents.

According to Article 8 (10) of the Decree on Combatting of Doping in Sport, NADO-DG is responsible for informing the athletes / sportsmen about the disqualifying status of the people accompanying / working with them ("Sportlerbetreuer, within the meaning of Article 3(51) of the Decree, e.g. coach, manager, parents) within the meaning of Article 8(1)a, b, c of the Decree. When NADO-DG possesses the knowledge of the athlete's staff who fulfil the criteria of Art 8(1) a, b, c of the Decree, NADO-DG forwards the information to WADA.

According to Article 9 of the Decree on combatting of Doping in Sport, the relevant anti-doping organisation bears the burden of proof for the alleged breaches of Article 8 of the Decree (the instances of doping). The Anti-Doping organisation needs to convincingly present the evidence of breaching the anti-doping provisions to the hearing body.

According to Article 10, the NADO-DG is also responsible for conducting investigations according to the international standards of anti-doping controls, for researching and collecting anti-doping information as well as for gathering evidence which then can be used to prove violation of anti-doping provisions (as per Article 8).

When exercising its powers of investigation, NADO-DG receives, evaluates and provides anti-doping information from all available sources, and processes them in order to establish an effective plan for scheduling doping controls / targeted controls and / or in order to create a basis for the investigation of one or more alleged breaches of anti-doping rules within the meaning of Article 8. NADO-DG also investigates any conspicuous results and the results deviating from the standard for the athletes' pass. NADO-DG also examines any other information, analytical or non-analytical data which can expose any possible anti-doping rule violations. Finally, NADO-DG carries out an automatic examination concerning the conduct of the sportsmen's/athletes' staff/assistants (Sportlerbetreuer) if a breach of anti-doping rules by a minor comes in place; and if there are several violations of anti-doping rules.



According to Article 28 of the Decree on Combatting of Doping in Sport, punishment is envisaged for breach of Article 8, regardless of sanctions introduced by sports organization or the Criminal Code. Breach of this article may be punished with an imprisonment sentence of the duration between six months and five years and / or a financial fine of five to fifty euro.

**(4) Processing of personal information included in:**

Anti-Doping Decree.

**(5) Selection of athletes:**

According to Article 3(31) Decree on Combatting of Doping in Sport there are four categories (A, B, C, D) in the target group of the German speaking community. Athletes from these categories are subject to doping controls both during and outside of competitions and are obliged to share the data of their whereabouts.

First of all, in order to belong to any category, a sportsperson needs to be a high level athlete participating in competition. Once this condition is met, the allocation to the Category A, B, C, or D depends on the sports discipline of the athlete.

Category A is for the athletes who are difficult to localise, e.g. long-distance runners, triathlon athletes, cyclists.

Category B includes athletes in whose discipline, scientifically speaking, there are more possibilities to improve performance by using doping, e.g. judo, boxing or weightlifting.

Category C includes team sports – football, hockey, basketball, etc.

All the other top athletes belong to Category D (whom exactly this category includes is to be determined by NADO-DG).

**(6) Other relevant documents/decisions:**

No

### 3. Bulgaria

#### (1) Relevant laws and by-laws:

- Regulation on Doping Control in Training and Competition Activities (adopted by Decree No.453 of 30.12.2014 of the Council of Ministers): The main regulation on anti-doping can be seen as a Sport Governance Instrument.
- Law for the Physical Education and Sport: General act which sets the legal basis for: (1) adopting measures for doping control, compliance with anti-doping rules in combating the use of doping and (2) establishing the Anti-Doping Centre.
- Rules for the Structure and Activity of the Anti-Doping Centre adopted by Decree No. 232 of 11.10.2010 by the Council of Ministers: The rules regulate the structure and activity of the Anti-Doping Centre.
- Instruction for the Criteria for Inclusion of the Athletes in the Register of the Athletes for Testing of the Anti-Doping Centre 2015: Sets the criteria for inclusion of athletes in the Register of the Athletes for Testing of the Anti-Doping Centre 2015.
- National Strategy on Combating Doping in Sport 2015-2024 (adopted with Decision No. 390/29.05.2015 of the Council of Ministers): This is a Binding National Strategy on Combating Doping in Sport 2015-2024.
- Action Plan for Implementation of the National Strategy on Combating Doping in Sport for the Period 2016-2017: The plan regards the implementation of the Strategy for the period 2016-2017.
- Criminal Code: Art. 350 provides for imprisonment for the preparation, distribution and sale of foods and drinks designated for general consumption in which substances dangerous for health are created or contained.

#### (2) Transposition of international documents:

Bulgaria has ratified the following international documents:

- International Convention against Doping in Sport, Paris, 19 October 2005 (see the Law on Ratification of the International Convention against Doping in Sport dated 22 December 2006.)
- Anti-Doping Convention, adopted by the Council of Europe, Strasbourg, 16 November 1989 (see the Law on Ratification of the Anti-Doping Convention of the Council of Europe dated 05 May 1992)
- Additional Protocol of the Anti-Doping Convention, adopted by the Council of Europe, Warsaw (see the Law on Ratification of the Additional Protocol of AntiDoping Convention of the Council of Europe dated 22 May 2005)
- Bulgaria has also implemented the World Anti-Doping Code: Pursuant to § 2 of the Transitional and Final Provisions of the Regulation on Doping Control in Training and Competition Activities, in case of incompleteness or discrepancy of the Regulation with the World Anti-Doping Code, the provisions of the World Anti-Doping Code shall apply in compliance with a number of rules for its interpretation.

#### (3) Status of the NADO:

Article 41a of the Law for the Physical Education and Sport: The national body for conducting of doping control, prevention of and combating doping in sports is the Anti-Doping Centre – a secondary body with a budget to the Minister of Youth and Sports. The Anti-Doping Centre is a public body subject to the Ministry of Youth and Sports.

#### **(4) Criminal Law:**

- Art. 350 of the Criminal Code punishes the preparation, distribution and sale of foods and drinks designated for general consumption in which substances dangerous for health are created or contained. Whether substances are dangerous for health is being decided by courts on case-by-case basis.
- Pursuant to Art. 66 of the Law for the Physical Education and Sport, the violations against the Law for the Physical Education and Sport shall be established by acts of the specialized control bodies of the Ministry of Youth and Sports and the Anti-Doping Centre. Article 66 refers only to administrative offences, such as ban from sport or administrative fines, but not to criminal laws.
- The Anti-Doping Centre and the Bulgarian "Customs" Agency have recently signed a Memorandum of Cooperation. The document is part of the implementation of the National Strategy on Combating Doping in Sport 2015-2024 (adopted with Decision No. 390/ 29 May 2015 of the Council of Ministers). The memorandum provides for cooperation on legal regulation of trafficking and distribution of doping, exchange of information, knowledge, experience, ideas and best practices and joint action on specific signals against illegal import of drugs and substances used for doping. The laboratories of the two institutions will also exchange information and carry out joint actions for rapid analysis and identification of doping substances in the detection of cases of trafficking over the border of large amounts designer narcotic drugs and substances from the Prohibited List adopted by the WADA.

#### **(5) Processing of personal information included in:**

The Regulation on Doping Control in Training and Competition Activities.

#### **(6) Selection of athletes:**

- The Additional Provisions of the Regulation on Doping Control in Training and Competition Activities, §1, item 59, defines “athlete” as each person who participated in sports activities at international level or at national level (as defined by each national anti-doping organization).
- Art. 4 of the Regulation on Doping Control in Training and Competition Activities, subjects to doping control: 1. Athletes registered to licensed sports organizations on the territory of Bulgaria; 2. Athletes from countries which have signed the Additional Protocol to the Anti-Doping Convention of the Council of Europe, when such athletes reside on the territory of Bulgaria; 3. Athletes participating in international sports events on the territory of Bulgaria upon request by international sports organizations; 4. Athletes deprived of competing rights as a result of a violation of anti-doping rules.

- Pursuant to Art. 6 of the Instruction for the Criteria for Inclusion of Athletes in the Register of Athletes for Testing of the Anti-Doping Centre 2015, in its Register of Athletes for Testing the Anti-Doping Centre shall include athletes who meet criteria such as the status of the athlete, the status of the sport, whether the athlete has violated the anti-doping rules before and how doping-prone a sport is.

**(7) Additional/different privacy and data protection regime:**

“Personal data related to the human genome” is regarded as sensitive data in Bulgaria.

**(8) Other relevant documents/decisions:**

Not identified.

## 4. Croatia

### (1) Relevant laws and by-laws:

- Croatian Institute for Toxicology and Anti-doping's (CITA's) Anti-doping Rules, version 3.0: The by-law based on the WADC, published by the NADO.
- The Sports Act, Official Gazette of Republic of Croatia no. 71/06, 150/08 (Decree): Act of the Parliament, which can be considered a sports governance instrument.
- Health Care Act (Official Gazette of Republic of Croatia no. 150/08, 71/10, 139/10, 22/11, 84/11, 154/11, 12/12, 35/12, 70/12, 144/12, 82/13, 159/13, 22/14, 154/14, 70/16)
- Act on the Ratification of the International Convention against Doping in Sport
- Croatian Criminal Code, Official Gazette of the Republic of Croatia no. 125/11, 144/12, 56/15 and 61/15
- Act on Combating Drug Abuse, Official Gazette of the Republic of Croatia no. 107/01, 87/02, 163/03, 141/04, 40/07, 149/09, 84/11 and 80/13

### (2) Transposition of international documents:

Croatia has ratified the Anti-Doping Convention (Strasbourg, 16.11.1989) which is in force from 01.03.1993. By the Act on the Ratification of the International Convention against Doping in Sport passed in July of 2007, Croatia has embedded the Convention and all its Annexes into its legal system thus allowing formal acceptance of WADA and the Code. It is also the Act fundamental to further codification through the Sports Act and Health Care Act and creation of the national anti-doping organization. The WADA Code and its standards are binding on the basis of the Sports Act and Health Care Act. CITA Anti-Doping rules are based on the 2015 WADA Code. CITA first adopted the WADA Code in 2011. The Croatian Olympics Committee starting with its 2014 Antidoping Rules adopted the WADA World AntiDoping Code applicable as of 1.01.2015., which now forms part of its Rules, and also accepted the authority of CITA as a national anti-doping organization.

### (3) Status of the NADO:

The Croatian NADO is a public institution, which is a legal entity. Legal Basis is Article 5 of the Law on Amendment of the Sports Act. CITA is dissatisfied with its current status. In its Work Plan and Program for 2016 CITA's Department for Anti-doping announced it would initiate with the competent Ministry the procedure for amending national legislation in the area of anti-doping in sports. The reason for this is further alignment of national anti-doping organization's position with the UNESCO Convention, WADA Code and the Council of Europe Convention, and making possible for it to carry out of tasks in accordance with Article 10.10 (Financial Consequences) and Chapter 12 (Sanctions and Costs Assessed against Sporting Bodies) of CITA's Anti-Doping Rules, which are at the moment not possible due to national anti-doping organization's position. In the first half of 2016 there were announcements of governmental measures to abolish CITA as a legal entity, for economic considerations, and merge it with the Croatian Institute for Public Health. This was criticized in the public and the media, and CITA issued a warning that such a move especially in the Olympic year could entail Croatia's "non-compliant" status with the WADA Code.

#### **(4) Criminal Law:**

The crime of unauthorized production and marketing of banned substances in sport (Article 191a Criminal Code) has been in force as a separate criminal offense as of 2013. According to the Criminal Code the Minister of Health is obliged to issue a list of substances banned in sport for the purpose of application of the above stated Article. This List of substances prohibited in sport was issued by the Minister of Health in 2013 and it has not been amended since. There is no reference to WADA or other rules /standards in this List. However, in its Work Plan and Program for 2016 CITA announced it would initiate the procedure for amending the List, before the Ministry of Health, in relation to the mentioned Article 191a of the Criminal Code. It considers that the List needs to be amended in order to comply with the 2016 WADA List of prohibited substances.

Mere possession of drugs is a misdemeanor according to the Act on Combating Drug Abuse. For the purposes of this Act a List of drugs, psychotropic substances and plants from which one can get drugs, and substances which can be used for making drugs is used, which was passed by the Minister of Health. In addition to lists according to the Single Convention on Narcotic Drugs of 1961 and the Convention on Psychotropic Substances of 1971, this List implements lists according to relevant EU law sources.

While no official programs have been identified in this research under which CITA cooperates with the police or other law enforcement organizations, CITA's tasks as prescribed in the Health Care Act and in its Rules imply its cooperation with law enforcement organizations. Also, in its 2015 Annual Report 13 CITA noted that in the fight against doping in sports it cooperates inter alia with the State Attorney's Office, the Office for Combating Drugs Abuse, Ministry of Interior Affairs.

#### **(5) Processing of personal information included in:**

Croatian Institute for Toxicology and Anti-doping's (CITA) Anti-doping Rules, version 3.0.

#### **(6) Selection of athletes:**

##### Application to Persons

- 1.3.1 The Anti-Doping Rules shall apply to the following Persons (including Minors), in each case, whether or not such Person is a Croatian national or resident in Croatia:
  - 1.3.1.1 all Athletes and Athlete Support Personnel who are members or license-holders of any Croatian National Federation, or of any member or affiliate organization of any Croatian National Federation in (including any clubs, teams, associations or leagues);
  - 1.3.1.2 all Athletes and Athlete Support Personnel who participate in such capacity in Events, Competitions and other activities organized, convened, authorized or recognized by any Croatian National Federation, or by any member or affiliate organization of any Croatian National Federation (including any clubs, teams, associations or leagues), wherever held;
  - 1.3.1.3 any other Athlete or Athlete Support Person or other Person who, by virtue of an accreditation, a licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of any Croatian National Federation, or of any member or affiliate or-

- ganization of any Croatian National Federation (including any clubs, teams, associations or leagues), for purposes of anti-doping;
- 1.3.1.4 all Athletes and Athlete Support Personnel who participate in any capacity in any activity organized, held, convened or authorized by the organizer of a National Event or of a national league that is not affiliated with a National Federation; and
  - 1.3.1.5 all Athletes who do not fall within one of the foregoing provisions of this Article 1.3.1 but who wish to be eligible to participate in International Events or National Events (and such Athletes must be available for testing under these Anti-Doping Rules for at least six months before they will be eligible for such Events).
  - 1.3.2 These Anti-Doping Rules shall also apply to all other Persons over whom the Code gives CITA jurisdiction, including all Athletes who are Croatian nationals or resident in Croatia, and all Athletes who are present in Croatia, whether to compete or to train or otherwise.
  - 1.3.3 Persons falling within the scope of Article 1.3.1 or 1.3.2 are deemed to have accepted and to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of CITA to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules, as a condition of their membership, accreditation and/or participation in their chosen sport.

1.4 National-Level Athletes. 1.4.1 Of all of the Athletes falling within the scope of Article 1.3, the following Athletes shall be deemed National-Level Athletes for purposes of these Anti-Doping Rules:

- 1.4.1.1 all Athletes who compete at the highest level of national Competitions in Croatia. That includes first divisions and National Championships;
- 1.4.1.2 all Athletes who compete at international level and/or in International Events or Competitions; but if any such Athletes are classified by their respective International Federations as International-Level Athletes then they shall be considered International Level Athletes (and not National-Level Athletes) for purposes of these Anti-Doping Rules as well.
- 1.4.2 These Anti-Doping Rules apply to all Persons falling within the scope of Article 1.3. However, in accordance with Article 4.3 of the International Standard for Testing and Investigations, the main focus of CITA's test distribution plan will be National-Level Athletes and above.

#### **(7) Additional/different privacy and data protection regime:**

The Constitution provides protection to the right to privacy. Also, Article 35 of the Constitution, requires respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed. With respect to the processing of personal data, a highlighted difference in relation to the Directive is the widened legal basis for processing such data to all cases where processing is necessary to exercise controller's rights and obligations based on special regulations.

Personal data pertaining to underage persons may be collected and subsequently processed in accordance with the Personal Data Protection Act by applying special protection measures prescribed by special acts. This is most notably the Family Act (Official Gazette of the Republic of Croatia no. 103/15) and in line with the established practice of the Croatian Personal

Data Protection Agency the processing of minors' personal data, unless prescribed by the law, normally requires parental consent (or consent of another legal representative of the minor).

**(8) Other relevant documents/decisions:**

Not identified.



## 5. Cyprus

### (1) Relevant laws and by-laws:

- Act 2009 [N.7 (III)/2009] on the International Convention (UNESCO) against Doping in Sport (Ratification): The Act of the Parliament ratifies the UNESCO Convention.
- Decree 227/2009 on the Anti-Doping (Determination Competent Authority): Regulatory Administrative Act of the Minister of Education and Culture of Cyprus.
- Decree 498/2011 - Measures implementing the Convention, Appendices and its Annexes, Operation of the Competent Authority, Disciplinary Board Function AntiDoping Organization and Operation Secondary Disciplinary Committee Anti-Doping): Regulatory Administrative Act of the Minister of Education and Culture of Cyprus; Legal Basis in art. 4 of UNESCO convention, Act 2009 [N.7 (III) / 2009] and 16 [III]/2011 (ratification acts of the UNESCO convention). Includes detailed provisions for the implementation of the UNESCO convention in Cypriot jurisdiction.

### (2) Transposition of international documents:

The WADA Code is transposed via the law ratifying the UNESCO Convention (Annex I of Cypriot Law [N.7(III)/2009]). Both the Anti-Doping Convention of the Council of Europe and the Additional Protocol of the Anti-Doping Convention of the Council of Europe are signed by the Democracy of Cyprus.

### (3) Status of the NADO:

The Cyprus Anti-Doping Authority was established by Decree KDP 227/2009 of Education and Culture, on the basis of the International Convention (UNESCO) against Doping in Sport (Ratification) Law of 2009. The NADO is a public authority under the power of Ministry of Education and Culture.

### (4) Criminal Law:

Since the Decree of 2011 and the Act of 2009 include criminal law provisions (when anti-doping infringements are considered crimes), the NADO falls under the general obligation of public authorities to report any criminal activity to the police.

### (5) Processing of personal information included in:

Decree 498/2011.

### (6) Selection of athletes:

According to art. 2(1) of the Decree 498/2011, an athlete is any person participating in a sport at international or national level and includes any other contestant in sport, which is under the power/ authority of any Sports Federation, Sport co-federation, Sport School or Sport Union in Cyprus, Cypriot Institution of Sport, Cypriot Olympic Committee or Cypriot National Paralympic Committee, any sport institution that accepts the WADA Code, as well as any individual practicing sport, independent to his or her membership to a Sport Union. Art. 37(2) provides criteria for selection of the athletes to be tested, are: a. abnormal biological parameters,

b. injuries, c. withdrawal or absence from games expected to participate, d. withdrawal from athletic activity or return to it, e. behavior indicating doping f. sudden, significant increase in performance g. repeated non-reporting of location data h. submission of location data that might show increase in doping risk (for instance moving to a remote area) i. background of performance of the athlete over a period of time j. age of the athlete k. previous controls on the same athlete l. return of athlete after disqualification m. economic incentives for increasing performance n. relationship with a third person involved in doping o. information from a third person p. possible doping violation from another athlete of the same team. Art. 38 provides that in cases of non-targeted controls, the selection of the athletes to be under control, is random with the use of the appropriate system. The NADO takes into account that in this selection the athletes that ‘are at risk’ are represented with a higher percentage in the selection. Regarding the RTP, the criteria are mentioned in the Decree of 2011. The three criteria are a. participation in national planning b. participation in national team c. Distinction / performance. The lists are published on the website of the NADO and include the names of the athletes together with clarification on which specific criteria apply to each athlete. For instance, athlete X is included in the list because of criterion b (participation in national team) and c. (distinction/performance). There is no relevant information available on the National Testing Pool and the General Testing Pool.

#### **(7) Additional/different privacy and data protection regime:**

With respect to the processing of personal information, there are substantial differences, which are mainly the following: art. 5 (1) of 138(I)/2001 on legitimate processing provides that processing is allowed when the data subject has provided its consent. The processing is allowed even without consent according to art. 5(2), when one of the other grounds of art. 7 Directive is fulfilled (compliance with legal obligation of the controller (art. 5(2)(a), performance of a contract). With respect to the transfer of data, according to article 9 of the Cypriot Data Protection Act, data transfers are allowed only after permission is granted by the Information Commissioner, or if exceptions apply.

#### **(8) Other relevant documents/decisions:**

The Office of the Commissioner for personal data protection in Cyprus issued an announcement on 1st November 2012 concerning the issue of public disclosure of anti-doping sanctions imposed to athletes and the compliance of the Cypriot NADO (CyADA) with a recommendation of the Commissioner regarding the retention periods of the data. The announcement refers to ‘consent’ as a legal ground for processing in anti-doping cases and concludes that such consent of the athlete is not freely given since it is necessary for his or her participation to athletic competitions, and is generic. Thus consent is not a valid ground for making public the decisions of the Disciplinary Council of the Anti-Doping Agency and the Secondary Disciplinary Committee on Anti-Doping. Nevertheless, the Commissioner regards as appropriate the ground of “compliance with a legal obligation with which the controller is subject”. The Commissioner argues that the data protection legislation should not be a refuge for wrongdoers, and hence considers as lawful the disclosure of the decisions of the Disciplinary Council or the Secondary Disciplinary Committee Anti-Doping Code, with reference to the name of the athlete, sport, the category of substance, the regulation was violated, the penalty imposed and the date of the decision, but not online. The Commissioner states that the decisions can also be published anonymized. The announcement also mentions that the Cyprus

Anti-Doping Authority has complied with suggestions of the Commissioner and properly completed form of the Notification Document (e.g. limited the data retention time in eight years as indicated by the Article 29 Data Protection Working Party in its Opinion 4/2009). Also, the Cyprus Anti-Doping Authority granted permission to the World Anti-Doping Agency to transmit data to Quebec, Canada and Switzerland. The permission was signed by the Commissioner (DPA) in 2010 with duration of two years.

## 6. Czech Republic

### (1) Relevant laws and by-laws:

- Directive for doping control and sanctions in sport in Czech Republic: This is a Ministerial Directive and can be seen as the main anti-doping instrument.
- Act no. 115/2001 Coll., on support for sport: The Act describes the role of sport in society and states role of government body when supporting sport.
- Act. no. 40/2009 Coll., Criminal Code: It sets criminal sanctions to people who are involved in doping, if the doping usage is substantial.
- Government regulation no. 454/2009 Coll.: the regulation states inter alia what is determined as a substance with anabolic or other hormonal effect and what is substantial in the sense of the criminal code.

### (2) Transposition of international documents:

According to the “goal and purpose” part, the Ministerial Directive has been adopted and implemented in accordance with the World Anti-Doping Code. The World Anti-Doping Code is incorporated into the Czech legal order as an international treaty under notice no. 46/2008, Collection of international treaties. According to the arrangement part of the directive, it is stated that the directive contains provisions that are obligatory transferred from the World Anti-Doping Code in verbatim. The International Convention Against Doping in Sport is incorporated in the Czech legal order as an international treaty under notice no. 58/2007, Collection of international treaties.

### (3) Status of the NADO:

The National anti-doping organization in the Czech Republic is the Anti-doping Committee of Czech Republic constituted by a deed of foundation no. 33 141/2000-50 as a public-benefit organization controlled by the Ministry of education, youth and sports.

### (4) Criminal Law:

The criminal law has its own list of illegal substances (government regulation no. 454/2009 Coll.). A link to the WADA prohibited substances is made through the Directive, in particular, article 4 “List of prohibited substances and methods of doping”. These are separate.

### (5) Processing of personal information included in:

Directive for Doping control and sanctions in sport in Czech Republic.

#### **(6) Selection of athletes:**

According to article 1.2.1 the directive of NADO is applied to all individuals that are members of national sport associations and to all individuals that are participating in some roles in activities organized or authorized by a national sport association.

Any anti-doping organization can ask for a test whenever and wherever they want to (article 5.2).

According to article 5.7.1, NADO sets criteria on including sportsperson to NTP. : - The NTP consists of all sportspersons that are members of RTP of international sports federations; - Sportspersons from certain sports that are members of resorts sports centers and have part-time job (0,5) or higher shall be included in the NTP; the NADO publishes sports that shall be added to the NTP. - Additionally, sportspersons who have breached anti-doping rules once and who are nominated to the Olympic games, and would restore their sports career are in the NTP.

#### **(7) Additional/different privacy and data protection regime:**

The constitution specifies: Every person has a right to preserve his/her human dignity, personal honor, good reputation and her/his name.

Generally, controller can process personal data only with the consent of a data subject (§5 par. 2 of the law on personal data protection); these six grounds are mentioned in the law, additionally legitimate data processing is possible in cases such as when the controller is providing personal data about a public-known person, functionary or employee of a government that are connected to his/her public or official activities or where a processing for a archiving is needed.

Additional grounds for processing sensitive data are connected with social and health security insurance, revealing criminal activities and processing data for archiving purposes. Additional protection is provided for information on genetic data or biometric data that is enabling direct identification of a subject (§4 par. b) of the law).

#### **(8) Other relevant documents/decisions:**

Not identified.

## 7. Denmark

### (1) Relevant laws and by-laws:

- Integrity in sports Act: this act of parliament sets out rule on anti-doping and match-fixing. It can be seen as a sports governance instrument.
- Order (Ministerial order) on integrity in sports: implements the latest WADA doping list and the WADA code in Danish law.
- Anti Doping Act: the act is a criminal law instrument, which aims to promote public health by prohibiting certain substances.
- Penal Code: specifies that organized or severe violations of the antidoping act or integrity in sports act may be punished by up to 6 years imprisonment.
- National Anti-Doping Rules: regulation adopted by the ADD, the Danish National Olympic committee, and DIF, the Sports Confederation of Denmark. It implements the World Anti-Doping Program (WADP) in Danish sport.
- Anti-doping rules in fitness and amateurs sports: rules adopted by Anti-Doping Denmark (ADD) and DIF/DG. It provides the basis for the ADD testing in and cooperation with non-elite sports organizations and commercial fitness centers.

### (2) Transposition of international documents:

The WADA code is implemented in sports law through the National Anti-Doping Rules. The rules are not legislation but binding for all contestants in elite sports. The rules are enforced by ADD and special tribunals established by the Sports Federation of Denmark.

The UNESCO and Council of Europe Anti-Doping Conventions have been ratified by Denmark, but these Conventions are not integrated in domestic law.

### (3) Status of the NADO:

Anti Doping Denmark is a self governing public institution with the task of promoting the fight against doping in sports. Anti Doping Denmark is a self governing public institution. It is funded by the government. The Minister of Culture appoints the 6 members of the board. ADD operates independently from the Government as the minister is unable to give directions to the board in specific matters.

### (4) Criminal Law:

WADA's Guidelines on Coordinating Investigations and Sharing Anti-Doping Information and Evidence have been implemented in the daily work of Anti Doping Denmark. ADD meets on a regular basis with law enforcement agencies and shares information of general nature (intelligence). ADD is allowed to pass on information to another agency, if this information is important to form the basis of a decision this agency has to make. (As a general rule, the police are not allowed to pass on information from ongoing criminal investigations).

**(5) Processing of personal information included in:**

The National Anti-Doping Rules.

**(6) Selection of athletes:**

The subjects are defined in the National Anti-Doping Rules section 1, as follows:

“1.2 Application to Persons 1.2.1 With the limitations imposed by Article 1.1, these National Anti-Doping Rules apply to all persons who: 1.2.1.1 Are members of associations under DIF’s federation, no matter where they are living or staying; 1.2.1.2 Participate in any capacity in any activities organized, held, convened or authorized by a federation under DIF or its affiliated members, clubs, teams, associations or leagues; and 1.2.1.2 Participate in any capacity in any activities organized, held, convened or authorized by the organizer of a national sports event or a national league that are not affiliated to a national federation. 1.2.2 Participants, including minors, are expected to accept, submit to and abide by these Anti-Doping Rules by their participation in sport. 1.2.3 Anti-Doping Denmark has established criteria for definition of national level athletes published on its website. National level athletes are athletes in Anti-Doping Denmark’s Registered Testing Pool and all athletes included in the list of national elite level athletes in all sports. The list of athletes included the national RTP and the list of athletes at national elite level are published on [www.antidoping.dk](http://www.antidoping.dk) and are updated yearly or as needed”.

**(7) Additional/different privacy and data protection regime:**

With respect to the processing of sensitive personal data the Act’s § 8 restricts disclosure of these kinds of data to any third party unless the data subject has given explicit consent, the disclosure takes place for the purpose of pursuing private or public interests which clearly override the interests of secrecy, including the data subjects interests, the disclosure is necessary for the performance of an authority’s administrative tasks or the disclosure is required for a decision to be made by that authority, or disclosure is necessary for the performance of tasks for an official authority by a person or a company.

Private persons or entities can only process these types of information if they have obtained the data subject’s explicit consent, or without explicit consent if the processing takes place for the purpose of pursuing public or private interests (including the data subject’s interests) if those interests clearly override the interests of secrecy. The same conditions apply with respect to a private person’s or entity’s disclosure of these categories of data to a third party.

Furthermore, these data can be processed if the conditions laid out in the Act’s § 7 (the implementation of article 8 of the Directive) are met.

The reason behind this additional protection, at least as it is stated in the preparatory works of the Act (Ministry of Justice's comments on § 8), is that the legislature desired to continue to provide the additional protection to these types of information that also had been provided by the previous registry acts.<sup>2</sup> However, since the Ministry of Justice had observed that the enumeration of categories of sensitive information in the Directive's article 8 was exhaustive, it was decided to place these additional data types in a separate provision instead of appending them to the list in the Act's § 7 (implementation of article 8).

**(8) Other relevant documents/decisions:**

Not identified.



## 8. Estonia

### (1) Relevant laws and by-laws:

- Sport Act: Paragraph 11 of this act of parliament, which can be considered a sports governance instrument, specifies rules on compliance with anti-doping rules.
- Criminal Law: the law establishes the sanction for illegal carriage of medical products across a state border (§194) and for inducing person to use doping (§195).
- Estonian Anti-Doping Rules: by-laws from the NADO incorporating the WADC.

### (2) Transposition of international documents:

The Copenhagen Declaration on Anti-Doping in Sport was approved by the Government of the Republic of Estonia on 5th of July 2007.

The Anti-Doping Convention provisions are transposed into Estonian Anti-Doping Rules.

### (3) Status of the NADO:

EADA was founded on 3rd of April 2007 and registered as a private foundation on 19th April 2007. The legal basis of EADA is the founding decision by the Estonian Olympic Committee and Estonian Anti-Doping Centre, and Statute of Estonian AntiDoping Agency

### (4) Criminal Law:

Anti-Doping Denmark (ADD) and the National Olympic Committee and sports Confederation of Denmark have both adopted the WADA's (World Anti-Doping Agency) World Anti-Doping Code in a unified set of National Anti-doping Rules. These Rules have been developed and implemented in accordance with WADA's Model Rules for NADOs.

Penal Code §195 (1) Prescribing a medicinal product for use as doping in sports, inducing a person to use a medicinal product as doping, or delivery of a medicinal product for administering as doping, is punishable by a pecuniary punishment or up to one year of imprisonment. (2) The same act if: 1) committed repeatedly; 2) committed against a person of less than eighteen years of age; is punishable by a pecuniary punishment or up to three years' imprisonment. (3) An act provided for in subsection (1) or (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.

The provision of the penal code does not differentiate between hard or soft drugs but says they cannot be used in sports without any medical necessity.

### (5) Processing of personal information included in:

Estonian Anti-Doping Rules.

## **(6) Selection of athletes:**

Estonian Anti-Doping Rules (EADR) do not distinguish non-professional and professional athlete. Distinction is: 1. Athletes and Athlete Support Personnel; 2. National-Level Athletes.

1.1. Athletes and Athlete Support Personnel are persons (regardless the person is an Estonian citizen or resident) (EADR 1.3.1): - any Athletes or Athlete Support Personnel who are members or licence holders of any Estonian National Federation or a member or affiliate organisation thereof (incl. clubs, teams, federations and leagues); - any Athlete or Athlete Support Personnel participating in Events, Competitions and other activities as an Athlete or Athlete Support Personnel organised, convened, licensed or recognised by any Estonian National Federation or a member or affiliate organisation thereof (incl. clubs, teams, federations and leagues), irrespective of the venue of the Event, Competition or other activities; - any other Athlete or Athlete Support Personnel or other Person who, in terms of anti-doping activities, belongs to any Estonian National Federation or falls within the jurisdiction of a member or affiliate organisation thereof (incl. clubs, teams, federations and leagues) on the basis of accreditation, a licence, any agreement or on other grounds; - any and all Athletes and Athlete Support Personnel participating in any activities organised, convened or licensed by an organiser of a National Event or national league not related to a National Federation; - any and all Athletes who are not covered by the previous provisions of Article 1.3.1 but who wish to participate in international or National Events (considering that under these Rules such Athletes must be available for Testing at least six months before they are deemed eligible for the aforementioned Events).

1.2. EADR 1.3.2 These Doping Rules also apply to any other Persons who according to the Code fall within the jurisdiction of the EADA, including all Athletes who are Estonian citizens or residents and Athletes who are in Estonia in order to compete or train or for any other purpose. 2.1. National-Level Athletes are (EADR 1.4.1.): (-) all Athletes in EADA's Registered Testing Pool; (-) all Athletes who are members or license-holders of a National Federation in Estonia or who participate in Events organized by a National Federation in Estonia; (-) all Athletes who are nationals of Estonia and compete at international level or in International Events or Competitions. If any of those Athletes is classified as an International-Level Athlete by their international federation, they are also considered International-Level (and not National-Level) Athletes for the purposes of these Rules. The conditions for inclusion in RTP, according to the EADR (20.4. The Code and International Standards constitute an integral part of these AntiDoping Rules and, in the event of a conflict, the Code and International Standards shall prevail.) are in WADA International Standard for Testing and Investigations.

## **(7) Additional/different privacy and data protection regime:**

Both TUE-applications and doping control forms are provided with the consent of the athlete to process the data by the anti-doping organisations and other relevant bodies.

Processing sensitive data should in principle be based on consent. According to the Data Protection Act of Estonia: § 10. Permission for processing personal data (1) Processing of personal data is permitted only with the consent of the data subject unless otherwise provided by law. § 14. Processing of personal data without consent of data subject (1) Processing of personal data is permitted without the consent of a data subject if the personal data are to be processed: 1) on the basis of law; 2) for performance of a task prescribed by an international agreement or directly applicable legislation of the Council of the European Union or the Eu-

European Commission; 3) in individual cases for the protection of the life, health or freedom of the data subject or other person if obtaining the consent of the data subject is impossible; 4) for performance of a contract entered into with the data subject or for ensuring the performance of such contract unless the data to be processed are sensitive personal data.

(2) Communication of personal data or granting access to personal data to third persons for the purposes of processing is permitted without the consent of the data subject: 1) if the third person to whom such data are communicated processes the personal data for the purposes of performing a task prescribed by law, an international agreement or directly applicable legislation of the Council of the European Union or the European Commission; 2) in individual cases for the protection of the life, health or freedom of the data subject or other person if obtaining the consent of the data subject is impossible; 3) if the third person requests information obtained or created in the process of performance of public duties provided by an Act or legislation issued on the basis thereof and the data requested do not contain any sensitive personal data and access to it has not been restricted for any other reasons.

**(8) Other relevant documents/decisions:**

Not identified.

## 9. Finland

### (1) Relevant laws and by-laws:

- Finnish Anti-Doping Code 2015 – the code is not an act, but a by-law set by the NADO and may bind an athlete only as a set of standard contract terms.
- Criminal law – the law emphasises the significance of the illegal import and dissemination of doping as offences.

### (2) Transposition of international documents:

The operations of NADO (FINADA) are regulated by UNESCO's International Convention Against Doping and the Council of Europe's Anti-Doping Convention, which have been ratified by the Finnish Parliament. Finland's Antidoping Code is based on the WADC.

### (3) Status of the NADO:

FINADA acts as an independent national organization in Finland. FINADA is private body, a nonprofit organisation that receives its funding from the Ministry of Education and Culture.

### (4) Criminal Law:

Import and dissemination of doping agents is regulated by Chapter 44 of the Finnish Criminal Code. It prohibits the illegal manufacturing, import and distribution of doping agents and their possession with the purpose of dissemination. Import and dissemination of doping agents is regulated by Chapter 44 of the Finnish Criminal Code. The use of doping agents is also subject to the Medicines Act and the regulations of the Criminal Code on smuggling, unlawful dealing in imported goods and narcotic agents. Doping agents according to the Criminal code are: • synthetic anabolic steroids and their derivatives • testosterone and its derivatives • growth hormones and • chemical substances that increase the production of testosterone, its derivatives or growth hormone in the human body. This list is considerably narrower than the list of prohibited medicinal substances in sport. This is due to the provisions of the Criminal Code on doping offences intending to protect against health risks related to the misuse of doping agents. Therefore, the Criminal Code only lists agents associated with a known medical risk.

### (5) Processing of personal information included in:

Finnish Anti-Doping Code 2015.

### (6) Selection of athletes:

According to Finnish Anti-Doping Code: 5.6.2 FINADA is working with international sports federations to determine athletes' connection to testing pools and whereabouts for the collection of their data. If an athlete is a covenant between nations, international registered testing pool and FINADA's national registered testing pool, FINADA and the International Federation shall agree which one of them is the athlete whereabouts information: the athlete does not

have to report the whereabouts. FINADA reviews and updates as necessary criteria for FINADA's Registered Testing Pool and a registered testing pool must be compatible with the criteria. FINADA will work with national federations to determine testing pool to eligible athletes. Athletes informed in writing of their inclusion or removal from the registered testing pool. 5.6.4 FINADA's athlete included in the testing pool is obligated to compliance with ISTI, until (a) the Athlete shall notify in writing to FINADA that he is no longer an athlete or (b) FINADA declares in writing that athlete is no longer in the FINADA's registered testing pool under the criteria, and that he is removed from the FINADA's registered testing pool.

APPENDIX 1: DEFINITIONS (LIITE 1: MÄÄRITELMÄT) from Finnish Anti-Doping Code: International-Level Athlete: Athletes who compete at the international level as determined by each International Federation, which is an international testing and investigation in accordance with the standard. National Level athlete: athlete who compete at national level, tested by each national anti-doping organization. International testing and investigation is in accordance with applicable standard. In Finland, a national-level athlete is defined in paragraph 1.3 - This Code applies to all natural persons, irrespective of nationality or place of residence, who are members or license holders of any of the national federation or members or affiliated organizations or participating in their organized, authorized by competitions or other events, or are the subject of a contractual arrangement, or otherwise contribute to a country's national federation or of the Member's or a sister's organization. Athlete: Any person, who is competing at the international level (such as each International Federation defines it) or national level (such as each National Anti-Doping Organization defines it). Anti-Doping Organization may at its discretion, apply antidoping rules to athletes, which is not an international level athlete or a national-level athlete. In the case of an athlete who is not an international and national level athlete, anti-doping organization can choose to do one of the following: to test to a limited extent or not at all, to analyze the samples not in whole the range of banned substances, require whereabouts information on a limited extent. However, some breaches, athlete who will compete under the international or national level is punishable under the Code sanctions (paragraph 14.3.2 with the exception).

**(7) Additional/different privacy and data protection regime:**

There are additional grounds for processing both normal and sensitive personal data. Also, with respect to the processing of personal data, additional grounds have been implemented, most importantly: 'there is a relevant connection between the data subject and the operations of the controller, based on the data subject being a client or member of, or in the service of, the controller or on a comparable relationship between the two (connection requirement)'.

**(8) Other relevant documents/decisions:**

Not identified.

## 10. France

### **(1) Relevant laws and by-laws:**

Code du sport (Articles L. 230-1s and R. 231-1s): the Sports Code is a Sports governance instrument that comprises criminal provisions.

### **(2) Transposition of international documents:**

France adopts, on a regular basis (2007, 2013, 2015), ordinances the provisions of which are incorporated into the French Sports Code, in order to comply with the developments of the World Anti-Doping Code.

### **(3) Status of the NADO:**

Article L. 232-5 of the Sports Code: “The AFLD, public independent authority with legal personality, sets out and implements anti-doping policies. To this end, it cooperates with the World AntiDoping Agency, with bodies recognized by the latter and having similar functions and powers, and with international sports federations.”

### **(4) Criminal Law:**

Article L. 232-9 of the Sports Code mentions WADA’s list of prohibited substances for athletes and provides that such list is published in the Official Journal of the French Republic.

Article L. 232-26 of the Sports Code provides that detaining, without medical reason, one or several of the prohibited substances for athletes may result in one year of imprisonment and in a fine of up to € 3 750.

It was pointed out, in the preparatory works for the 2006 Act, that the list of prohibited substances applicable in France would be that of WADA, since the Council of Europe’s list is the same as WADA’s (France ratified the Convention of the Council of Europe in 1990).

Article L. 232-11 of the Sports Code provides that, on top of the officials entitled by the criminal procedural code, officials under the authority of the Sports Minister and persons authorized by the French NADO and sworn in are entitled to carry out controls conducted by the French NADO or required by the World Anti-Dumping Agency, a NADO or international sports body.

Article L. 232-25 further provides that opposing these controls may result in 6 months of imprisonment and a fine of up to € 7 500.

The respective preparatory works for the 2006 and 2015 Acts both point out that they aim to strengthen international cooperation regarding anti-doping policy.

**(5) Processing of personal information included in:**

Code du sport lays down the rule and obligations with respect to gathering and analysis of the whereabouts information and the blood and urine samples.

**(6) Selection of athletes:**

Article L. 230-3 of the Sports Code defines an athlete as “any person who participates in or gets ready for 1° either a sports event organized by an authorized federation, 2° or a sports event subject to a declaration or authorization procedure foreseen by the Sports Code, 3° or an international sports event”.

**(7) Additional/different privacy and data protection regime:**

There seems no explicit link to the right to privacy in the French constitution. There a few additional grounds for processing sensitive data.

**(8) Other relevant documents/decisions:**

Opinion n° 2014-146 of 3 December 2014 was issued by the AFLD’s Board authorising the President to transfer to the competent authorities a draft of a regulatory act creating a processing of personal data entitled “therapeutic use exemptions delivered to athletes”<sup>1</sup>.

In this opinion, the Board defines the purpose of the draft i.e. integrating into French law Article 6.8 of the international standard relating to therapeutic use exemptions as of 1 January 2015 based on Article 4.4 of the World Anti-doping Code. This standard provides that the therapeutic use exemption committee’s decision “must be [...] made available to WADA and to other AntiDoping Organizations via ADAMS or any other system approved by WADA”.

The French DPA is consulted each time anti-doping legislation involves data protection. Its latest opinion is Opinion 2013-283 of 10 October 2013 on the draft of the regulatory act relating to the creation by the French NADO of a personal data processing system within the framework of the implementation of the biological profile of athletes. The French DPA viewed no objections based on data protection law to the adoption of the data processing system.

## 11. Germany

### (1) Relevant laws and by-laws:

- Act against doping in sport (Anti-Doping Act – AntiDopG): Sports governance, criminal law
- Anti-Doping Act of 10 December 2015 (Federal Law Gazette I, p. 2210): Sports governance, criminal law
- Arzneimittelgesetz in der Fassung der Bekanntmachung vom 12. Dezember 2005 (BGBl. I S. 3394): Criminal law
- § 100a Absatz 2 Nummer 3 der Strafprozessordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319): criminal procedural law
- § 1 Absatz 1 Nummer 6 der FIDEVerzeichnis-Verordnung vom 5. Oktober 2011 (BGBl. I S. 2057): Customs information system
- National Anti-Doping Code 2015: private rules NADO based on WADC

### (2) Transposition of international documents:

The Anti-doping code provides the foundation for the anti-doping activities to be carried out by the NADO. It does refer to the CoE Anti doping Convention (27-5-1992) (BGBl. 1994 II S. 334,335) and UNESCO Convention (19-10-2005) (BGBl. 2007 II S. 354, 355)) according to the memorandum (BT-Drs 18/4898 (Gesetzentwurf)) "Die Bundesrepublik Deutschland ist zudem durch das Internationale Übereinkommen vom 19. Oktober 2005 gegen Doping im Sport (BGBl. 2007 II S. 354, 355) und das Übereinkommen vom 16. November 1989 gegen Doping (BGBl. 1994 II S. 334, 335) völkervertraglich verpflichtet, Maßnahmen zur Dopingbekämpfung zu ergreifen." (BT-Drs 18/4898 p. 2)

### (3) Status of the NADO:

The NADO is a foundation (private law (Stiftung)). The State endorses/mandates NADO in the memorandum to the Anti-Doping Act, however no formal provision is found in the act itself.

### (4) Criminal Law:

The German Anti-Doping act refers to the UNESCO convention and contains a list of prohibited substances in an annex belonging to the act. The NADC 2015 also contains provisions about prohibited substances (article 4).

The Medicinal Products Act, Article 6a, also refers to prohibited substances in the context of doping in sport.

Finally, law enforcement organizations (public prosecutor, court) can inform the NADO about relevant criminal offences in their operation. (section 8 Anti-Doping Act).



**(5) Processing of personal information included in:**

National Anti-Doping Code.

**(6) Selection of athletes:**

This is not handled in the AntiDopG, but rather in the NADA Code 2015, the instrument adopted by the NADA. It follows the ISTI.

Registered Testing Pool: 'Cadre' status athletes of national sports federations, and A-cadre members of risk category A sports

National Testing Pool: A-Cadre members of risk category B and C sports, B-cadre of risk category A sports, members of the extended Olympic team.

General Testpool: all Bundeskaderatheltes not already in RTP or NTP.

Team Testpool: all athletes in national league games not in RTP, ATP, or NTP.

For a test pool, athletes with no management status who are connected to NADA's training control system pursuant to a control agreement of an organization.

**(7) Additional/different privacy and data protection regime:**

The 'general right of personality' is contained in Article 2 paragraph 1 GG, which reads: 'every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.' The Constitutional Court has also acknowledged a right to informational self-determination. NADA regulations contain special provisions for underage athletes.

**(8) Other relevant documents/decisions:**

Not identified.

## 12. Greece

### (1) Relevant laws and by-laws:

- Law 2725/1997 Amateur and professional sport and other provisions: law which can be seen as a sports governance instrument. It includes criminal law provisions.
- Law 4373/2016 Necessary adjustments to harmonize Greek legislation with the new Anti-Doping Code of World Anti-Doping Agency and other provisions: parliamentary law mainly focused on sports.
- Law 4049/2012 Tackling violence in stadiums, Doping, rigging of competitions and other provisions: This law amended provisions of law 2725/1999 and introduced amendment to art. 187 of the Greek Criminal Law Code.
- Law 3708/2008 Combating violence on the occasion of sporting events and other provisions: parliamentary law which amended provisions of law 2725/1999.
- Law 3516/2006 Ratification of the International Convention against doping in sport (Paris, 19.10.2005): parliamentary law ratifying the International Convention against anti-doping in Sport (UNESCO).
- Decree 3956/2012 Necessary measures and procedures, mechanisms and systems provided by the International Convention against doping in sports (Paris, 19/10/2005) and necessary arrangements for its implementation. (Official Gazette 343, 17.02.2012): joint Ministerial Decision (Ministry of Culture and Ministry of Tourism) which introduces measures and mechanisms necessary to implement the International Convention against doping in sport.
- Ministerial Decision 34912 (1)/2011 Determination of prohibited substances and methods of doping, within the meaning of Articles 128B and 128C of Law 2725/1999: this is a joint Ministerial Decision (Ministry of Health , Ministry of Culture and Ministry of Tourism) which specifies the list of prohibited substances and methods, as mandated by the Law 2725/1999.
- Ministerial Decision No. 39047/2009 (Official Gazette 1771 / 25.08.2009) Establishment of a Body of Samplers of the National Council for Combating Doping (ES-KAN): ministerial decision which appoints the members of the National Council of Combating Doping which had been established with the law 2725/1999.
- Ministerial Decision 19514/2005 Determination of audit procedures doping in athletes and any other necessary detail: ministerial decision describing the procedures, requirements and competent bodies for within and outside games doping controls.

### (2) Transposition of international documents:

The WADA Code and the Anti-Doping Convention of UNESCO are transposed into Greek legislation. Council of Europe and its Additional Protocol are mentioned in the preamble of the Greek law ratifying the UNESCO Convention.

### **(3) Status of the NADO:**

A private legal entity under the name of National Organization for Combating Doping (E.O.K.A.N.) is established, which shall be based in Athens, supervised by the General Secretariat of Sports and subsidized by it with regular annual grants. (Law 2725/1999, Article 128ΣΤ', as last amended by Article 11 of Law 4049/2012).

### **(4) Criminal Law:**

No information found.

### **(5) Processing of personal information included in:**

Ministerial Decision 19514/2005 and some provisions are included in Law 4373/201.

### **(6) Selection of athletes:**

The list of natural persons that are subject to monitoring activities is established in Law 4373/2016 (art. 2.3), which includes: a. All athletes and support staff of athletes who are members or license holders of any national federation in Greece or any club member or affiliated organization any national federation in Greece, included clubs, groups of associations or leagues. b. All athletes and support staff of athletes participating under any capacity in events, competitions and other sports activities, which are organized, convened, supported or recognized by any national federation of Greece, including clubs, sports companies, part-time paid athletes, c. Any other athlete or support staff support the athletes or any person which under an accreditation or license or any other contractual relationship is subject to the jurisdiction of any national federation in Greece or any member or affiliated organization of any national federation in Greece including clubs, sports, limited liability companies for the purposes of anti-doping. d. All athletes who are not in the foregoing provisions of this article but wish to be selected to participate in international or national events. The process of the compilation of the catalogue of athletes to be tested (RTP) is included in a regulation of the Greek NADO. The NADO requests from the sports federations in Greece to send a catalogue with the names of athletes with the most significant distinctions. It is then further refined according to sport and several additional criteria such as the level of the athlete, whether the athlete is already subject to testing by another body, any previous doping violations (or by his or her coach), the evolution of his or her results.

### **(7) Additional/different privacy and data protection regime:**

The Greek constitution protects privacy and data protection. It also specifies: 'Tortures, any bodily injury, impairment of health or exercise of psychological violence, as well as any other offense against human dignity are prohibited and punished as provided by law.'

Greek law contains additional grounds for processing sensitive data, such as: 'Processing is carried out by a Public Authority and is necessary for the purposes of aa) national security, bb) criminal or correctional policy and pertains to the detection of offences, criminal convictions or security measures, cc) protection of public health or dd) the exercise of public control on fiscal or social services.'

The Greek Data Protection law mentions minors in two instances: firstly, it mentions that the publication of criminal charges or convictions aims at the protection of community, of minors and of vulnerable or disadvantaged groups; secondly, the law provides from an exception from its application to the processing of personal data which is carried out, inter alia, by judicial public prosecution authorities which act under their supervision in the framework of attributing justice or for their proper operation needs with the aim of verifying crimes which are punished as felonies or misdemeanours with intent, and especially with the aim of verifying, inter alia, crimes against minors.

**(8) Other relevant documents/decisions:**

Not identified.

## 13. Hungary

### (1) Relevant laws and by-laws:

- 43/2011 (III. 23) Government decree about the rules on anti-doping related activities: the decree is a mixed sport law and criminal law.
- 99/2007. (V.8.) Government Decree on the declaration of the International Convention Against Doping in Sport: this decree deems the International Convention against doping in sport binding under national law.
- 2004. I. Act on Sport: the regulation underlines the importance of sport and the importance of fairness, also in terms of doping. A violation can result in criminal punishment as laid down by the government decree 43/2011 III. 23.
- 309/2015. (X. 28.) Government decree on the declaration of the amendment of Annex I. of the UNESCO International Convention Against Doping in Sport which has been accepted on 19th October 2005: government decree implementing the UNESCO treaty.
- 39/2004. (III. 12.) Government decree on disciplinary liability in sports: the decree regards the procedural liabilities during sport disciplinary proceedings (incl. proceedings about the use of doping).

### (2) Transposition of international documents:

The International Convention against Doping in Sport of the UNESCO is implemented into national legislation via Government Decree 43/2011. Through this Hungary as a signatory State to the Convention also aligned its domestic rules with the World Anti-Doping Code. The Anti-Doping Convention from 1989 of the Council of Europe has been accepted and implemented into Hungarian national law in 2003 by the Law (nr.) LXXVIII of the year 2003.

### (3) Status of the NADO:

It is a public organization. The legal basis is 43/2011 (III. 23) Government decree about the rules on anti-doping related activities.

### (4) Criminal Law:

There is no explicit link between the anti-doping list and the list of substances prohibited via criminal law. But it is explicit that any athlete caught using doping will be exposed to criminal investigation.

The Guidelines to help Anti-Doping Organizations are referenced in the government decree 43/2011. In the Hungarian law nr. XXXIV of 1994 on the Police, § 33 (2) c) refers to the fact that the police are entitled to call upon/assess the competitor during doping investigations. Furthermore, in 2013 a co-operation agreement has been developed between Hungarian National Police Headquarters (ORFK) and HUNADO regarding the prosecution of crimes carried out using illegal performance enhancers as defined in the Criminal Code.

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**(5) Processing of personal information included in:**

43/2011 (III. 23) Government decree about the rules on anti-doping related activities.

**(6) Selection of athletes:**

According to Art. 2 (n) of the Government decree 43/2011 the following athletes are considered to participate in doping testing and are qualified as professional athletes: - The adult and the first consequent members of the junior age group who are part of the international national team. - Competitors at international sport competitions - On country championships the first three ranked competitors

According to Art. 2 2.1 (2) of the rules of the Hungarian Olympic Committee (MOB): - All members of the Olympic team (the number of members from a given sport disciplines are defined by the relevant sport disciplinary committee). An athlete can be included in the Registered Testing Pool (RTP), National Testing Pool (NTP). Those athletes can join National Registered Testing Group and the domestic whereabouts registration information system, that are identified as top athletes by the given sport disciplinary committee. Any athlete can be included in the National Registered Testing Pool if he is expected to potentially win an international competition medal/scores, member of the national team, has produced a sharp increase in performance in a short time in the past, has been subject to proceedings due to his/her doping offense, was or is currently sentenced due to having committed a doping offence. Only athletes above 16 years old are registered.

**(7) Additional/different privacy and data protection regime:**

In 2011 the new Data Protection Act has been laid down in the Act on informational self-determination and the freedom of information.

There is additional protection for minors. The law states that a minor of the age of 16 is mature enough to decide about its personal data without parental consent or subsequent approval. For the consent of minors between the age of 14 and 16 a subsequent approval of their legal representative is required, except those data processing activities when the representative can only acquire advantage. All consent of children under the age of 14 years is void. To the processing of their data only their legal representative can give consent.

**(8) Other relevant documents/decisions:**

The NADO provides on its website a form indicating what will happen to one's data after an athlete provided consent to the processing of his/her data that has been registered during doping tests. Furthermore they indicate that the International Standard for the Protection of Privacy and Personal Information of WADA applies including any additional rights for athletes that stem from these standards. In line with this the HUNADO also states in which international/national fora an athlete can issue a complaint against HUNADO in case the athlete has data protection or privacy concerns stemming from the activities of HUNADO (as a data controller).

On May 11, 2016 the Hungarian Supreme Court issued a decision in the case of the athlete Fazekas Róbert concerning his doping use, and that he deserves maximum penalty as for the use of doping/drugs only zero tolerance is acceptable. Within this judgement the court underlined the importance of data processing that is in line with data protection rules.

## 14. Ireland

### (1) Relevant laws and by-laws:

- Sport Ireland Act 2015 (Part 4) - sports governance instrument –
- Irish Sports Council Anti-doping Rules 2015 - Rules passed by a statutory body, pursuant to the abovementioned Act of Parliament; Sports governance instrument -

### (2) Transposition of international documents:

Section 41 of the Sport Ireland Act 2015 specifies that Sport Ireland shall perform the functions and obligations of such an organisation referred to in the following: (a) the World Anti-Doping Code; (b) the UNESCO Anti-Doping Convention; (c) the Irish Anti-Doping Rules.

The Anti-Doping Rules 2015 specify that the prohibited list is the list of prohibited substances published by WADA, and amended from time to time. Any amendments are automatically incorporated into the Irish rules within 3 months of publication by WADA, without any further action being necessary at national level.

### (3) Status of the NADO:

Sport Ireland is a statutory body established pursuant to the Sport Ireland Act 2015.

### (4) Criminal Law:

NADO has no powers of criminal enforcement or prosecution. To give NADO such powers would require rules of procedure which would reflect the criminal nature of such a function

- Section 42(4) the Sport Ireland Act 2015, gives Sport Ireland the power to provide information (including personal data) to and receive information from certain organisations such as the police and the revenue commissioners, for the relevant purposes mentioned in the Act.
- Article 5.8.2 of the Anti-Doping Rules states that “Investigations may be conducted in conjunction with and intelligence and/or information obtained in such investigations or otherwise may be shared with, other Anti-Doping Organisations, law enforcement authorities and other regulatory or disciplinary authorities.”
- Article 5.8.3 provides “The Irish Sports Council may also share with and receive intelligence and/or information from other Anti-Doping Organisations, law enforcement authorities and other regulatory or disciplinary authorities.”

### (5) Processing of personal information included in:

Sport Ireland Act 2015 (Part 4).



## **(6) Selection of athletes:**

Article 1.3 of the Anti-Doping Rules state that they apply to: - All Athletes and other Persons who are members or licence holders of a National Governing Body and/or of a member or affiliate organisation or licensee of a National Governing Body which shall be deemed to include a club, team, association or league; - All Athletes and other Persons participating as such in an Event, Competition or other activity organised, convened, authorised or recognised by a National Governing Body and/or by a member or affiliate organisation or licensee of a National Governing Body which shall be deemed to include a club, team, association or league; and - All Athletes and other Persons who are subject to the authority and/or jurisdiction of a National Governing Body.

According to the Anti-Doping Rules, Sport Ireland shall define the criteria for Athletes to be included in the Registered Testing Pool. From time to time, it shall publish those criteria as well as a list of the Athletes meeting those criteria and so included in the Registered Testing Pool at the time of publication. The current criteria are: - Athletes on the carding scheme in the Contract, World Class and International categories - Athletes in the developmental category from high risk sports listed in the Council's Test Distribution Plan and other sports targeted by the Council - Olympic or Paralympic Qualifiers - Athletes who are included in an International Federation RTP - Any athlete currently serving a period of ineligibility - Any athlete who wishes to return from retirement and was previously in the Registered Testing Pool - Any other athlete that is required to be target tested under Clause 4.4.2 of the International Standard for Testing

A non-RTP athlete is an athlete who is not part of the Registered Testing Pool but still competes at a national and or international level and may be subject to a doping control in competition.

National Testing Pool Athletes (NTP Athletes) are athletes who are on teams in team sports including Senior Inter-County in GAA, Division 1A&B in Men's Rugby, Mens and Womens Super League in Basketball and Senior Inter-County Camogie. Athletes who are in National Squads in certain sports including Swimming, Triathlon, Athletics, Cycling, Boxing.

## **(7) Additional/different privacy and data protection regime:**

No explicit specific provision in the Irish Constitution concerning privacy, data protection or bodily integrity. The right to privacy and the right to bodily integrity are generally considered to be unenumerated rights.

The Irish Data Protection Act provides that if the data subject, by reason of his or her age, is or is likely to be unable to appreciate the nature and effect of such consent, it may be given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject and the giving of such consent is not prohibited by law.

## **(8) Other relevant documents/decisions:**

Not identified.

## 15. Italy

### (1) Relevant laws and by-laws:

- Law 522/1995 Ratification and implementation of the Anti-Doping Convention (Strasbourg 16 November 1989) - Sport governance instrument –
- Law 230/2007, Ratification and implementation of the international convention against doping in sports adopted at the UNESCO General Conference the 19 of October 2005
- Sports Anti-Doping Rules – provides 1) Sport Anti-Doping Code; 2) Procedural Guideline on Testing and Investigations; 3) Procedural Guideline on the Exoneration for Therapeutic Aims; Administrative rules –
- Health protection instrument - Act 376/2000 has two aims: firstly, to protect health in sport; secondly, to fight against doping –
- Health protection instrument - Ministerial decree which reviews the list of drugs and medical practices which constitute doping in accordance with Article 1 of the law 2000/37, law 2007/230 and law 1995/522 -

### (2) Transposition of international documents:

Law 1995/522 ratified and implemented the Anti-Doping Convention (Strasbourg, 16.XI.1989). The WADA code has been transposed into the Italian sports law by Law 2007/230 which ratified and implemented the International UNESCO Convention; it introduced the Code and the WADA's International Standards. The above-mentioned Sports Anti-Doping Rules are technical standards for the implementation of WADA's Code and WADA's International Standards in Italy.

### (3) Status of the NADO:

CONI – Italian National Olympic Committee, is the NADO in Italy. It is a public law entity.

### (4) Criminal Law:

Article 23 of the Sports Anti-Doping Rules / Procedural Guideline on Testing and Investigations, refers to the cooperation between the NADO-Italy and the Carabinieri Corps - NAS (Nucleo Antisofisticazioni Sanità – Against Adulteration Squad, a specific department of the Carabinieri which acts to protect health and it is responsible for controls of foodstuff, drink, medicines, etc...), in anti-doping investigations and in fighting anti-doping rules violation.

### (5) Processing of personal information included in:

The Anti-Doping Code and Procedural Guideline on Testing and Investigations.

#### **(6) Selection of athletes:**

Sports Anti-Doping Rules, under the section Definition, provide a general definition of athlete - everyone who practices sport under the auspices of the International Federation and / or the Italian National Olympic Committee (CONI). International-level athlete are those people who participates in sport activities at international level, defined as such by their International Federations in line with the International Standard for Testing and Investigations (ISTI). National-level athletes are those people not included in their International Federation's RTP participating in sport activities at national level.

Article 4 (Management of the Registered Testing Pool) of the Sports Anti-Doping Rules, Procedural Guideline on Testing and Investigations, establishes the criteria for a sportsperson to be included in the RTP and how to establish a NTP. Whereabouts provisions are applicable to athletes included in the Registered Testing Pool.

#### **(7) Additional/different privacy and data protection regime:**

The Italian Constitution recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.

Consent is the basic ground for processing sensitive data; exceptions can be made. Section 26, paragraph 5 of the Personal Data Protection Code states that data disclosing health may not be disseminated.

#### **(8) Other relevant documents/decisions:**

Not identified.

## 16. Latvia

### (1) Relevant laws and by-laws:

- Cabinet of Ministers Regulation No 820, dated 19 October 2011, “Doping Control Procedures” - Sports governance instrument -
- Likums “Par Eiropas padomes Antidopinga konvenciju Nr.135” – Law adopting the Council of Europe’s Anti-Doping Convention, as well as its Annexes -
- Likums “Par Antido-pinga konvencijas papildprotokolu” – Law adopting the Additional Protocol to the Anti-Doping Convention –
- Likums “Par Starptautisko konvenciju pret dopingu sportā” – Law adopting the International Convention against Doping in Sport–
- Administratīvo pārkāpumu kodekss – Administrative law providing sanctions for violations of anti-doping rules –
- Sporta likums – Law setting out general obligations for institutions and athletes to comply with anti-doping rules –
- Ministru kabineta 2012. gada 4. decembra noteikumi Nr. 821 “Valsts sporta medicīnas centra nolikums” – Cabinet of Ministers Regulation; statutes of the institution responsible for carrying out doping control –

### (2) Transposition of international documents:

Latvia has ratified the Anti-Doping Convention and acceded to the International Convention against Doping in Sport, it is also a signatory to the Copenhagen Declaration (as of 12 January 2004). In Latvia the Anti-Doping Convention (Strasbourg, 16.XI.1989) came into effect on 1 March 1997 as provided in the Law “On the Council of Europe Anti-Doping Convention No 135a” (Likums “Par Eiropas padomes Anti-dopinga konvenciju Nr.135a) which transposes (cites) the provisions of this Convention. While its additional protocol came into effect on 1 April 2004 as provided in the Law “On the Additional Protocol to the Anti-Doping Convention” (Likums “Par Anti-dopinga konvencijas papildprotokolu”) which cites the provision of the protocol. The International Convention against Doping in Sport came into effect in Latvia on 1st February 2007 as per the Law “On the International Convention Against Doping in Sport” (Likums “Par Starptautisko konvenciju pret dopingu sportā) citing the provisions of the Convention. Latvia is also a signatory to WADA’s World Anti-Doping Code. Although the World Anti-Doping Code is not directly implemented in Latvian law, the State Sports Medicine Centre (institution carrying out doping controls in Latvia) considers the Code to be binding through Art. 4 of the International Convention against Doping in Sport.

Latvian law holds numerous references to both the International Convention against Doping in Sport and the Anti-Doping Convention. For example, para. 2 of the Doping Control Procedures states that the prohibited doping substances and doping methods shall be approved in conformity with Annex 1 “Prohibited List – International Standard” to the International Convention Against Doping. Para. 9 of the Doping Control Procedures states that the Commission of Therapeutic Use shall act in conformity with the principles laid down in Annex 2 “Standards for Granting Therapeutic Use Exemptions” to the International Convention against Doping in Sport. While para. 38 of the Doping Control Procedures provides that doping control samples have to be sent to laboratory which has been accredited in accordance with the crite-

ria laid down by the monitoring group of the Anti-Doping Convention of the Council of Europe. The Sports Law sets out the ministries responsible for implementation of the provisions of the International Convention against Doping in Sport and the Anti-Doping Convention of the Council of Europe. Furthermore, this law puts obligations on athletes, sports federations and sports employees to comply with the rules of the anti-doping conventions.

### **(3) Status of the NADO:**

The organization responsible for performing doping tests on athletes in Latvia is the State Sports Medicine Centre. However, doping controls are initiated and decisions on whether an anti-doping violation has occurred are taken by the Anti-Doping Committee. Doping control measures is coordinated by the Anti-Doping Committee which is an advisory body in the field of doping control. The Minister for Health approves the personnel of the Anti-Doping Committee.

### **(4) Criminal Law:**

The list of prohibited doping substances and methods is independent from the list of prohibited substances under criminal law (which is contained in Cabinet of Ministers Regulation No 847, dated 8 November 2005 “Regulations regarding Narcotic Substances, Psychotropic Substances and Precursors to be Controlled in Latvia”), although the two share some substances.

Para. 45 of the Doping Control Procedures states that if the presence of substances referred to in Paragraph 8, 9 or 10 of Annex 1 (i.e., Stimulants, Narcotics, Cannabinoids) are detected in the blood or urine sample of an athlete, the Anti-Doping Committee shall send a report to law enforcement authorities.

### **(5) Processing of personal information included in:**

Cabinet of Ministers Regulation No 820, dated 19 October 2011, “Doping Control Procedures”.

### **(6) Selection of athletes:**

According to para. 10 of the Doping Control Procedures, the Anti-Doping Committee is entitled to initiate doping control on athletes during and out of competitions. Art. 1 of the Sports Law defines an athlete as a natural person who engages in sport and takes part in sports competitions.

The Anti-Doping Committee may initiate doping control on athletes according to the doping control plan developed by State Sports Medicine Centre, or on the basis of a request submitted by appropriate subjects (listed in para. 10.2. of the Doping Control Procedures, namely, the relevant sports federation of the sports type represented by the athlete and recognised in Latvia or international federation, the Latvian Olympic Committee, the Council of the Latvian Sports Federations or the Ministry of Education and Science). According to para. 11 of the Doping Control Procedures the State Sports Medicine Centre includes in doping control plan the following athletes:

- athletes included in RTP;

- other athletes, while considering the location and time of their training sessions and competitions, accomplishments in sport, previous doping controls and their respective results, the possibility of the representatives of the particular sports discipline to be associated with use of doping, and other information.

Anti-doping Committee includes in the RTP athletes of the Latvian Olympic Team, as well as athletes who have committed anti-doping violations within the past year (para. 11.1. of the Doping Control Procedures). No further categorization of testing pools exists in Latvia.

**(7) Additional/different privacy and data protection regime:**

The main legislative act transposing the Data Protection Directive is the Personal Data Protection Law (*Fizisko personu datu aizsardzības likums*). Separate provisions of the Data Protection Directive have also been implemented in the Criminal Law.

Article 25 of the Personal Data Protection Law the State Sports Medicine Centre as a data controller must use the necessary mandatory technical and organizational measures in processing personal data. Such measures are prescribed by the Cabinet of Ministers Regulation No. 40, dated 30 January 2001 “Mandatory Technical and Organizational Requirements for Protection of Personal Data”.

**(8) Other relevant documents/decisions:**

Latvian representatives of Ministry of Health and Ministry of Education and Science (which also governs anti-doping) on 10-11 May 2012 attended the meeting of the EU Education, Youth, Culture and Sport Council meeting in Brussels, Belgium. The Latvian delegation expressed an opinion that the most significant challenges EU and its Member States face regarding anti-doping is to ensure that the fight against doping does not violate universal human rights (right to privacy, protection of personal data, freedom of movement), and on the other hand, to guarantee that the fight against doping is maintained and improved, in order not to allow the legalizing of doping use. When asked on how to strike a balance between the privacy of athletes on one hand and the interests to fair and safe sport on the other, the Latvian delegation replied that it is necessary to strengthen the fight against doping on an educational and informative level, while also making doping controls.

It is also worthwhile to note that the State Sports Medicine Centre as a controller of personal data has registered its data processing with the Data State Inspectorate. According to our information this registration includes the purpose of performing anti-doping testing.

There are plans by the Latvian government institutions to re-work the institutional model of anti-doping controls till year 2021. This would include new laws and regulations in the sphere of anti-doping, including new procedures for decision-making and dispute resolution.

## 17. Lithuania

### (1) Relevant laws and by-laws:

- Law on Ratification of the International Convention against Doping in Sports No. X-591 of 2 May, 2006 - Sports governance instrument –
- Order of the Director of the Public institution Lithuanian Anti-doping Agency on the adoption of the Anti-doping Rules of 23 December 2014 No. V-3 - Sports governance instrument –
- Resolution of the Parliament of Lithuania on Ratification of the Council of Europe Anti-Doping Convention No. I-1087 of 7 November 1995
- Law on Physical Education and Sports - Sports governance instrument -
- Law on control of certain doping substances No. XIII1672 of 7 May 2015 - Sports and health governance instrument –
- Order approving the lists of certain doping substances No. V-1325 of 24 November 2015 - Order of the Minister of Health, concerning sports and health governance –
- Code of Administrative Offences - Administrative law –
- Criminal Code - Criminal law -

### (2) Transposition of international documents:

On 10 July 2004, the Government of Lithuania signed the Copenhagen Declaration on Anti-Doping in Sport. Lithuania has ratified the UNESCO International Convention against Doping in Sport and accepted the World Anti-Doping Code. The Anti-Doping Rules (adopted by the Order of the Director of the Public Institution Lithuanian Anti-Doping Agency on 23 December 2014 No. V-3) make reference to the World Anti-Doping Code and are in accordance with the Code as well as the international standards adopted as of 1 January 2015. The Rules also take into account the International Convention against Doping in Sport.

### (3) Status of the NADO:

According to Article 46 (6) of the Law on Physical Education and Sports, on 27 July 2005, the Department of Physical Education and Sports under the Government of the Republic of Lithuania established the Public Institution Lithuanian Anti-doping agency to conduct control of doping agents and doping methods in the Republic of Lithuania. Public institution is a legal person that works for the public interest. It can carry out commercial activities as well, but the use of its profit is limited to its own activities.

### (4) Criminal Law:

Order of the Minister of Health Approving the Lists of Certain Doping Substances No. V1325 of 24 November 2015 implements the Law on Control of Certain Doping Substances No. XII-1672 of 7 May 2015 and defines substances that are limited in circulation and allowed only for the purposes of health, veterinary, sciences, education and law enforcement in accordance with the law. The list refers to the substances that are specified and outlined in the List of prohibited substances of the International Anti-Doping Convention.

Article 449 of the Code of Administrative Violations sets administrative sanctions (a fine and confiscation of certain doping substances) for a natural person or the head of the legal person who unlawfully produces, processes, acquires, stores, transports, forwards certain doping substances specified in the Law on Control of Certain Doping Substances in small amounts without the aim to sell or otherwise distribute them.

Article 199.2 of the Criminal Code on Smuggling foresees sanctions (a fine or arrest or imprisonment for a term of up to six year) for a person who fails to go through the customs control or otherwise avoids this control or has no permission to transport across the state border of the Republic of Lithuania, certain doping substances specified in the Law on Control of Certain Doping Substances.

Article 160 of the Criminal Code: a person who involves a minor in the use of certain doping substances specified in the Law on Control of Certain Doping Substances for purposes other than medical treatment shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up three years.

Article 276(1) of the Criminal Code: states that a person who unlawfully produces, processes, acquires, stores, transports, forwards certain doping substances specified in the Law on Control of Certain Doping Substances with the aim to sell or otherwise distribute them shall be punished by a fine or by arrest or by imprisonment for a term of up to four years. A legal entity shall also be held liable for the acts provided for in this Article.

Article 276(2) of the Criminal Code: a person who unlawfully distributes certain doping substances specified in the Law on Control of Certain Doping Substances to minors for purposes other than medical treatment shall be punished by arrest or by imprisonment for a term of up to three years.

Article 276(3) of the Criminal Code: a person who assists a minor in the acquisition of, forces, induces or otherwise habituates him to the use of certain doping substances specified in the Law on Control of Certain Doping Substances for purposes other than medical treatment shall be punished by a fine or by arrest or by imprisonment for a term of up two years.

The NADO has the duty to cooperate with other relevant national organizations and agencies and other anti-doping organizations. No other specific programmes were identified during the research.

#### **(5) Processing of personal information included in:**

The Anti-Doping Rules (adopted by the Order of the Director of the Public Institution Lithuanian Anti-doping Agency of 23 December 2014 No. V-3).

#### **(6) Selection of athletes:**

Annex 1 of the Anti-Doping Rules: Athlete is any Person who competes in sport at the international level (as defined by each International Federation), or the national level (as defined by each National Anti-Doping Organisation). An Anti-Doping Organisation has discretion to apply anti-doping rules to an Athlete who is neither an International Level Athlete nor a Na-



tional Level Athlete, and thus to bring them within the definition of "Athlete". In relation to Athletes who are neither International-Level nor National-Level Athletes, an Anti-Doping Organisation may elect to: conduct limited Testing or no Testing at all; analyse Samples for less than the full menu of Prohibited Substances; require limited or no whereabouts information; or not require advance TUEs. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any Athlete over whom an Anti-Doping Organisation has authority who competes below the international or national level, then the Consequences set forth in the Code (except Article 14.3.2) must be applied. For purposes of Article 2.8 or 2.9 and for purposes of anti-doping information and education, any Person who competes in sport under the authority of any Signatory, government, or other sports organisation accepting the Code is an Athlete.

Art. 5.4. of the Anti-doping rules: In compliance with the requirements of the international Standard for Testing and investigations and coordinating its actions with other anti-doping organizations that carry out the testing of the same athletes, the Agency develops and implements an effective, intelligent and proportionate test distribution plan that prioritizes appropriately between disciplines, categories of athletes, types of testing, types of Samples collected, and types of Sample analysis. The Agency shall provide WADA upon request with a copy of its current test distribution plan.

The Agency published some (not very detailed) information (rules) on the drafting of the Registered Testing Pool (RTP) on its website, which is essentially following the Lithuanian Anti-doping Rules, in accordance with the WADA Code and the WADA ISTI. According to the information on the website – according to Article 4.3 of ISTI, the Agency sets the following criteria for the athletes included into the RTP:

1. First group – all athletes who are part of national teams in Olympic sports and recognised national federations;
2. Second group – six male and six female best athletes from all sports and different categories.
3. Third group – other athletes that are not mentioned above.

The priority is given to targeted testing. The lists are renewed by the Agency every year.

**(7) Additional/different privacy and data protection regime:**

Instead of referring to the public interest, the Lithuanian Law on Legal Protection of Personal Data specifies: ‘processing is necessary for the exercise of official authority vested by laws and other legal acts in state and municipal institutions, agencies, enterprises or a third party to whom personal data are disclosed.’ The Law contains several additional grounds for processing sensitive data, such as when the data are necessary in order to prevent and investigate criminal or other illegal activities and when it is a legal obligation of the data controller under laws to process such data.

**(8) Other relevant documents/decisions:**

Not identified.

## 18. Luxembourg

### (1) Relevant laws and by-laws:

- Article 16 “Fight against doping” of the law on sport adopted on 3 August 2005, published 17 August 2005 in Memorial A under number 131 (A-n°131). - Sports governance instrument that includes a criminal law provision –
- Luxembourg Anti-Doping Agency Code (hereinafter ALAD) – Regulation by NADO which transcribes the rules and principles of the World Anti-doping Code –
- Ratification act A-n°31 – Ratifies the Council of Europe Anti-doping Convention -
- Ratification act A-n°206 – Ratifies the UNESCO Convention -

### (2) Transposition of international documents:

Luxembourg has adopted the UNESCO Convention by ratification act A-n°206. Consequently, the World Anti-Doping Code applies in national law. Further, the rules of the World Anti-Doping Code have been transcribed by ALAD in its Anti-Doping Code. In regard to the Council of Europe Convention: it has been adopted in national law by ratification act A-n°31. Hence, the Convention also applies in national law. In addition, Article 16 of law on sport (A-n°131) refers explicitly to the Council of Europe Convention, in particular to the Annex “SUBSTANCES AND METHODS PROHIBITED AT ALL TIMES”.

### (3) Status of the NADO:

NADO has been installed by a joint decision of the Minister of Sports and the Luxembourg Olympic and Sport Committee to create a “foundation” called Luxembourg Anti-doping Agency. (Grand Ducal decision A-n°15 of 28 January 2015: fight against doping, ALAD are under the duties of the Minister of Sports)

ALAD is an independent organ. Law of 4 March 1994 (A-n°17) states that a foundation has a legal personality.

### (4) Criminal Law:

Article 16 paragraph 3.3. of Law on sport states that the administrator of a substances of the WADA list will be sentenced from 8 days to 3 years imprisonment and/or to a fine from 1.250 euros to 50.000 euros. If the substance is administrated to a minor, the imprisonment sentence can increase up to 5 years and the fine up to 75.000 euros.

In regard to Article 16 of Law on sport (A-n°131), only the grand-ducal police, the judicial police and the customs are competent in accordance with the procedure established by Law of 19 February 1973 (A-n°12) on sell of medicinal substances and the fight against drug addiction. Article 16 paragraph 6 on Law on sport (A-n°131) refers to the NADO in regard to its sanction power on the disciplinary level.

According to the annual activity report of the Ministry of Sports for the year 2015, ALAD collaborates actively with customs, the police, the prosecutor and the Health Ministry. But no specific program has been found.

Article 61 of ALAD Code states that ALAD instructs any fact that may constitute a breach of an anti-doping rule and it refers any violation to the judicial body, in this particular case the Disciplinary Board (which sentences are appealable before the Superior Disciplinary Board).

**(5) Processing of personal information included in:**

Luxembourg Anti-Doping Agency Code.

**(6) Selection of athletes:**

According to Article 2 paragraph 4 of UNESCO Convention, a professional athlete is: any person who participates in sports activities at an international and national level as defined by the national anti-doping organization. Thus the ALAD Code gives a definition of international and national level athletes:

- International level athletes: athletes classified by their international federations as international level athletes.
- National level athletes:
  - o Members of the Luxembourg Olympic and Sporting Committee
  - o Members of the elite sporting department of the army
  - o In collective sports, members of the first-team set-up within clubs playing in the national highest league
  - o In individual sports, athletes selected by their federation and the Luxembourg Olympic and Sporting Committee to take part in international sporting events

Sportspersons that belong to the ALAD list of “groupe cible de sportif”, and that can be controlled at any time within or without competition by ALAD, are high-level athletes: they have a license, and they compete nationally and internationally. The conditions to be included in a Testing Pool are not specified; Article 5.6.2 of the ALAD Code only states the ALAD follows certain “criteria”. Athletes that are members of the elite team of the Luxembourg Sports and Olympic Committee and the sport section of the army belong automatically to the “groupe cible de sportif”.

**(7) Additional/different privacy and data protection regime:**

With respect to the processing of sensitive data, additional grounds are contained in the Data Protection Act, among others when data processing is in the public interest in particular in a historical, statistical or scientific perspective or if required by a Grand-Ducal Regulation for the purposes of: (a) general order, (b) public security, defence and national security or (c) criminal law in accordance with international conventions or with Interpol.

**(8) Other relevant documents/decisions:**

On its website, the NADO states: Regularly, ALAD conducts controls within and outside competitions in Luxembourg. They are planned with a high level of confidentiality in order to respect the protection of the controlled athletes' data. The results are published anonymously.

ALAD Code: Article 5.9.4 : In regard to the collecting of samples, the identity of the athletes needs to be protected and must not appear on the material.

## 19. Malta

### (1) Relevant laws and by-laws:

- Anti-Doping Regulations 2015 (L.N. 17 of 2015) - Sports governance instrument, can be considered as a form of secondary legislation passed (by executive rather than legislature) in exercise of powers conferred by the Sports Act –
- Sports Act (Chapter 455) - Sports governance instrument -

### (2) Transposition of international documents:

The Anti-Doping Regulations refer to the WADA Code, and adopt and incorporate it. The UNESCO Convention is defined in the interpretation of the Regulations (Article 2) but not actually mentioned in the substantive provisions. No reference to the Council of Europe Convention.

### (3) Status of the NADO:

The Anti-Doping Commission (established by Minister, as envisaged by Regulation 2 of the Anti-Doping Regulations). The legal status of the Commission is unclear. It is established by the Minister, pursuant to Anti-Doping Regulations, in exercise of powers conferred by the Sports Act.

### (4) Criminal Law:

The Sport Act (Article 55(2)) provides: “Any person who fails to comply with the provisions of any regulations providing for anti-doping measures or regulating or prohibiting the unsanctioned use of prohibited substances or regulating behaviour in sport facilities shall on conviction be liable to imprisonment for a term of not less than three months but not exceeding ten years or to a fine (multa) of not less than four hundred and sixty-five euro and eighty-seven cents (465.87), but not exceeding twenty-three thousand and two hundred and ninetythree euro and seventy-three cents (23,293.73) or to both such imprisonment and fine.”

Article 51 of same notes: “For the purposes of the Criminal Code and of any provisions of a penal nature, the members of SportMalta, and of any directorate, management committee, advisory committee, as well as of the Sport Appeals Board and every officer or employee of SportMalta, shall be deemed to be public officers.

### (5) Processing of personal information included in:

Anti-Doping Regulations 2015.

### (6) Selection of athletes:

The Anti-Doping Regulations provide a definition for “Athlete” which refers to “any person who competes in sport at international level as defined by each international federation or at national level as defined by each national anti-doping organization”.

The Anti-Doping Commission is also given the discretion to bring other athletes within the definition of Athlete, so as to ensure they are treated in the same way as those who fall into the above definition.

**(7) Additional/different privacy and data protection regime:**

Not identified.

**(8) Other relevant documents/decisions:**

Not identified.

## 20. The Netherlands

### (1) Relevant laws and by-laws:

- Anti-Doping regulations - Rules issued by a foundation established by private law –
- Customs law – Law specifying that trafficking certain drugs can be illegal –
- Law on medicines – Law specifying that the production of certain drugs without qualification can be illegal -

### (2) Transposition of international documents:

De WADA Code is adopted in the rules of a foundation established by private law. This might change, however; as there is now a Bill before parliament, that proposes to make the Anti-Doping organization of the Netherlands a governmental organization (zelfstandig bestuursorgaan), invested with the public task of combatting doping in sports. Mostly, it seems that the WADA rules are directly followed by the Netherlands, although the UNESCO Convention is also referred to a number of times. The Dopingautoriteit makes direct reference to WADA's list of prohibited substances and methods, and includes it as an attachment to its Doping regulation.

### (3) Status of the NADO:

Private law organisation with no public task.

### (4) Criminal Law:

Combating drugs and drug trafficking is a task of the Police .

The Dopingautoriteit seems to cooperate with law enforcement organizations. This is also confirmed by the Council of Europe report on the Netherlands: '4.1.13 Have any measures been taken to ensure the co-ordination between police services, border control, pharmaceutical inspections and justice in trafficking of doping substances? Answer of Netherlands: Yes there have been some research to the co-ordination'

The Regulation holds, among others, that the Dopingautoriteit is authorized: 'to cooperate with police, judiciary, customs, the Health Inspectorate and other judicial institutions and agencies (such as customs, the Public Prosecution Service, the police and the Dutch Food Safety Authority, and foreign equivalents of these organizations) concerning possible doping cases'

### (5) Processing of personal information included in:

National Doping Rules 2016.

#### **(6) Selection of athletes:**

It basically states that the Dopingautoriteit will control the registered testing pool. How decisions are made is not described. On its website, the Dopingautoriteit states that athletes who are qualified as top sportspersons by the National Olympic Committee/the National Sport Federation (which is one organization in the Netherlands) are among others included in the testing pool. Others may be selected as well by the Dopingautoriteit. A special whereabouts annex is applicable but it does not specify in further detail who are or can be incorporated in the testing pool.

More generally, the Doping Regulation specifies the following about ‘the concerned person’: The persons concerned in the Doping Regulation are defined as the member (i) which has been selected for doping control, (ii) that is or shall be subject to a doping control, (iii) the subject of an investigation into a possible doping violation, (iv) that provides substantial support or wants to do so, (v) that, under these regulations, must prove something, (vi) that is subjected to disciplinary measure, (vii) against whom a complaint is made, (viii) that has committed a doping offense and / or has been found guilty of one, (ix) that has appealed against a decision, (x) that is subject to a decision against which appeal has been made, or (xi) that is subject to a period of exclusion.

#### **(7) Additional/different privacy and data protection regime:**

With respect to processing sensitive data, the Data Protection Act specifies, inter alia, that it may be legitimate to process such data when processing is necessary for the public interest, suitable safeguards for the protection of privacy have been adopted and the law mandates the processing or the DPA has granted an exemption.

#### **(8) Other relevant documents/decisions:**

The NADO has referred to the issue of data protection a number of times. For example, in its strategic plan for 2012-2016, it stated: ‘The introduction of the ADAMS system within the Doping Authority also depends on the solution within Europe regarding the privacy issue around this system and the associated protection of the country of establishment of WADA, Canada and other ‘third’ countries that use the system.’

The DPA has issued an opinion on the new law which is now before the Parliament, in which it was critical of the proposal. The critique regarded, inter alia, the question whether the enforcement of anti-doping provisions by sport clubs is really a public task and whether the data processing is indeed proportional.

Two legal cases have been of quite some importance. Although they were determined in favour of the existing legal situation, it helped spiralling a discussion in parliament, which resulted in the current proposal for the law.

##### Case I:

- Athlete X filed for a preliminary relief proceeding with the Dutch Civil Court in Haarlem. He wants the sanction for a doping violation, a two year period of ineligibility, based on the decision of the Disciplinary Committee of the Netherlands Water Ski and



Wakeboard Federation (Nederlandse Waterski en Wakeboard Bond, NWWB), to be annulled based on violation of his right of privacy.

- The athlete had been selected for an out-of-competition doping test. Analysis of the A and B samples showed the prohibited substance nandrolone. The athlete used several prescribed medication as treatment for a serious condition he suffered. One medication was prescribed nandrolone, the other medication will not be mentioned because of privacy reasons. The medication nandrolone is the source of the positive test.
- The NWWB doubts that the court has jurisdiction in this case, but the judge contradicts this. There is an urgent need for the athlete for a quick decision because he wants to take part in the national championship. There is no guaranty that the NWWB Appeal Committee or the Netherlands Institute for Sport Adjudication (Instituut voor Sportrechtspraak, ISR) can or will deliver a decision in time. The judge rules it has jurisdiction in this case.
- The athlete has a disability but this disability has no consequences for the rules regarding the doping control. The judge notices that the athlete did not made any objection during the doping control how his personal data was handled. In the NWWB decision of 29 June 2009 the athlete's medical condition nor the other medication was mentioned. The judge finds that mentioning the name of the prohibited substance nandrolone as medicine in the NWWB decision does not violate the athlete's privacy. The assumption that the information mentioned in this case could be an indication for some medical specialists about the athlete's medical condition does not alter this.
- Decision on 24 June 2009: - The athlete's request is denied. - The athlete has to bear the legal costs of the NWWB.  
<http://www.doping.nl/filter/doc:3495/Dutch%20District%20Court%202009%20Athlete%202009064%20vs%20NWWB>

## Case II

- The legal representatives of athlete 2009005 engaged preliminary relief proceedings against the Royal Dutch Skating Association (Koninklijke Nederlandsche Schaatsenrijders Bond, KNSB) and the Anti-Doping Authority Netherlands (Dopingautoriteit, ADAN) before the Civil District Court in Rotterdam.
- During an in-competition doping test the athlete, a minor at the time of the test, provides samples for doping test purposes. The samples tested positive on norandrostosterone, which is a prohibited substance according the World Anti-Doping Agency (WADA) prohibited list, and the athlete was provisionally suspended. The legal representatives claimed the samples were gathered unlawfully and wanted a public rectification and destruction of the samples and paperwork connected to the samples. Also the legal representative of the athlete was not asked for permission to handle the personal data of the athlete. The representatives refer to act 8 of the European Convention on Human Rights regarding the protection of private life.
- Decision - The decision of the disciplinary committee is upheld. - The athlete must pay the legal costs for KNSB and Dopingautoriteit"  
<http://www.doping.nl/filter/doc:3071/Dutch%20District%20Court%202009%20Athlete%202009005%20vs%20KNSB%20and%20Dopingautoriteit>

## 21. Poland

### (1) Relevant laws and by-laws:

- Act of 25 June 2010 on Sports - Sports governance instrument -
- Polish Anti-doping Rules - By-laws of the Polish NADO -

### (2) Transposition of international documents:

The Act on Sports refers to the International Convention Against Doping in Sport, signed in Paris in 2005, both when it comes to the definition of doping (reference to Annex II of the Convention) and to disciplinary procedures (indicating explicitly that the procedures should comply with the Convention).

### (3) Status of the NADO:

The Polish NADO is a public body. The legal status of the Polish NADO is determined by Art. 44 (1-4, 7-9) of the Act on Sports. According to it, the competent body to combat doping in sport is the Commission Against Doping in Sport.

### (4) Criminal Law:

The Polish NADO is a policymaker and a coordinator of anti-doping checks. The enforcement of criminal law remains outside of its remit. Polish law does not incorporate the guidelines, and the Polish NADO does not pursue an official coordination programme with law enforcement agencies.

### (5) Processing of personal information included in:

Polish Anti-Doping Rules; by-laws of the NADO.

### (6) Selection of athletes:

There are no legal provisions in Poland answering any of the questions: decisions in all the respects are at the discretion of the Polish NADO, which in turn follows international arrangements. Decisions of the NADO in this respect cannot be contested either by an individual athlete or a national sport association, as Polish Antidoping Rules (Sec. 1.3) provide that they apply to any participant in recognised national or international sports competitions, as well as to the assistance personnel.

### (7) Additional/different privacy and data protection regime:

The Polish Data Protection Act describes sensitive data in somewhat broader terms, also including genetic code and addictions.

**(8) Other relevant documents/decisions:**

There is a draft Act on Combating Doping in Sports, which is a law containing both criminal and administrative aspects. It is currently at an initial stage of the legislative process – not even a final government proposal. If adopted, the Act will comprehensively regulate the field now only generally determined by one chapter of the Act on sports.

## 22. Portugal

### (1) Relevant laws and by-laws:

- Law 38/2012 of 28 August as amended by Law 33/2014 and Law 93/2015 (Hereinafter PT / Portuguese AntiDoping Law) - Primarily sports governance instrument with some provisions of criminal law –
- Lei n.º 93/2015, de 13 de Agosto - Statute (parliamentary act) which introduces the World Anti-Doping Code into the national legal order –
- Portaria n.º 11/2013, de 11 de janeiro – Decree which establishes the execution norms for the PT Anti-Doping Law –
- Portaria n.º 232/2014, de 13 de novembro – Decree which amends Decree 11/2013 and determines the anti-doping controls that can be performed by doctors, nurses and other technical personnel –
- Portaria n.º 411/2015 – Decree which establishes the list of prohibited methods and substances for 2016 (the list is updated yearly) –
- Despacho n.º 1208/2015, de 5 de fevereiro – Order which establishes the rules for the granting of authorisations for medical treatments –
- Despacho n.º 2318/2015, de 6 de março – Order which approves ID cards for the anti-doping control agents –
- Despacho n.º 9621/2010, de 8 de junho – Order which regulates the functioning of the National Anti-Doping Council –
- Decreto n.º 2/94, de 20 de janeiro – Law which approves and implements the Anti-Doping Convention into the PT legal order –
- Decreto n.º 4-A/2007, de 20 de março - Statute which approves and implements the International Anti-Doping Convention (UNESCO) -

### (2) Transposition of international documents:

The Council of Europe Convention (Anti-Doping Convention) was implemented in Portugal by Decree 2/94 of 20 January. The International Convention under the auspices of UNESCO is implemented in Portugal via Decree 4-A/2007 of 20th of March.

### (3) Status of the NADO:

The NADO is part of the Portuguese Institute for Sports and Youth which is a Public Law Organisation. The main legal basis for the Portuguese NADO is Law 38/2012 of 28 August (as amended by Law 33/2014 and Law 93/2015).

### (4) Criminal Law:

The Anti-Doping Law makes a link between the prohibited substances and methods and the criminal law (Law 38/2012). The Portuguese criminal (procedural) code, the Narcotics regulation and Portuguese criminal law do not confer powers to the NADO. Although, the Anti-Doping legislation itself includes criminal law provisions, but these do not confer specific powers to the NADO. Article 20 of the Law 38/2012 of 28 August envisages that the NADO and the services, bodies or entities with a role on preventing and repressing administrative

irregular behaviour and/or criminal behaviour must cooperate. The latter must also provide technical cooperation to the NADO when solicited.

**(5) Processing of personal information included in:**

Law 38/2012 of 28 August & Decree 11/2013.

**(6) Selection of athletes:**

The Portuguese Anti-Doping Law qualifies as an athlete (‘praticante desportivo’) the person who is registered with a sports federation, national or foreign, and practices and/or competes at national or international level; or the person who is not registered with a sports federation but participates in a competition at national level. The law does not refer specifically to ‘professional’ athletes (Article 2).

Furthermore, Decree 11/2013 on the execution of the Anti-Doping Law (Article 4 ‘Grupo alvo de praticantes desportivos’ / Target group of athletes) clarifies that the NADO selects the athletes to be tested, namely those: 1 - Belonging to the ‘high performance group’ (‘regime de alto rendimento’); 2 - Integrated in the national team; 3 – Who show risk of use of prohibited substances or methods through their behaviour, their body morphology, health and competition results; 4 - Who are suspended for anti-doping violations.

The Portuguese Anti-Doping Law (Law 38/2012 of 28 August) defines three ‘target groups’ to be included in a Testing Pool according to the category of sport they belong to. Accordingly, ‘Target / Risk Group A’ is the one considered to have more ‘doping risk / exposure’ and includes 13 types of sports, such as, inter alia, boxing, canoeing, cycling, football and swimming. ‘Target / Risk Group B’ is considered to have less risk / exposure than the previous group and includes, for example, basketball, golf, gymnastics, surf, tennis, volleyball, etc. Finally, ‘Target / Risk Group C’ is considered the least exposed to doping threats and includes, inter alia, chess, minigolf, bridge, fishing, camping, etc.

**(7) Additional/different privacy and data protection regime:**

With respect to processing sensitive data, the Portuguese national law adopts a slightly different wording: it adds the category of ‘private life’, clarifies that genetic data is to be included in ‘health data’, covers both religious convictions and religious faith, and includes ‘political membership’ (rather than political opinions). The categories of data classified as ‘sensitive data’ are: religious and philosophical convictions, trade union and political membership, religious faith, private life and racial or ethnic origin, health and sexual data, including genetic data (see Article 8 (1)). In particular, the law provides that processing sensitive data may be legitimate when authorised by law or by the Data Protection Authority for the pursuit of the public interest when absolutely necessary for the fulfilment of a task attributed by law or when the data subject has consented to the processing

**(8) Other relevant documents/decisions:**

The DPA has issued an authorisation regarding the processing of personal data for the purposes of an ‘authorisation of therapeutic treatment’. The DPA found that consent from the athlete, although present, was not necessary as the Anti-Doping Law already provided sufficient legal basis for the processing of such personal data. (PT Data Protection Authority, Authorisation 2995/2010, Proc 9026/09, of 5 July 2010).

## 23. Romania

### (1) Relevant laws and by-laws:

- Law no. 227/2006 regarding prevention and control of doping in sport (republished, as amended last by art. III of Law no. 243/2015) –Sports governance instrument –
- H.G. no. 244/2015 for the approval of methodological norms regarding the organization and process of anti-doping control amended by H.G. no. 771/28.09.2015) - Government Decision which can be qualified as sports governance instrument –
- Law no. 104/2008 on prevention and control of production and illicit traffic of doping substances with a high degree of risk - Criminal/administrative law –
- Law no. 69/2000 of physical education and sport – Statute prescribing the establishment of the Romanian NADO -

### (2) Transposition of international documents:

Art. 1(2) of the Law no. 227/2006 regarding prevention and control of doping in sport (republished, as amended last by art. III of Law no. 243/2015) states that according to the Anti-Doping Convention adopted by the Council of Europe (ETS No.135), the UNESCO International Convention against Doping in Sport as well as the World Anti-Doping Code (WADC), doping is prohibited in sports. This law is the implementation of WADC obligations, and establishes the authority and tasks of the NADO. In the memorandum to the same law, it is also mentioned that through the acceptance of the UNESCO Convention, the ratification of the CoE Convention and the signature of the Copenhagen Memorandum in 2003, Romania engaged in respecting the WADC and implement it at a national level. It further states that if Romania does not harmonise its anti-doping legislation with international requirements undertaken through ratification laws, negative effects will rebound on sports movement as a whole, with the risk of Romania not being able to organize major sports events.

### (3) Status of the NADO:

Article 4 Law no. 227/2006 specifies that with the view of combatting the doping phenomenon in sport, the National Anti-Doping Agency will function as public institution with legal personality, with decisional and operational autonomy in anti-doping activity and scientific research in this field, coordinated by the Prime Minister, financed through own revenues and subventions from the State budget and through the budget of General Secretariat of the Government, with the headquarters in Bucharest.

### (4) Criminal Law:

In Law no. 104/2008 regarding the prevention and combatting of production and illicit traffic of doping substances with a high degree of risk (including criminal law elements), a link is made to the list of substances in Law no. 143/2000 regarding the prevention and combatting of traffic and illicit consumption of drugs, or of Emergency Ordinance of the Government no 121/2006. If the NADO, during a control in bodybuilding/fitness gyms, identifies a substance which is included in the lists in the aforementioned laws, it has the obligation to notify imme-

diately the prosecution organs as well as the National Anti-Drug Agency, where the sanctioning regime is applied as in the aforementioned laws (Law 143/2000 and OG 121/2006).

Furthermore, according to art. 74(2) Law 227/2006, the NADO collaborated with law enforcement organs, regulating bodies or disciplinary organs in case an offence was committed (violation of a criminal nature), breach of regulations or other conduit rules.

**(5) Processing of personal information included in:**

Law no. 227/2006 & H.G. no. 244/2015.

**(6) Selection of athletes:**

Under art. 5 H.G. no. 244/2015, categories included in the registered testing pools are: athletes of international level or in the Olympic/Paralympic teams, national level athletes (seniors, youth, cadets, juniors) selected on the basis of their annual rankings of national sports federations; in case of team sports, one or more athletes can be included in the registered testing pool; if the Agency intends to collect 3 or more samples outside the competition within one year from certain athletes, these have to be included in the registered testing pool unless whereabouts information can be collected from other sources. The selection of athletes during competition is aleatory selection and through hierarchical and targeted selection. Outside the competition, only through aleatory and targeted selection.

The definition of an athlete under art. 3(50) Law no. 227/2006: any person who participates in sports activities at an international level, or any person participating in sports activities at a national level, legitimated to a sports club which is affiliated to a national sports federation, and any other person who participates at a sport activity at an inferior level. The definition includes the persons practicing sports for leisure purposes, without these having the obligation to provide their whereabouts information or apply for TUEs.

Law no. 104/2008 also confers to the NADO the power of conducting doping tests in bodybuilding/fitness gyms with the purpose of establishing the degree of use of high degree doping substances in leisure/amateur sport. The testing can be conducted only with express written consent of the person practicing such sport, with the respect of confidentiality relating to his personal data. Throughout this check, the NADO personnel checks: the validity of the authorization for functioning issued by the NADO; the written and factual balance of commercialized substances; the dietary supplements sold to the sportsmen or the substances used by these.

**(7) Additional/different privacy and data protection regime:**

The Romanian Data Protection Act refers to sensitive data as ‘racial or ethnic origin, political opinions, religious, philosophical or similar beliefs’ (in Romanian: ‘de natura similara’, meaning, of a similar nature). For processing of personal data for minors, there a prior notification to the DPA 30 days prior to the inception of processing is required



**(8) Other relevant documents/decisions:**

The Romanian DPA has issued two decisions regarding sensitive data. The first one (Decision no. 11/2009), regards the establishment of categories of processing of personal data susceptible to special risks for the individual rights and freedoms. It identifies, inter alia, health data, data regarding sexual life, genetic data and data which permit the geographic localization of individuals, including for the scientific research purposes, processing of personal data regarding penal, administrative sanctions, organized within automatic systems by private entities, processing of personal data of minors in direct marketing, and processing of personal data of minors collected through the internet or electronic communication. All these categories require prior notification to the DPA at least 30 days prior to the inception of processing. The second DPA decision (Decision no. 101/2008) regards processing of health data, regarding processing without the consent of the person when it regards the protection of the data subject's life, physical integrity or health of other persons or of the public.

## 24. Slovakia

### (1) Relevant laws and by-laws:

- Statute no. 440/2015 coll. on sports and on the changes and amendments of certain statutes (Sports Act) - Act of Parliament, which can be considered a sports governance instrument –
- Anti-doping Rules of the Slovak Republic, version 1.2 - Rules issued by the NADO on the basis of the Sports Act –
- Criminal Act 300/2005z.z. – Criminalizing some more serious cases of enabling doping and handling anabolic or hormonal substances (§176) –

### (2) Transposition of international documents:

§ 86 of the Sports Act specifies that the Slovak Anti-Doping Agency fulfils the tasks of the World Anti-Doping Code. This is the only direct reference to these instruments in the law. The explanatory report also makes a reference to the UNESCO Convention which is supposed to be implemented by the Sports Act. On its website, the NADO refers to these international instruments and emphasizes the importance of the WADC as the most important anti-doping document

### (3) Status of the NADO:

§86 Sports Act: The Agency is a state-owned, public-benefit organization attached by financial relations to the budget of the Ministry of Education

### (4) Criminal Law:

In general, under §3 of the Code of Criminal Procedure, every legal person has an obligation to report without delay any indications of criminal offences being committed to the law enforcement authorities and cooperate in the investigation. These duties apply to the NADO.

### (5) Processing of personal information included in:

Anti-Doping Rules of the Slovak Republic, version 1.2.

### (6) Selection of athletes:

The difference between professional and amateur athletes is specified in §4 of the Sports Act:

(3) Professional athlete participates in sports

a) on the basis of a contract of professional sports activity, if the exercise of this activity fulfil the elements of dependent labour

b) on the basis of labour relations or equivalent work relation according to a special provision in a resort sport center or

c) independently as a self-employed person

(4) Amateur athlete participates in sports

- a) on the basis of a contract of amateur sport activity, if
  1. The scope of sport activity, even if it fulfils the conditions of dependent labour, during one calendar year does not exceed eight hours per week, five days per months or 30 days per calendar year
  2. The contract does not bind the athlete to participate in preparation for a competition or
  3. she exercises sports within one competition or several interconnected competitions in a short time-frame
- b) on the basis of a contract of preparation of a talented athlete
- c) on the basis of a contract of work performed outside labour relations or
- d) without a contract

#### § 87 Sports Act

(...)

(2) The competence of the Agency applies to:

- a) Sports organization based in the territory of Slovak Republic,
- b) organizer of a competition based in the territory of Slovak Republic,
- c) athlete who is a citizen of Slovak Republic
- d) regardless of nationality to:

1. Athlete and support personnel of an athlete who are members of the national sports federation or sports club belonging to a national sports federations,
2. Athlete and support personnel of the athlete, who are participating in a competition which is organized by a national sports federation or a sports club belonging to the national sports federation,
3. natural person who for the purposes belongs to a sports organization,
4. athlete and the support personnel of an athlete who are participating in a national competition whose organizer is not the national sports federation or a sports club belonging to the national sports federation,
5. athlete who is not an athlete under the first, second, third or fourth point and is interested to participate in an international competition or a national competition,
6. athlete who is present in the territory of Slovak Republic during competition or (...)(can't translate – makes no sense to me),
7. athlete with permanent residence in the territory of Slovak Republic.

#### The Rules for Including Athletes in the National Testing Pool:

The general pool of athletes is created by the NADO for the purposes of possible doping control. Athletes are included in the pool by their sports federations which provide basic information about the athletes (name, last name, date of birth, residence, email, phone contact).

Athletes who are included in the general pool do not have a duty to notify information about their places of residence. It is, however, their duty, when approached by a worker of the NADO or a doping control commissioner, to report at the agreed place in the agreed time and be subject to the collection of samples.

Criteria for inclusion of athletes in the general pool:

- national team members who participate in the World Championships or European Championships and are not included in the National Testing Pool.

- members of the youth national team highest after the seniors (u23, u21 and juniors),
- athletes who created an acknowledged Slovak record.

The national testing pool (NRTP) is created from athletes who represent SR in the highest international events and reach top positions therein. Criteria for their inclusion are created by the NADO in cooperation with the Slovak Olympic Committee, Slovak Paralympic Committee and the Section of State Care for Sports of the Ministry of Education.

Athletes who are included in the International Testing Pool are obliged to use the ADAMS system. Their information in the system can be accessed by the relevant international federation, the WADA and the National Anti-Doping Agency.

**(7) Additional/different privacy and data protection regime:**

In addition to the right to privacy, the constitution specifies: Everyone has a right to respect of her human dignity, personal honour, good reputation and protection of name. The grounds for processing ordinary and sensitive personal data have been elaborated on. For example, with respect to processing sensitive data, the Data Protection Act provides: ‘the legal basis for the processing of personal data is based on a special Act, a legally binding act of the European Union or an international treaty which is binding for the Slovak Republic.’

**(8) Other relevant documents/decisions:**

Not identified.

## 25. Slovenia

### (1) Relevant laws and by-laws:

- Act on the ratification of the International convention against doping in sport (MKUNSS), 30 November 2007, nr. 001-22146/07, Official Gazette of the Republic of Slovenia, nr. 113, 11.12.2007
- Sports Act (ZSpo), Official Gazette of the Republic of Slovenia, 20 March 1998, nr. 22/98, with amendments (97/01 – ZSDP in 15/03 – ZOPA) - Sports governance law –
- Anti-doping rules of the Slovenian Antidoping Organization (SLOADO), 16 December 2013; - Rules of the NADO concerning antidoping –
- Anti-doping rules of the Olympic Committee of Slovenia – Association of Sports Federation, January 2015 - Rules of the Olympic Committee of Slovenia, which established the Slovenian antidoping organization (SLOADO) –
- Criminal Code (KZ1), Official gazette, nr. 58/2008, with amendments - the Criminal Code regulates criminal acts relevant for antidoping in 2 provisions -

### (2) Transposition of international documents:

The current 1998 Sports Act regulates anti-doping in a single provision (art. 45), which states that athletes, organizers of competitions, healthcare personnel and operators of the national sports program need to follow the rules of the 1989 Anti-doping Convention (Council of Europe) and the rules of the International Olympic Committee. Slovenia has signed the Copenhagen Declaration on Anti-doping in Sport, ratified the CoE Convention on Anti-doping in 1992 and ratified the UNESCO International Convention against Doping in Sport in 2007. After Slovenia ratified the International Convention against Doping in Sport in 2007, there has been a draft Anti-Doping Act drafted in 2012 but has not yet been confirmed by the Ministry of Sport. Instead, a new Sports Act – which would regulate antidoping and databases in the field of sports on the level of a statute – was drafted in 2015. This draft encountered a lot of backlash from the interested public and was amended in June 2016 but has not yet been accepted by the parliament. In the explanatory document to the draft 2016 Sports Act, it is stated that by the ratification of the International Convention against Doping in Sport, Slovenia committed itself to follow the rules in the WADA Code so that additional legal basis (on the level of a statute)/rules are not required.

### (3) Status of the NADO:

SLOADO is organized as a private law organization based on the Institutes Act, established by the Olympic Committee of Slovenia. The legal basis is found in the 2007 Act on the ratification of the International convention against doping in sport (MKUNSS).

### (4) Criminal Law:

There are two provisions in the Criminal Code that are relevant for anti-doping.

Article 186: Unlawful Manufacture and Trade of Narcotic Drugs, Illicit Substances in Sport and Precursors to Manufacture Narcotic Drugs. Article 187: Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport

The Slovenian Criminal Procedure Code (Zakon o kazenskem postopku (Uradni list RS, št. 32/12 – uradno prečiščeno besedilo, 47/13, 87/14, 8/16 – odl. US in 64/16 – odl. US) refers to illicit substances in sport only in three provisions. Arts. 150 and 151 relate to undercover investigative measures (prikriti preiskovalni ukrepi) for unlawful manufacture and trade of narcotic drugs, illicit substances in sport and precursors to manufacture narcotic drugs in Art. 186, Rendering Opportunity for Consumption of narcotic drugs or illicit substances in sport. Art. 162 refers to the suspension of criminal prosecution for rendering opportunity for consumption of narcotic drugs or illicit substances in sport in the first paragraph of Art. 187 of the Criminal Code. The Criminal Procedure Code does not confer any powers to SLOADO.

According to the director of the NADO, Jani Dvoršak, at the moment there is no system of formal cooperation with law enforcement organisations, however, such a system/procedure is on the way (in the following months). They work more with the Slovenian customs administration, checking the ingredients of drugs or food supplements ordered abroad. He also stated that there has been no criminal procedure against support personnel in Slovenia.

**(5) Processing of personal information included in:**

2007 Act on the ratification of the International convention against doping in sport.

**(6) Selection of athletes:**

Art. 5 of the NADO's Anti-doping rules states in general that its Rules apply to all persons who:

- o Are members of a National Sports Federation of Slovenia, regardless of where they reside or are situated;
- o Are members of a National Sports Federation's affiliated members, clubs, teams, associations or leagues;
- o Participate in any capacity in any activity organized, held, convened or authorized by a National Sports Federation of Slovenia or its affiliated members, clubs, teams, associations or leagues; and
- o Participate in any capacity in any activity organized, held, convened or authorized by a National Event organization, or a national league not affiliated with a National Sports Federation. Participants including Minors are deemed to accept, submit to and abide by these Rules by virtue of their participation in sport.

Annex I of the SLOADO Anti-doping Rules define:

- o Athlete: any person who participates in sport at the international level (as defined by each International Sport Federation), the national level (as defined by each National Anti-doping Organization, including but not limited to those Persons in its Registered Testing Pool). The national anti-doping organization may by discretion apply the definition of an athlete to any other athlete, who is not an athlete on an international or national level. The anti-doping organization is not obliged to apply all aspects of the Code to this additional (recreational) type of athlete. Instead, it may perform limited or no testing at all; analyse samples on only certain forbidden substances; request limited data on the athlete's whereabouts or none at all; does not require therapeutic use exemption information in advance.
- o Athlete that is minor: a physical person that is younger than 18 years of age;
- o Athlete support personnel: any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, or any other Person working with, treating or assisting an Athlete

participating in or preparing for a sports Competition; o Participant: any athlete or athlete support personnel.

Athletes are included in the Slovenian National Testing Registered Pool (NRTP) based on the following criteria:

- for individual sports:

o athletes that fall under the jurisdiction of SLOADO and have already been included in a registered testing pool at an international federation (IF RTP);

o athletes which are a part of the national selection of the Olympic, Para-Olympic or World Games/Events and can be chosen to appear at such events;

o athletes that train independently and appear at the Olympic, Para-Olympic or World Games/Events and can be chosen to appear at such events;

o athletes that have been excluded from sports for a certain period due to a breach of anti-doping rules;

o athletes that have retired from sports and have previously been included in the NRTP but now want to return to sports and take part in sport competitions;

o any other athlete as per discretion of SLOADO (e.g. athletes that train with support personnel, who have been a part of a breach of anti-doping rules; athletes who are suspected, based on reliable sources, to take part in doping; athletes who have achieved great and unexpected progression; and similar);

- for team sports: based on the Code and ISTI, national selections, which are to appear the Olympic Games and are training for it are also included in the NRTP (included by the Olympic Committee of Slovenia).

#### **(7) Additional/different privacy and data protection regime:**

Besides privacy and data protection, the Slovenian Constitution also protects dignity and personality rights. With respect to processing personal data, the Slovenian Data Protection Acts specifies:

‘Article 9: Legal grounds in the public sector

(1) Personal data in the public sector may be processed if the processing of personal data and the personal data being processed are provided by statute. Statute may provide that certain personal data may only be processed on the basis of personal consent of the individual.

(2) Holders of public powers may also process personal data on the basis of personal consent of the individual without statutory grounds where this does not involve the performance of their duties as holders of public powers. Filing systems created on such basis must be held separate from filing systems created on the basis of the performance of duties of the holder of public powers.

(3) Irrespective of the first paragraph of this Article, in the public sector personal data may be processed in respect of individuals that have contractual relations with the public sector or on the basis of the individual’s initiative are negotiating on the conclusion of a contract, provided that the processing of personal data is necessary and appropriate for conducting negotiations for the conclusion of a contract or for the fulfilment of a contract.

(4) Irrespective of the first paragraph of this Article, personal data may in exceptions be processed in the public sector where they are essential for the exercise of lawful competences, duties or obligations by the public sector, provided that such processing does not encroach on the justified interests of the individual to whom the personal data relate.

#### Article 10: Legal grounds in the private sector

(1) Personal data in the private sector may be processed if the processing of personal data and the personal data being processed are provided by statute, or if the personal consent of the individual has been given for the processing of certain personal data.

(2) Irrespective of the previous paragraph, in the private sector personal data may be processed in respect of individuals that have contractual relations with the private sector or on the basis of the individual's initiative are negotiating on the conclusion of a contract, provided that the processing of personal data is necessary and appropriate for conducting negotiations for the conclusion of a contract or for the fulfilment of a contract.

(3) Irrespective of the first paragraph of this Article, personal data may be processed in the private sector if this is essential for the fulfilment of the lawful interests of the private sector and these interests clearly outweigh the interests of the individual to whom the personal data relate.'

#### **(8) Other relevant documents/decisions:**

Draft Sports Act, version from 20 June 2016 (intended to replace the 1998 Act on sports, which did not regulate doping) – Act of Parliament; Sports governance law –

SLOADO issued their Rules on the protection of personal and confidential data (Pravilnik o varstvu osebnih in zaupnih podatkov SLOADO; <http://www.archery-si.org/uploads/datoteke/Pravilnik%20o%20varovanju%20osebnih%20in%20zaupnih%20podatkov%20SLOADO.pdf>) in January 2014, based on the WADA Code, the International standard for protection of privacy and personal data (<https://www.wada-ama.org/en/resources/dataprotection/international-standard-for-the-protection-of-privacy-and-personal>) and the Slovenian Data Protection Act (Zakon o varstvu osebnih podatkov, Uradni list RS, št. 94/07; <https://zakonodaja.com/zakon/zvop-1>). This document generally follows the main principles of the Slovenian Data Protection Act (which is based on the 1995 Data Protection Directive) and the International standard for protection of privacy and personal data.

All of the rules concerning the purpose, organization and procedure relevant for antidoping are found in the Rules of the Slovenian Anti-doping Organization, which was established by the Slovenian Olympic Committee – Association of Sports Federation in 2013 and is organized in the form of a private entity. The legal basis for these rules is found in the 2007 Act on the ratification of the International convention against doping in sport (MKUNSS), by which the International Convention (along with all its Annexes, e.g. a list of forbidden substances) became a part of the internal legal order of Slovenia (confirmed by a judgment of the Slovenian Supreme Court – Sodba I Ips 9415/2011).



## 26. Spain

### (1) Relevant laws and by-laws:

- Organic Law 3/2013, of the 20th of June, on the protection of the athlete's health and against doping in sport activity. –Sports governance instrument combined with sanctionatory provisions. –
- Royal Decree 461/2015, of the 5th of June, approving the Statute of the Spanish Agency for Health Protection in the sport sector. - Royal decree approving a Statute.-
- Circular 3/2016 de AEPSAD - Bye-law of the NADO on avoiding, preventing or disturbing the performing of doping controls in the form legally required –
- Circular 2/2016 de AEPSAD - Bye-law of the NADO providing information on the ordering of doping controls at official competitions at national and regional level –
- Resolución de 17 de diciembre de 2015 - Ministerial decree of the Presidency of the High Sports Council approving the list of substances and methods prohibited in sport.-
- Real Decreto 63/2008 - Royal Decree 63/2008 of 25 January, regulating the procedure for the imposition and revision of disciplinary sanctions on doping -

### (2) Transposition of international documents:

Spain has ratified the International Convention against Doping in Sport of the UNESCO (Instrumento de Ratificación de la Convención Internacional contra el dopaje en el deporte. París, 18 de noviembre de 2005) and the Convention has contributed to the shaping of the Spanish legal system on doping (Resolución de 22 de diciembre de 2010 , de la Secretaría General Técnica, sobre la Modificación al Anejo II, Normas para la concesión de autorizaciones para uso con fines terapéuticos, de la Convención Internacional contra el dopaje en el deporte, París 18 de noviembre de 2005; Resolución de 16 de diciembre de 2014, de la Secretaría General Técnica, sobre la modificación al Anejo II, Normas para la concesión de autorizaciones para uso con fines terapéuticos, de la Convención Internacional contra el dopaje en el deporte, hecha en París el 18 de noviembre de 2005). Also the Strasbourg Anti-Doping Convention has been integrated in the Spanish legal system (Resolución de 27 de enero de 2016, de la Secretaría General Técnica, sobre las Enmiendas al Anexo del Convenio contra el dopaje, hecho en Estrasburgo el 16 de noviembre de 1989). The role of the World Anti-Doping agency and of the World Anti-Doping Code (Circular 1/2015 sobre la publicación por parte de la Agencia Mundial Antidopaje de la Lista de Asociación Prohibida).

### (3) Status of the NADO:

The Agency is governed by Law 28/2006, of July 18, by the Organic Law 3/2013, of June 20, and its implementing regulations, by the Royal Decree establishing the Statute of the NADO and, additionally, by the rules applicable to public law entities affiliated to the General Administration.

### (4) Criminal Law:

In order to adapt the above list of substances and methods prohibited in sport, adopted by Resolution of 18 December 2014 of the Chair of the Sports Council, with the list adopted

within the International Convention, the Sports Council has approved an updated list of substances and methods prohibited in sport, contained in the Annex to this resolution (Resolución de 17 de diciembre de 2015, de la Presidencia del Consejo Superior de Deportes, por la que se aprueba la lista de sustancias y métodos prohibidos en el deporte). This set of provisions is linked to the substances prohibited via criminal law. Article 361 bis of the Penal Code affirms that is forbidden the prescribing or supplying of “prohibited substance” not therapeutically-justified.

**(5) Processing of personal information included in:**

Organic Law 3/2013 of 20 June, on the protection of the health of athletes and anti-doping in sports.

**(6) Selection of athletes:**

The relevant provision in the Spanish anti-doping regulation is Ley Orgánica 3/2013. According to this normative, subjected to the monitoring activities of the NADO are athletes who are in possession, had been in possession previously, or have requested the federative state or autonomous homologated license; also the subjects under Article 24 (clubs, sports teams and federations), Article 25 (technicians, judges, referees, other people with sports license, managers, leaders or personnel of Spanish sports federations, professional leagues, from entities organizing sports competitions of official character, clubs or sports teams) and Article 26 (doctors and medical personnel as well as staff clubs, teams, federations and any other sporting bodies and those responsible for sports infrastructures); also, subjects to this regulation are foreign athletes who, under the provisions of this Act, may be subject to controls outside the context of a competition. Our research did not show information about RTP, NTP, and ATP conditions.

**(7) Additional/different privacy and data protection regime:**

Not identified.

**(8) Other relevant documents/decisions:**

In the Circular 4/2016 de AEPSAD, Consecuencias de la Sentencia dictada por el Tribunal Supremo el 28 de julio 2016 (p.2), the agency stresses the obligation of the athlete to sign an informed consent provision by which he/she agrees the NADO to release his/her personal data to other anti-doping agencies, and the commitment the athlete takes to gives access to the NADO to data related to his/her actual domicile, his/her eventual periods of absence from this declared place, where he/she trains and his/her training calendar, and his/her minimum availability for the authority to perform anti-doping controls.

- Resolution 2010.02.27\_2009-0383 on the Form for the authorization of therapeutic use of doping. The DPA affirmed that the form and the relating consent request contained therein were compliant with the law on Personal Data Protection. However, the DPA also affirms that instead of the entire clinic history of the athletes, only the clinic history connected to the medical situation justifying the use of such form shall be provided, based on the principle of proportionality.

- Resolution 2011.12.27\_2011-0312 and Resolution 2013.06.21\_2012-0288, both concerning the compatibility of the Draft Law for the Protection of the Health of the Athletes and the Fight against Doping with the Personal Data Protection Law. The Resolution affirms the compatibility of the Draft, stressing:

- the necessity to specify in the Draft that the transfer of information to the World Antidoping Registry will occur under the provisions of the law concerning the Protection of Personal Data (in particular with regard to the principles of proportionality, quality and consent), that the request of cancellation of the data shall also be transmitted to the transferee, and that in order for the transfer to be considered legitimate even in the case of a State that does not guarantee the minimum level of protection of Personal Data, it shall happen in compliance with obligations assumed by Spain under international conventions or other instruments to be binding.
- the necessity to provide efficient security measures for the information contained in the registers provided for in the Draft,
- the necessity to guarantee the principle of proportionality with regard not only to the information required but also the subjects to which such information might be communicated.

- Informe 0455/2010 concerning the publication on the Internet of the sanctions issued against certain athletes according to the anti-doping legislation. Such publication represents, according to the law on the Protection of Personal Data, represents a transfer of the data to third parties and shall comply with the requirements established by the law for such transfer. However, the anti-doping legislation provides for such transfer in order to comply with the principle of transparency established by the relevant international instruments executed by Spain, and for such reason it is considered as admissible by the DPA (see Resolution 2013.06.21\_2012-0288 above) when it is carried out according to the principles established by the law on the Protection of Personal Data.

The case of Marta Dominguez vs IAAF, before the Audiencia Provincial de Palencia in 2016 considered that the diffusion of haematological test results of the athlete and the biological passport are not considered contrary to the Personal Data Protection and Privacy legislation.

## 27. Sweden

### (1) Relevant laws and by-laws:

- Act (1991:1969) on the prohibition of particular doping substances - Criminal law –
- Swedish Sports Confederation Statutes - As amended after the Swedish Sports Confederation General Meeting 2015 - Sports governance instrument, issued by the Swedish Sports Confederation –
- Sport Anti-Doping Regulations - Sports governance instrument, issued by the Swedish Sports Confederation -

### (2) Transposition of international documents:

As the sports movement is independent from government, no legislative implementation of WADA's World Anti-Doping Code was necessary. As the National Anti-Doping Organisation (NADO), the WADA Code applies to the Swedish Sports Confederation. The WADA Code has in effect been translated into Swedish to form the Sport Anti-Doping Regulations.

### (3) Status of the NADO:

The Swedish Sports Confederation is the NADO. It is a private, non-profit organisation.

### (4) Criminal Law:

No link to the WADA prohibited substances list is made from the criminal law, Act (1991:1969) on the prohibition of particular doping substances. It is up to the courts to decide which substances are prohibited according to the law. The Swedish Public Health Agency (Folkhälsomyndigheten) has, however, a list of substances that might fall within the scope of the law. As the Swedish NADO is a non-profit organisation and independent body, no powers are conferred by the criminal or procedural law.

In accordance with Chapter 13 section 8 Swedish Sports Confederation Statutes and Article 14.1.6 Sport Anti-Doping Regulations, the Anti-Doping Commission (DopK) may provide data on anti-doping activities to the police, Prosecution Authority and customs. In the Introduction to the Sport Anti-Doping Regulations, the Swedish Sports Confederation states that it collaborates with other national organisations, government agencies and other anti-doping organisations. However, no official programs of cooperation are stated.

### (5) Processing of personal information included in:

Sport Anti-Doping Regulations. Testing and investigation shall be carried out in accordance with ISTI.

### (6) Selection of athletes:

Article 1.3 Sport Anti-Doping Regulations details the regulations' applicability. The article states that the regulations are applicable regardless of whether an athlete is a citizen of or res-

ident in Sweden. The regulations apply for example to athletes who are members of a sports federation or association or compete in events or competitions organised or approved by a sports federation or association.

A professional athlete (*idrottsutövare*) is included as one of the definitions within the Annex to the Sport Anti-Doping Regulations. A person who competes within sport at the international or national level is classed as a professional athlete. However, an anti-doping organisation may apply anti-doping rules to athletes who do not fall under this classification, but rather determine that a person is deemed to be an athlete, and as a result perform limited doping tests.

The registered testing pool (RTP) (*registrerad kontrollpool*) is defined in the Annex to the Sport Anti-Doping Regulations as a group of high priority athletes, determined at the international level by the international sports federation and at the national level by the national anti-doping organisation, who are subject to specific doping tests both in and outside competition. The testing pool (*kontrollpool*) is a complement to the registered testing pool, determined by the Anti-Doping Commission (DopK), made up of a specified group of athletes or other persons.

**(7) Additional/different privacy and data protection regime:**

Not identified.

**(8) Other relevant documents/decisions:**

The Swedish Data Inspection Board has not issued any opinions or decisions on antidoping measures, except its strong criticism of the earlier mentioned Government Report SOU 2011:10 Antidopning Sverige - En ny väg för arbetet mot dopning, in which processing of sensitive data within anti-doping was considered in line with the Swedish Personal Data Act by the expert committee responsible for the report. The Board especially criticised the suggestion by the committee to publish details of athletes who have committed doping offences on the Internet. ([www.datainspektionen.se/press/nyheter/2011/allvarliga-brister-i-antidopningsutredningens-forslag/](http://www.datainspektionen.se/press/nyheter/2011/allvarliga-brister-i-antidopningsutredningens-forslag/))

No case law on anti-doping and data protection exists, but an Administrative Court of Appeal (*Kammarrätt*) recently decided (*Kammarrätten i Stockholm*, 11 March 2016, case number 6352-15) that the Swedish Sports Confederation's processing of individuals' personal numbers in the online database *IdrottOnline* for the purposes of state aid was not necessary in accordance with Section 22 Personal Data Act. Though several different factors were taken into consideration in this case, e.g. the database contained the personal numbers of people within the age of 7-25, a few general conclusions can be drawn: When it comes to adequacy and relevance in relation to the purpose of the processing, there is not too much room for flexibility. Even though the personal numbers were required to some extent for the state aid, it was not necessary that the Swedish Sports Confederation (*Riksidrottsförbundet*) was processing this information in *IdrottOnline*. As the case dealt with children to a large extent, there was even a higher threshold for the necessity of the personal number.

The set-up of the Swedish anti-doping regulations is somewhat unique, due to the sports movement's independence from government. The result is that the majority of the anti-doping regulations are non-statutory in nature and power rests with the governing body and NADO, the Swedish Sports Confederation. However, the Swedish system does not seem to suffer from government independence, as it follows WADA's standards explicitly in its anti-doping regulations. Both the Swedish Sport Anti-Doping Regulations and the Swedish Sports Confederation Statutes were updated in 2015, as a result of the WADA Code. These changes resulted for example in the Anti-Doping Commission (DopK) being given more independence within the Sports Confederation.

## 28. United Kingdom

### (1) Relevant laws and by-laws:

- The UK Anti-Doping Rules - Sports governance instrument, by an executive body -
- UK National Anti-Doping Policy (Version 1, 14 December 2009) – Non-legislative Government Policy Document establishing government policy in the field -

### (2) Transposition of international documents:

The UK Anti-Doping Rules 2015 expressly state that their purpose is to implement the World Anti-Doping Code. The UK National Anti-Doping Policy (2009) states that by ratifying the UNESCO Convention, the UK Parliament has formally committed the UK Government to pursue doping-free sport based on the principles of the WADC. The Policy itself is expressed as an attempt to satisfy the requirements of the UNESCO Convention.

### (3) Status of the NADO:

UK Anti-Doping is an executive non-departmental public body regulated in accordance with the Management Agreement issued by the Secretary of State for Culture, Media and Sport. In terms of legal form, it is a company limited by guarantee.

### (4) Criminal Law:

UK Anti-Doping receives data from the Serious Organised Crime Agency.

### (5) Processing of personal information included in:

UK Anti-Doping Rule; refers to ISTI.

### (6) Selection of athletes:

Section 5.4 of the Anti-Doping Rules provides:

“UKAD shall establish a pool of athletes (the “National Registered Testing Pool”) who are required to provide whereabouts information in accordance with ISTI Article I.3 and to make themselves available for Testing at such whereabouts in accordance with ISTI Article I.4. Section 4.2.4 also provides:

“UKAD may also establish a further pool of athletes not in the National Registered Testing Pool (the “Domestic Pool”).”

Athletes are notified of their inclusion in the RTP.

### (7) Additional/different privacy and data protection regime:

The UK does not have a written constitution. With respect to the grounds for processing per-

sonal data in the public interest, specific examples (such as administration of justice) are provided. Section 66 of the Data Protection Act contains the following provision in respect of Scotland only: “Where a question falls to be determined in Scotland as to the legal capacity of a person under the age of sixteen years to exercise any right conferred by any provision of this Act, that person shall be taken to have that capacity where he has a general understanding of what it means to exercise that right. (2) Without prejudice to the generality of subsection (1), a person of twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding as is mentioned in that subsection.” There are no provisions concerning the rest of the UK, but guidance from the Information Commissioner (Personal Information Online Code of Practice) suggests balancing the age and understanding of the child and the nature of the processing which is to be carried out.

**(8) Other relevant documents/decisions:**

In 2010, the NADO published a Report of a Privacy Impact Assessment (PIA) conducted by UK Anti-Doping in relation to personal information disclosed to it by the Serious Organised Crime Agency.

The Information Commissioner’s Office (ICO) has published a number of decisions concerning freedom of information requests, where UKAD has refused to make public certain information in relation to test. The complainants appealed to the ICO, which made decisions on the whether the public interest of transparency outweighed the public interest cited by the UKAD.

The most interesting case for our purposes (Reference: FS50468810) involves a request to make public the details of drug tests carried out on weightlifters during the previous 24 months. The public interest in favour of non-publication was that athletes may be able to use the information to spot patterns and plan their doping accordingly. The ICO accepted this might be the case, but held that the balance of transparency outweighed this public interest.

More importantly for our present study, the ICO went on to consider the relationship between doping and data protection law. Under the FOI Act, information cannot be disclosed if it constituted personal data, and disclosure was not in accordance with the DPA. The ICO found that the information was personal data. Even if the names were redacted, the individuals could be identified by a combination of information (such as whether it was in/out of competition, the date of testing, and other publicly available information). It was found that the athletes had a reasonable expectation that test results would be made public, and therefore processing was not unfair. It was held that transparency and accountability in doping was a “legitimate interest pursued by the controller”. Given that there was a reasonable expectation of publication, it could not be said that the processing was an unwarranted interference with the rights freedoms or legitimate interests of the data subject. Also, it was held that the processing was necessary for the legitimate interest. Therefore the test data could be published.



# Annex III – Survey distributed to all NADOs

## NADO Questionnaire

Tilburg University is leading a study for the European Commission on the relationship between anti-doping rules and data protection principles, among others in the light of the recently adopted General Data Protection Regulation. We would like to ask you to provide some background information on the operations conducted by you (the national NADO) by filling in the questionnaire below.

On behalf of the European Commission, we thank you for your cooperation.

**Please specify the following information:**

Name of NADO:

Name of NADO in English:

Country:

## 1. Gathering of information

1.1 How many amateur or non-professional athletes have you tested in 2015 and what was the occasion?

1.2 How many athletes are included in the national testing pool (the athletes required to submit their whereabouts information) and what are the criteria?

1.3 How many Doping Control Officers do you employ or hire?

■

1.4 How many Doping Control Tests have you executed in 2015?

■

1.5 Which Laboratories do you use and where are they located?

## **2. Sharing of information with third parties**

2.1 Do you use ADAMS? If not, please specify why not and what system you are using:

2.2 Do you share personal data of athletes with law enforcement organizations? If so, please specify the number of instances you shared data in 2015 and clarify whether this is done on your own initiative or upon request:

2.3 Do you share personal data of athletes with other NADOs? If so, please specify the number of instances you shared data in 2015 and clarify whether this is done on your own initiative or upon request and whether the NADO was an EU or a non-EU NADO:

2.4 Do you share personal data of athletes with sport organizations? If so, please specify the number of instances you shared data and clarify whether this is done on your own initiative or upon request:

2.5 Do you share personal data of athletes with WADA? If so, please specify the number of instances you shared data and clarify whether this is done on your own initiative or upon request:

## **3. Any final remarks**

# Annex IV – Interview Protocol

## European Commission (DG EAC) Study on anti-doping and data protection Interview protocol for stakeholder interviews

### Background of the study

Tilburg University and Spark legal are conducting a project for the European Commission on anti-doping measures and data protection.

Phase I of the project consisted of mapping the legal landscape and selecting countries and other parties for more detailed analysis in phase II.

Phase II of the project consists of several interviews with NADO's, International Sport Federations and other parties involved.

Phase III of the project will identify points that need to be addressed and make recommendations on how to bring the current anti-doping frameworks of the various countries within the European Union in conformity with the General Data Protection Regulation (GDPR), which will come into effect in 2018.

### This interview

This interview is conducted for phase II of the study. It focuses on the way the WADA instruments are implemented in practice in view of the data protection framework, in particular the GDPR.

The interview consists of 6 sections, each containing a number of questions:

- Section 1: Quantitative questions concerning the operation of anti-doping rules;
- Section 2: Questions concerning the gathering of data;
- Section 3: Questions on the storage of data;
- Section 4: Questions on the sharing of data;
- Section 5: Questions on the analysis and publication of data; and
- Section 6: Concluding questions.

## Section 1: Quantitative questions concerning the operation of anti-doping rules

### 1. Number of tests

Please specify the number of athletes tested and the number of blood and urine samples taken.

**Please indicate the number of samples collected in 2016:**

NUMBER OF SAMPLES COLLECTED	2016
Urine Samples taken In-Competition	
Blood Samples taken In-Competition	
Urine Samples taken Out-Of-Competition	
Blood Samples taken Out-Of-Competition	
Other samples taken, namely...	

### 2 Number of athletes subjected to controls

- Please specify the number of athletes subjected to controls and whether those athletes are minors, amateur sport persons and whether you gather data about third persons.
- **Please indicate the number of athletes subjected to controls in 2016:**

NUMBER OF ATHLETES SUBJECTED TO CONTROLS	2016
Number of athletes in the various testing pools	
Number of athletes for whom a biological passport exists	
Number of under-age athletes subjected to tests	
Number of amateur sportspersons subjected to tests	
Number of 3 <sup>rd</sup> persons (staff, medical personnel, trainers etc) about whom information is kept (for example, in ADAMS)	

## Section 2: Gathering of data

### 3. Athletes

**Q. Can you describe the criteria on the basis of which you select the athletes for inclusion in the Registered Testing Pools, for tests, for biological passports, etc.? Please specify the criteria for each decision.**

### 4. Types of data

**Q. What data do you gather about/from the athlete and what is the purpose for such collection?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **Blood samples**
- **Urine samples**
- **Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

### 5. Procedure

**Q. Can you describe the various procedures you use for gathering the different types of data?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **Blood samples**
- **Urine samples**
- **Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## 6. Information

**Q. What information do you provide to the athlete about these procedures and the data you gather about them, as well as the processing of their data?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **Blood samples**
- **Urine samples**
- **Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## 7. Consent

**Q. Do you ask for the athlete's consent and/or signature? For what purpose is consent sought?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **Blood samples**
- **Urine samples**
- **Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## 8. Differentiation

**Q. Are there differences in (types of) data collected and processed or procedures between different kinds of athletes (e.g. minor-adult, professional-amateur athlete and or individual athlete-team of athletes)?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **Blood samples**
- **Urine samples**
- **Other samples**
- **TUEs**

- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## 10. Legal ground

### **Q. On the basis of what processing ground do you collect information about the athletes, including their personal details and their whereabouts?**

Processing grounds that the General Data Protection Regulation mentions are:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) where processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) where the processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) where the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; or
- (f) where the processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party.

**Can you explain in which situation you rely on the athlete's consent, contractual agreement, a legal basis, a vital interest, a public interest or otherwise and why you rely on this ground in that specific situation? More than one ground may apply in a specific context. Please specify per category.**

## 11. Sensitive personal data

### **Q. Do you process data that could disclose an athlete's health, genetic information and/or biometric data? If so, can you explain why you need these data and/or have you thought about on which legal ground you base the processing of sensitive data?**

Processing grounds that the General Data Protection Regulation mentions for sensitive data are:

- (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;
- (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;
- (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;



- (d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;
- (e) processing relates to personal data which are manifestly made public by the data subject;
- (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;
- (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;
- (h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;
- (i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;
- (j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

**Can you explain in which situation you rely on the athlete's consent, a vital interest, a substantial public interest or any other ground mentioned and why you rely on this ground in that specific situation? More than one ground may apply in a specific context. Please specify per category.**

### Section 3: Storing data

#### 12. Use of ADAMS

- Q. Do you use ADAMS or are you planning to do so?  
What are the considerations for doing so or not doing so?  
Would you prefer another information system or way of sharing data?  
Please specify per category, such as:**
- **Personal details (name, address, etc.)**
  - **Whereabouts**
  - **(Information about) Blood samples**
  - **(Information about) Urine samples**
  - **(Information about) Other samples**
  - **TUEs**

- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

### 13. Retention periods

**Q. Which retention periods do you use for storing the data? If these differ from the ISTI protocol or other WADA standards, can you explain why you use different retention periods?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **(Information about) Blood samples**
- **(Information about) Urine samples**
- **(Information about) Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

### 14. Data security

**Q. Do you use data protection techniques such as anonymization, pseudonimization and encryption techniques? If so, how?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **(Information about) Blood samples**
- **(Information about) Urine samples**
- **(Information about) Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## Section 4: Sharing data

### 15. Laboratories

**Q. Can you describe the procedure for transferring the test material (urine/blood) to the laboratories? How and in which form do the laboratories communicate the results to you?**

■

### 16. Inside the EU

**Q. Do you have protocols and/or criteria you use for deciding when and how to share data with other NADOs and/or IFs who are based in the EU?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **(Information about) Blood samples**
- **(Information about) Urine samples**
- **(Information about) Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

### 17. Outside the EU

**Q. Do you have protocols and/or criteria you use for deciding when and how to share data with other NADOs and/or IFs who are based outside the EU?**

**Please specify per category, such as:**

- **Personal details (name, address, etc.)**
- **Whereabouts**
- **(Information about) Blood samples**
- **(Information about) Urine samples**
- **(Information about) Other samples**
- **TUEs**
- **Biological passport**
- **Other information gathered from open sources**
- **Information about staff**
- **Information about team members**
- **Etc.**

## 18. Legal basis

**Q. Which instrument for transfer do you rely on for transferring personal data to third countries outside the EU, such as adequacy decisions or appropriate safeguards?**

Please specify per category, such as:

- Personal details (name, address, etc.)
- Whereabouts
- Blood samples
- Urine samples
- Other samples
- TUEs
- Biological passport
- Other information gathered from open sources
- Information about staff
- Information about team members
- Etc.

## 19. Law enforcement agencies

**Q. Do you have protocols and/or criteria you use for deciding when and how to share data with law enforcement agencies?**

Please specify per category, such as:

- Personal details (name, address, etc.)
- Whereabouts
- Blood samples
- Urine samples
- Other samples
- TUEs
- Biological passport
- Other information gathered from open sources
- Information about staff
- Information about team members
- Etc.

## Section 5: Analysis and publication of data

### 20. Use of the data

**Q. Can you specify which categories of data you use for which type of purpose? Are there internal protocols/rules/standards that govern the use of the data?**

Please specify per category, such as:

- Personal details (name, address, etc.)
- Whereabouts
- Blood samples
- Urine samples
- Other samples

- TUEs
- Biological passport
- Other information gathered from open sources
- Information about staff
- Information about team members
- Etc.

## 21. Results

**Q. Which procedures do you use for analysing the lab results and for determining whether there is a doping violation?  
Please specify per type of finding (negative, adverse analytical finding, atypical results, etc.)**

## 22. Sanctions

**Q. On the basis of which criteria do you decide on a sanction on an athlete, team or otherwise for a specific doping violation?**

## 23. Publication

**Q. Which data about the doping violation, the athlete and/or the sanction do you publish and which protocols do you use? Please specify per type of data why you publish the data.**

## Section 6: Concluding questions

### 23. Athletes' opinions/ Data subject rights

**Q. Have you ever received questions/complaints of athletes regarding the collection and processing of their data? If so, please elaborate.**

### 24. Concluding remarks

**Q. Do you have comments or suggestions regarding the processing of personal data in the context of anti-doping in sport?**

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