WORLD ANTI-DOPING AGENCY

EUROPEAN COMMISSION CONSULTATION: THE LEGAL FRAMEWORK FOR THE FUNDAMENTAL RIGHT OF PERSONAL DATA

I. INTRODUCTION

The World Anti-Doping Agency ("WADA") appreciates the opportunity to respond to the European Commission's consultation focusing on the effectiveness of EC Directive 95/46/EC (the "Directive"). WADA is an independent international agency established in 1999, and is composed and funded by the sports movement and governments around the world. WADA's mission is to foster and promote a doping-free culture in sport. To that end, WADA conducts scientific research, offers education and awareness programs, contributes to the development of anti-doping practices and monitors implementation of the World Anti-Doping Code (the "Code") – the document harmonizing anti-doping practices worldwide for sport. WADA also produced in 2009 the first global data protection standard, the International Standard for the Protection of Privacy and Personal Information (the "Standard").

WADA's mission of implementing anti-doping controls in organized sport, and its creation of the Standard, has brought it into regular discussions with the various bodies overseeing Europe's data protection regime, including the Council of Europe, the Article 29 Working Party and national data protection regulators. More recently, the Standard and anti-doping practices more generally were the subject of two opinion papers published by the Article 29 Working Party.[1] This experience has given WADA a unique insight into how European data protection regulators interpret certain provisions of the Directive, as well as convinced it of the need to submit this response. Indeed, WADA fears that some regulators are engaging in an overly restrictive interpretation and application of EU data protection rules and thereby threatening to undermine the very anti-doping programs that Europe, both at the Community and local level, has been promoting and supporting around the world for many years.

[1] *See* WP 162 (adopted 6 April 2009); WP 156 (adopted 1 August 2008). WADA's formal response to the Article 29 Working Party papers, and other relevant materials, can be found on WADA's website at: www.wada-ama.org.

Community instruments, as well as numerous Commission policies and public statements, repeatedly recognize the importance of the fight against doping in sport and the substantial public interest that anti-doping efforts serve. The Commission's recent *White Paper on Sport* (COM (2007) 391) refers to the serious threat doping in sport poses to individual and public health, as well as the image of sport.[2] Meanwhile, the Treaty of Lisbon has enshrined into European law the aim of "protecting the physical and moral integrity of sportsmen and women," an aim directly advanced by European anti-doping regimes, and nearly all Member States have ratified both the Council of Europe's *Anti-Doping Convention* (ETS No. 135) and the United Nations' *International Convention Against Anti-Doping in Sport*.

Given the above, the Commission's consultation represents a critical opportunity for Europe to ensure that its data protection framework, and Directive 95/46/EC in particular, is not brought into needless conflict with European anti-doping efforts. WADA continues to believe that this framework can accommodate modern anti-doping practices when sensibly applied by national regulators. It has even prepared and published a number of detailed submissions on this point. For purposes of this response, WADA simply will concern itself with features of Directive 95/46/EC that could be updated to take account of modern anti-doping programs and reduce the possibility of conflicts between anti-doping practices and data protection rules arising in future.

II. PROPOSED AMENDMENTS TO DIRECTIVE 95/46/EC

1. Amend Article 8 to provide an explicit legal basis for the processing of sensitive data by anti-doping organizations.

WADA would urge the Commission to propose amending Article 8, governing the processing of sensitive personal data, to provide a much clearer legal basis for the processing of such data by European anti-doping organizations. By way of background, anti-doping organizations routinely collect and process health information relating to athletes in the normal course of administering their anti-doping programs. For instance, athletes may submit requests to use banned substances for a documented therapeutic use or have their biological samples analyzed in connection with in and out-of-competing testing. Anti-doping organizations thereby acquire a significant amount of information relating to the health of athletes.

[2] See, in particular, the Commission's "Staff Working Document" accompanying the *White Paper*, which refers to the fact that doping represents a threat to, among other things, individual and public health (especially for children and young people), the principle of open and equal competition, and the image of sport.

To be clear, WADA believes that European anti-doping organizations should be able to rely on existing Article 8 provisions, such as Article 8(2)(a) (consent), when processing such data. But, WADA's experience is that certain European data protection regulators challenge this view. Consequently, except in those Member States that have enacted legislation expressly addressing the processing of sensitive athlete data by anti-doping organizations, a clear legal basis for such processing often appears to be lacking. This "legislative solution," moreover, cannot be the preferred solution. Expecting Member States to enact local laws would be inconsistent with the aim of the Commission's own *White Paper on Sport* and the terms of the Treaty of Lisbon, both of which call for a more coordinated "European" approach to doping and action at the EU - not Member State - level.[3]

We therefore think the Commission should consider creating alternative legitimate grounds for the processing of sensitive data by anti-doping bodies, both public and private. On the one hand, this could be achieved by expanding existing Article 8(3) of the Directive to explicitly permit the processing of sensitive athlete data by anti-doping organizations. Article 8(3) excludes the application of Article 8(1) in cases where health information is processed by medical professionals subject to a professional duty of confidentiality or by others subject to a comparable duty. We suggest extending Article 8(3) to allow "processing of sensitive data performed by competent national or international anti-doping authorities required for the purposes of conducting anti-doping procedures on athletes participating in organized sport," provided such processing is performed by persons subject to a professional duty of confidentiality (e.g., medical professionals) or its equivalent.[4]

Alternatively, the same result might be achieved by amending Article 8(2)(d), which permits foundations, associations and non-profit bodies to process sensitive data relating to their own members or other persons with a close connection with those entities. Amending Article 8(2)(d) to expressly include the processing of sensitive data by anti-doping organizations represents a logical extension of the provision to a closely analogous context, one that the original drafters of Directive 95/46/EC may not have considered. Anti-doping organizations similarly gather information from and about their "members" (i.e., the athletes who have registered with the organization) and ensure that they

[3] The Treaty of Lisbon, for instance, calls for Union action aimed at "developing a European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen." *See* Article 165(2).

[4] Alternatively, language similar to that found in Article 13(1)(d) and (f) of the Directive could be used. This might help solve a potential second problem that might arise where certain data protection authorities engage in an expansive interpretation of Article 8(5) to treat certain anti-doping data – namely, that data indicative of a doping violation – as "judicial data."

adhere to rules of appropriate conduct when training for or competing in events and competitions, including compliance with a strict anti-doping code that guarantees a level playing field for all.

That said, Article 8(2)(d), as now drafted, provides that the covered entities also must refrain from disclosing the relevant "membership" data to third parties without the consent of the data subject. This particular condition will prove problematic in the anti-doping context given the open hostility shown by European data protection regulators to reliance on consent to justify the processing of sensitive data, both generally and specifically in the anti-doping context, and the fact that European anti-doping organizations routinely need to disclose data to other anti-doping organizations (in Europe and elsewhere). For this reason, any proposal tabled by the Commission would need to eliminate the need to secure data subject consent to third party disclosures (or provide for other options) or else the proposed amendment would be of little practical benefit.

Third, and last, the Commission could investigate whether some of the legal bases that now appear under Article 7, perhaps combined with proposals for heightened security, new audit and transparency requirements, greater oversight by data protection authorities or expanded user control, could be sensibly incorporated into Article 8.[5] For instance, one possibility would be to permit processing carried out in the public interest, as now appears at Article 7(e). That anti-doping serves such interests is clear, as we note above. This has even been affirmed by the European Court of Justice, which observed in *Meca-Medina* (Case C-519/04 P) that combating doping is necessary to safeguard both the health of athletes, the integrity and objectivity of competitive sport and the ethical values in sport.

2. **Revise Article 26 to enable anti-doping organizations to transfer personal data where necessary in connection with their legitimate anti-doping activities.**

WADA would urge the Commission to propose amending Article 26, establishing derogations to the general transfer restrictions contained at Article 25, to facilitate the transfer of personal data by anti-doping organizations in connection with their anti-doping programs. This is necessary because, at present, some European data protection regulators appear to question the basis upon which such data may be legitimately transferred by European anti-doping organizations to other anti-doping bodies outside the European Union. In the

[5] Article 8(4) even permits Member States and data protection regulators to create exemptions to permit the processing of sensitive data - something they cannot do for ordinary personal data under Article 7. The result is that European data controllers are subject to divergent Member State approaches to the regulation of sensitive personal data.

absence of a clear legal basis, some European anti-doping organizations are uncertain as to whether they may lawfully transfer such data.

That European anti-doping organizations need to transfer such data is clear. For example, when athletes in the registered testing pools of these organizations train or compete in a foreign country, their whereabouts data often needs to be shared with local anti-doping authorities in order to allow them to perform in- or out-of-competition testing. If relevant data cannot be shared with competent anti-doping authorities in these circumstances, it is easy for an athlete to simply circumvent the rules and evade doping tests. Further, European anti-doping organizations may collect data on foreign (i.e., non-EU) athletes competing or training in Europe, and will need to disclose the results of any anti-doping tests they conduct with the foreign anti-doping organizations with whom the athletes are registered.

Again, WADA's position is that Member States and their national data protection regulators could allow such transfers using one of the existing derogations at Article 26. Further, representations made by the Canadian data protection authorities reveal that anti-doping data, including personal data, uploaded onto WADA's anti-doping database located in Canada, known as ADAMS, are subject to adequate protection (in the Article 25 sense) by virtue of applicable Canadian federal and provincial privacy laws. For other international transfers, WADA believes that the sensible application of Article 26(1)(a) (consent), 26(1)(c) (fulfillment of contracts) or Article 26(1)(d) (public interest) could apply in the anti-doping context, although some regulators are sceptical.[6] This is unfortunate, as most athletes themselves often wish to participate in such controls to demonstrate their adherence to the World Anti-Doping Code and commitment to doping-free sport.

Ultimately, European anti-doping organizations and athletes should be afforded a clearer legal basis legitimizing the international transfer of such data. WADA can envision at least two possible solutions to this problem arising from the current restrictive interpretation and application of Article 26. First, Article 26(1) could be amended to specifically permit transfers of personal data by European anti-doping organizations "where necessary to perform anti-doping controls" (or language having an equivalent effect). Second, and alternatively, the Commission could propose amending Article 26(4) to allow transfers not only where the Article 31 Committee concludes that particular contractual clauses provide adequate safeguards, but also where industry codes or standards do so

[6] Some have suggested reliance on other measures, such as contracts, to transfer athlete personal data. Such a suggestion is unsuited to the anti-doping context given that athletes can compete and train in a multitude of countries, often at short notice, and anti-doping organizations processing the data can be public bodies unwilling or unable to execute data transfers agreements. This was even acknowledged by the Swiss Federal Data Protection Authority in its 15th Annual Report (2007/2008).

as well. It is unclear why Article 26(4) only permits the Article 31 Committee to consider contractual controls, when it is clear that adequate protections can also be adduced through other mechanisms, such as codes, standards or even "binding corporate rules."

WADA considers the above suggestion concerning Article 26(4) relevant to anti-doping, insofar as there currently exists – in the form of the WADA International Standard for the Protection of Privacy and Personal Information – an effective and robust data protection standard that governs the activities of anti-doping bodies worldwide and creates a high level of protection for personal data processed by such bodies. WADA's Standard meets, and very often exceeds, the level of protections provided for by the International Privacy Standard endorsed by the global privacy community, including European authorities, at the recent Privacy Commissioners' Conference in Madrid, Spain. In WADA's opinion, it would be an easy step for the Article 31 Committee to conclude that the Standard, either as it exists now or with certain provisions amplified, provides a sufficiently high level of protection to warrant its own adequacy determination.

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WADA once again would like to thank the European Commission for this opportunity to make its views on EC Directive 95/46/EC known. WADA would be pleased to discuss its suggestions with the Commission in more detail, should that be helpful.