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Athletes' Human Rights and the Fight Against Doping: A Study of the European Legal Framework

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Foreword

I. Anti-doping, Data Processing and Athletes' Right to Privacy

Devoted to the identification of conflicts between *Athletes' Human Rights and the Fight Against Doping: A Study of the European Legal Framework*, this book is largely about privacy, but not only. It looks at the World Anti-Doping Code[1] (WADC) of the World Anti-Doping Agency, but not only. The readers will see that the relatively narrow exercise of balancing WADC "expectations"[2] against legally binding requirements under European Union law, such as the General Data Protection Regulation (GDPR)[3] which took full effect on 25 May 2018, points to other and more far-reaching legal, political and practical challenges related to other fundamental and procedural rights which can be invoked by athletes.

By grounding its analysis of the current (July 2018) anti-doping rules, procedures and practices in the right to private life (Article 8 ECHR, Article 7 EU CFR) and protection of personal data (Article 8 EU CFR), the right to an effective remedy and a fair trial (Article 6 ECHR, Article 47 EU CFR) as well as the prohibition of discrimination (Article 14 ECHR, Article 21 EU CFR), it goes beyond the narrow confines of privacy and data protection. In so doing, the authors have kept their focus on athletes' procedural rights, with privacy taking centre stage, while

[1] World Anti-Doping Code 2015 with 2018 amendments. N.B. This Foreword represents the situation as of July 2018. See also the Postscript October 2019 subsequent to the Foreword.

[2] Article 22 WADC. Note that under the terms of the WADC, governments cannot be "Signatories" and thus are not bound by the WADC itself, but only by UNESCO's International Convention against Doping in Sport 2005, but note that under Article 3 (Means to achieve the purpose of the Convention) State Parties are at liberty to adopt whatever measures they themselves deem appropriate to further the objectives of the Convention. There is no obligation to adopt legislation, nor to exchange data.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4.5.2016.

recognising that, for athletes to be able to exercise their fundamental rights to private life and data protection, broad procedural protections must be in place. Whether this is the case, in the Member States of the European Union, is what this book sets out to explore. By focussing strongly on data protection, it builds a bridge to debates which have been topical, in policy circles as well as in academia. By also taking on board the right to private life, it recognises that anti-doping rules, procedures and practices are not limited to the electronic aspects of surveillance. Moreover, by covering the right to an effective remedy and a fair trial, and the prohibition of discrimination, it finally makes clear that the fundamental rights discussed here invariably have important procedural implications. The pervasiveness of the "strict liability" principle[4] and the absence of recognition of the presumption of innocence, for instance, mean that the WADC has the potential to accumulate procedural imbalances to the detriment of athletes suspected of doping.[5]

As any standard of an NGO (the World Anti-Doping Agency), the WADC[6] and the related International Standards,[7] are not legally binding.[8] These standards, as well as the procedures and practices based on them, must comply with the human rights law of the Council of Europe and the fundamental rights law of the European Union. These private rules cannot overrule human rights and fundamental rights, although national legislators may by legislative means put the anti-doping fight on a securer footing, thereby providing for a more lenient (from the perspective of data controllers and data processors) interpretation of the said human rights and fundamental rights.[9] This confirms the established EU case law, based on antitrust

[4] Article 2.1 WADC.

[5] See, e.g. Kornbeck J (2016) The EU, the Revision of the World Anti-Doping Code and the Presumption of Innocence. International Sports Law Journal, 15:3–4, 172–196.

[6] World Anti-Doping Code 2015 with 2018 amendments. https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pdf.

[7] Of the six International Standards (https://www.wada-ama.org/en/what-we-do/international-standards) (accessed 20 August 2018), those most directly relevant to the topic of this book are the International Standards for Testing and Investigations (ISTI) (January 2017), Therapeutic Use Exemptions (ISTUE) (January 2016) and the Protection of Privacy and Personal Information (ISPPPI) (June 2018), although exigencies laid down in other International Standards may also bear upon data processing operations, e.g. references to the publication of results in the International Standard for Code Compliance by Signatories (ISCCS) (April 2018), Sect. 10.2.1 and Annex A, Sect. 23.5.7; or to the "sharing" of "knowledge" in the International Standard for Laboratories (ISL) (June 2016), Sect. 4.2.4, 4.4.6.

[8] See ECtHR, Fifth section. Joined cases Fédération nationale des associations et des syndicats sportifs (FNASS) et al. v France (48151/11) and Longo v France (77769/13). Strasbourg 18.01.2018, confirmed 18.04.2018. ECLI:CE:ECHR:2018:0118JUD004815111 (Judgment only available in French), Rec. 45, 126.

[9] ECtHR (2018), Rec. 183: The Court notes that in implementing WADC rules through binding national legislation, France has made "a clear choice".

standards, requiring anti-doping rules to be necessary, proportionate and inherent in order to achieve a legitimate aim.[10]

In providing the analysis of and commentary on the WADC, the book adds much needed independent scholarship to policy discussions which have been taking place since 2008. Such discussions occasionally led to controversy,[11] making objective research even more necessary. Building on a study[12] commissioned by the European Commission and carried out by the authors of this book, the present text is apt to make a substantial contribution to scholarship in a field which remains still largely under-examined. While the human rights aspects of anti-doping policies and practices have received some attention in legal[13] and social science scholarship,[14] the exact implications under European data protection law—which is highly specific and includes a protocol to be followed mandatorily, while the non-digital aspects of privacy are left to a broader case-by-case appreciation—still need to be understood better than they currently are. The discussion on fair trial and the prohibition of discrimination provided in this book is, to the best of my knowledge, entirely new and deserves therefore to be welcomed especially.

More than anything else, however, the data protection implications of the current anti-doping regime (and its likely future emanations) need to be understood better. To this end, the way in which data protection is embedded within the larger concept of privacy needs to be taken into account. Clarity is needed regarding the respective scope and reach of privacy and data protection rules. While the application of this distinction to sport and anti-doping might, until recently, have seemed rather "academic" (in the sense of the word when used among practitioners), the ECtHR recently[15] adjudicated such a case for the very first time. In so doing, the Court

[10] CJEU, David Meca-Medina and Igor Majcen v Commission of the European Communities, case C-519/04, 18 July 2006. P. ECR 2006 I-06991. ECLI:EU:C:2006:492, Rec. 42-49. See in particular Rec. 47 acknowledging "the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached", making them "capable of producing adverse effects on competition" if "penalties were ultimately to prove unjustified". The Court finds it necessary, therefore, for anti-doping rules to be "limited to what is necessary to ensure the proper conduct of competitive sport".

[11] Waddington I (2010) Surveillance and control in sport: a sociologist looks at the WADA whereabouts system. International Journal of Sport Policy and Politics, 2:3, 255–274.

[12] Van der Sloot B, Paun M, Leenes R, McNally P, Ypma P (2017) 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. Publications Office of the European Union, Luxembourg https://publications.europa.eu/fr/publication-detail/-/publication/50083cbb-b544-11e7-837e-01aa75ed71a1/language-en.

[13] Pettiti C, Korchia N (2012) Droits fondamentaux du sport: Dopage. Institut de formation en droits de l'homme du Barreau de Paris, Paris.

[14] Houlihan B (2004) Civil Rights, Doping Control and the World Anti-doping Code. Sport in Society, 7:3, 420–437.

[15] ECtHR, Joined cases Fédération nationale des associations et des syndicats sportifs (FNASS) et al. v France and Longo v France', application nos. 48151/11 & 77769/13, 18 January 2018.

focussed almost exclusively on the non-digital aspects of the surveillance regime known as "whereabouts requirements".[16] That it did not find a violation of Article 8 ECHR, while its focus remained so narrowly confined, does not allow concluding that the data processing operations involved in the anti-doping fight were cleared on that occasion. Efforts in fine-tuning the legal assessment of these challenges must therefore continue.

II. A Timely Contribution

Against this backdrop, this book is a timely and necessary contribution to a debate which is only just emerging at the academic level, at least as a broader one attracting input from wider academic and professional communities. For although the problems addressed here have been known for over a decade (the first known doctoral thesis in law was subsequently published as a book in 2008[17] and thus predates the World Anti-Doping Code (WADC) 2009 which sparked so much controversy[18]), until now they have rarely received the attention they deserved. However, with the release by the World Anti-Doping Agency (WADA), in 2018, of a revised International Standard on privacy (ISPPPI)[19] which incorporates some important new principles matching the General Data Protection Regulation (GDPR)[20] of the European Union (EU), arguably the most progressive data privacy law in the world,[21] reasons for renewed optimism can be found as to the prospects of a rapprochement between anti-doping rules, on the one hand, and privacy and data protection law, on the other hand.

[16] See also Kornbeck J (2018) An exemplary illustration of the distinction between private life and data protection (Article 7-8 CFR): the ECtHR's joint decision in FNASS v France and Longo v France (Article 8 ECHR). Journal of Data Protection and Privacy, 2:2, 120–134.

[17] Flueckiger C (2008) Dopage, santé des sportifs professionnels et protection des données médicales. Schulthess, Geneva.

[18] Waddington I (2010) Surveillance and control in sport: a sociologist looks at the WADA whereabouts system. International Journal of Sport Policy and Politics, 2:3, 255–274.

[19] International Standard for the Protection of Privacy and Personal Information (ISPPPI). June 2018. https://www.wada-ama.org/sites/default/files/resources/files/ispppi-_final_-_en.pdf (accessed 25 July 2018).

[20] Regulation (EU) 2016/679 (n 4).

[21] Kuner C, Jerker D, Svantesson B, Cate FH, Lynskey O, Millard C, Loideain NN (2017) The GDPR as a chance to break down borders. International Data Privacy Law, 7:4, 231–232: "set to become the most influential piece of data protection legislation ever enacted, and its influence will extend beyond the boundaries of Europe. This poses challenges at both the European and international levels, but also presents opportunities". See also Soros G (2018) Only the EU can break Facebook and Google's dominance. The Guardian, Thursday 15 Feb 2018 15.31 GMT, https://www.theguardian.com/business/2018/feb/15/eu-facebook-google-dominance-george-soros. Accessed 25 July 2018.

Just like privacy and data protection have gone from being the niche of a small community, largely ignored by their peers, towards becoming relevant to all manner of professionals working in all sectors, so it is to be hoped that the legitimate place of privacy and data protection in anti-doping governance will have become more self-evident. This is especially the case within the EU, but certainly also outside, as anti-doping organisations (ADOs) cooperating with ADOs based in the EU will also have to ensure their GDPR compliance, especially under Rec. 80 and Article 27 GDPR (obligation for controllers or processors not established in the Union to designate in writing a representative in the Union). Much has changed during the decade comprised between the floating, in limited circulation, of an initial ISPPPI draft, back in early 2008, and the magic cut-off date 25 May 2018, by which the GDPR took full effect. At the same time, members of the privacy and data protection community are well aware that the GDPR includes many rules which were already extant law before that date. Whereas many parts of the GDPR actually amount to a codification (e.g. the right to the forgotten ("RTBF") (Rec. 65-66 and Article 27 GDPR), sometimes of what was extant law as confirmed by the Court in *Google Spain*,[22] this went largely unheeded in many sectors, including in the anti-doping sector. Privacy and data protection professionals will need to explain this to their colleagues, reiterating it as often as required, because this realisation will help them to make a more nuanced and authentic assessment of their own pre-GDPR practice.

This does not imply that the sports sector or the anti-doping community must be any worse than many other sectors or industries—far from. While many industries had developed IT tools and business models relying on the legal and political vacuum left by a technological development unfolding at breakneck speed, so many actors came to assume that the availability of new technologies had brought about a new normative reality, which of course it had not: the availability of a technology cannot be a source of law governing the use of that same technology.[23]

It took time for legislators, regulators and courts to react to the many new and indeed novel realities, yet react they did, increasingly egged on by digital activists.[24] Many industries took refuge in narratives of tech-hostile, disconnected, un-educated legislators, regulators and judges, having initially opposed the GDPR

[22] CJEU, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González. Request for a preliminary ruling from the Audiencia Nacional, case C 131/12, 13 May 2014. ECLI:EU:C:2014:317.

[23] European Data Protection Supervisor (2015) Opinion 4/2015. Towards a new digital ethics. Data, dignity and technology. 11 September 2015 (https://edps.europa.eu/sites/edp/files/publication/15-09-11_data_ethics_en.pdf) Accessed 25 July 2018), p 10: "Human innovation has always been the product of activities by specific social groups and specific contexts, usually reflecting the societal norms of the time. However technological design decisions should not dictate our societal interactions and the structure of our communities, but rather should support our values and fundamental rights".

[24] Kornbeck J (2018) Young Europeans and Digital Activism. Coyote Magazine (Youth Work/Knowledge/Policy), issue 26, 11/06/2018, https://pjp-eu.coe.int/en/web/coyote-magazine/young-europeans-and-digital-activism.

draft in many cases. By 25 May 2018, however, industries had largely learnt to use GDPR language, sometimes even trying to take credit for it.[25] The irony was not wasted on those who had been observing the same industry up until that point, yet in this respect their adaptation resembled that of the sport sector[26] after the Court's ground-breaking 1995 *Bosman* ruling.[27] What we experienced for some years was the same "cultural lag"[28] previously known from pollution or tobacco use,[29] which from the Industrial Revolution and well into the 1980s was largely ignored. In both cases, profits could be met without entering the full societal costs into the broader balance sheet. It may have been understandable that tech companies could go freestyle for some decades, both because many people in leading positions were insufficiently aware of the technological aspects as well as of the new social practices, which they may have not been partaking in themselves, and also because the new industry was tapping into a largely unchartered and insufficiently regulated territory. Just like the sports industry,[30] they would claim exceptionalism with some success over some time, but like sport, they too had to gradually accept that they were and are part of the economic, social, political and thus also legal mainstream of society. In both cases, tech and sport, the sector became a victim of its own success, but it was precisely because of its new-found pervasiveness that the seemingly exceptional sector had to bend in and accept the mainstream rule book.

Just like sport aims at reaching people of all walks of life, potentially bringing most of the human race together, so it gradually had to accept (albeit grudgingly) that it could no longer be self-regulated in the way it had once been while it had still been restricted to smaller communities, and with less influence over people's lives. Similarly, the tech industry has gone from "nerd" to "normal", its stated aim now being to include entire communities in "smart" workplaces, "smart" cities and much more of the sort. Precisely because it has been so successful in selling its vision of

[25] Example: "During Apple's 2018 Q2 Earnings Report, Apple CEO Tim Cook said, 'we believe privacy is a fundamental human right.' That's a strong and inspiring stand". Martellaro (2018). For an assessment, see, e.g. Satariano A (2018) G.D.P.R., a New Privacy Law, Makes Europe World's Leading Tech Watchdog. New York Times, 24 May 2018.

[26] García B, Weatherill S (2012) Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon. Journal of European Public Policy, 19:2, 238–256.

[27] CJEU, 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', case C-415/93, 15 December 1995. ECLI:EU:C:1995:463.

[28] Ogburn WF (1922) Social Change with Respect to Culture and Original Nature. B.W. Huebsch, New York.

[29] Stolley PD (1971) Cultural Lag in Health Care. Inquiry, 8:3, pp. 71–76.

[30] Weatherill S (2017) Principles and Practice in EU Sports Law. Oxford University Press, Oxford.

"smart" lives to citizens and decision-makers alike, the political can no longer be de-politicised.[31] How "smart" we want our lives to be—and indeed, the pervasive use of the US-English word "smart"[32] is highly manipulative, as digital solutions are not per se "cleverer" or more desirable than offline solutions: the smartness ought to be demonstrated in each case, which too often is not, digitalisation being sold rather as part of a "politics of inevitability"[33]—ought now to be submitted to democratic scrutiny, informed by unbiased advice free from trust-like[34] franchising systems.[35] The same applies to ADOs, who have perhaps for too long had to abide by sporting rules rather than by public laws. In this vein, the CEO of the Norwegian ADO recently called for appeals no longer to be lodged with the private, Lausanne-based Court of Arbitration for Sport (CAS): rather, they should be brought before the Supreme Court of Norway.[36]

In the long run, there is no way in which sports governing bodies (SGBs) and ADOs can permanently escape legal review of their decisions, and it is telling that in 2018 the *Pechstein* case was awaiting a ruling by the Federal Constitutional Court of Germany. Whereas SGBs have routinely been discouraging athletes from going to court,[37] in *Pechstein* the International Skating Union (ISU) had taken up the legal gauntlet, until now turning the litigation to their advantage, having their claims upheld, in 2016, by the civil division of the Federal Court, after substantial

[31] See, e.g. Sacriste G (2014) Sur les logiques sociales du champ du pouvoir européen. Politique européenne 44:2, 52–96: "la dépolitisation des enjeux que permet l'usage du droit" (p. 86). Robert C (2003) L'expertise comme mode d'administration communautaire. Politique européenne, 11, 57–78. Quatremer J (2017) Les salauds de l'Europe. Calmann Levy, Paris. Kotkas T (2012) Who needs social rights when we've got solidarity: Juridification of solidarity and the depoliticisation of EU social policy. European Journal of Social Law 2, pp. 84–98.

[32] Compare the Oxford (https://en.oxforddictionaries.com/definition/smart) and Webster (https://www.merriam-webster.com/dictionary/smart) entries (accessed 25 July 2018).

[33] Snyder T (2018) The Road to Unfreedom. Yale University Press, Yale.

[34] Given the massive concentration of market power in a very small group of Californian tech companies, the need to apply antitrust law more aggressively becomes more urgent by the day.

[35] See ISF School: "ISF Waterloo were the first Google for Education School in Belgium. All our teachers are Google Certified Educators including our Head of School, […]. […] Here's a couple of short videos explaining the incredible advantages of using Google Chromebooks & Tablets and why we decided to 'Go Google'". (http://www.isfwaterloo.org/327/key-facts) (accessed 25 July 2018). Note that the trust owning the school appears to be a charity, *not* a for-profit undertaking.

[36] Pavitt M (2018) Anti-Doping Norway seek Supreme Court to replace CAS in ruling on anti-doping matters. Sunday, 6 May 2018. https://www.insidethegames.biz/articles/1064749/anti-doping-norway-seek-supreme-court-to-replace-cas-in-ruling-on-anti-doping-matters.

[37] See Article 22.4 WADC: "Each government will respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law". See also Article 61 (Dispute Resolution) Olympic Charter in force as from 15 September 2017 (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.65610670.1403600554.1535134153-984243035.1527656047): "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration".

defeats in the two previous instances.[38] Even more spectacularly, in 2018 the International Olympic Committee (IOC) decided to appeal the athlete-friendly *Legkov* decision of the CAS to the Swiss Federal Tribunal (supreme court). This highly unusual move, profoundly contradicting the stated aims of the IOC and WADA, according to which arbitration ought to be the preferred mode of conflict-resolution[39] and litigation in court ought to be avoided as far as possible, came after the CAS quashed a doping-related decision by the IOC Disciplinary Commission on grounds very similar to due process rules applicable in courts of law.[40] It is at this point in time that this book arrives, informed by an innovative research project undertaken by its authors on behalf of the European Commission.[41]

The report was commissioned by the Commission. At that point in time, the EU and its Member States were trying to gauge the exact implications of the GDPR for ADOs and their partners.[42] The study provided the first-ever overview of national legislation, as well as political and administrative arrangements in place, underpinning ADOs and their work, especially their data processing operations. If the legal and political problems and challenges had been known, in principle, for a good decade (at least), created by the anti-doping sector's increased reliance on the personal data of athletes, partially as a result of an increasing reliance on out-of-competition (as opposed to in-competition) testing, they had not always received the attention they would have deserved "on the merits of the case". The EU had already engaged proactively with WADA to mitigate the effects of the WADC on privacy and data protection.

First, the EU Article 29 Working Party (WP29)—the joint collegiate organ assembling representatives of the data protection authorities (DPAs) of the EU Member States, EEA countries, Switzerland and of the EU Institutions themselves, which on 25 May 2018 was replaced by the European Data Protection Board

[38] LG München I, 26.02.2014—37 O 28331/12. OLG München, 15.01.2015—U 1110/14. BGH, 07.06.2016—KZR 6/15. Currenly listed by the Federal Constitutional Court (BVerfG) as an open case (Az. 1 BvR 2103/16).

[39] Article 22.4 WADC: "Each government will respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law".

[40] CAS 2017/A/5379 Alexander Legkov v. International Olympic Committee (IOC). Operative Award Dated: 1 February 2018. Reasoned Award Dated: 23 April 2018. http://www.tas-cas.org/fileadmin/user_upload/Award__5379__internet.pdf.

[41] Van der Sloot B, Paun M, Leenes R, McNally P, Ypma P (2017) 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. Publications Office of the European Union, Luxembourg https://publications.europa.eu/fr/publication-detail/-/publication/50083cbb-b544-11e7-837e-01aa75ed71a1/language-en.

[42] Kronenburg J, Kalkman I (2016) Report on EU Anti-Doping Conference, 15 June 2016 in Amsterdam. "The fight against doping in the EU legal framework: balance between effective anti-doping measures and fundamental rights". Organised by the Ministry of Health, Welfare and Sport in the context of the EU Presidency of the Netherlands. http://www.antidoping.ee/wp-content/uploads/2016/07/Report-on-the-anti-doping-conference-15-June-2016.pdf. Accessed 25 July 2018.

(EDPB) pursuant to Article 68 GDPR—published opinions on WADA's ISPPPI in 2008[43] and 2009[44] and on the adequacy of the provincial legal regime of Quebec (to which WADA is subjected) in 2014.[45] Second, the Commission had in 2008-09 negotiated a number of amendments to the initial ISPPPI text which, in May 2009, resulted in the publication by WADA of an "enhanced" ISPPPI.[46] Third, the Council of the European Union (Council of Ministers), as part of its first work plan for sport,[47] had dedicated considerable resources to the preparation of four long, substantial EU contributions to the 2011-13 revision of the WADC 2009 (which was superseded by the WADC 2015).[48] The same exercise, undertaken in connection with the 2018-20 revision of the WADC 2015 (which will be superseded by the WADC 2021) has until now (July 2018) seen the adoption of one EU contribution,[49] which however is considerably shorter and less specific: hopefully is a sign that privacy and data protection are now being taken more seriously by WADA, SGBs and ADOs.

III. Conclusion: Exaggerated Exigencies or Unrecognised Urgencies?

As this Foreword has shown, it took time for the worlds of sport and anti-doping to discover the overlap between anti-doping rules, on the one hand, and privacy and data protection rules, on the other. The discovery started a decade ago and is far

[43] EU Article 29 Working Party (2008). Opinion 3/2008 on the World Anti-Doping Code Draft International Standard for the Protection of Privacy. Adopted on 1 August 2008 WP 156. http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2008/wp156_en.pdf.

[44] EU Article 29 Working Party (2009). 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. Adopted on 6 April 2009. WP 162.

[45] EU Article 29 Working Party (2014). Opinion 7/2014 on the protection of personal data in Quebec. Adopted on 1 June 2014. WP 219. https://iapp.org/media/pdf/resource_center/wp219_PD-in-Quebec_06-2014.pdf.

[46] WADA, Protection of Privacy and Personal Information, June 2009. https://www.wada-ama.org/sites/default/files/resources/files/WADA_IS_PPPI_2009_EN.pdf.

[47] Work Plan for Sport (2011-2014) Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a European Union Work Plan for Sport for 2011–2014. OJ C 162, 1.6.2011, pp. 1–5.

[48] Kornbeck J (2015) The Stamina of the Bosman Legacy: the European Union and the revision of the World Anti-Doping Code (2011-13). Maastricht Journal of European and Comparative Law, 22:2 (2015), 283–304. Kornbeck J (2018) Young Europeans and Digital Activism. Coyote Magazine (Youth Work/Knowledge/Policy), issue 26, 11/06/2018, https://pjp-eu.coe.int/en/web/coyote-magazine/young-europeans-and-digital-activism.

[49] See Council doc. 7094/18, 16 March 2018, http://data.consilium.europa.eu/doc/document/ST-7094-2018-INIT/en/pdf.

from over by now. The overlap needs to be addressed explicitly, both in policy debates and within academia, since ADOs are required to abide by EU data protection law just like everybody else. As the preface has also shown, the role of the EU as a privacy regulator has taken on a very special role, partly with a global reach. If, according to George Soros, "only the EU can break Facebook and Google's dominance",[50] the EU cannot limit its oversight solely to the owners of major search engines and social networks. This book represents a crucial contribution to the emerging discussion and, far from being a point of arrival, it should be seen as one of departure. The need for independent, unbiased research into these issues is greater than ever. Not only legal scholars but also social scientists should contribute to what ought to become a pluridisciplinary debate. If the tech community can contribute to easing the pressure on athletes while maintaining a level of data processing commensurate with necessity and proportionality, that too would be most welcome.

Finally, to those not entering the debate from the vantage point of data protection law, the book offers additional insights into the "specificity" of sport and the need to balance its autonomy against legal requirements. Because its autonomy is conditional, recurrent compliance checks by public authorities can protect sport against the seductive processes which SGBs themselves invited in cooperation with corporate sponsors and, sometimes, even governments: commodification and commercialisation. SGBs must be clear about who they want to be, charities or business, so that charity rules apply to charities and business rules to businesses. According to one textbook author, the EU has hitherto acted as a helpful "facilitator",[51] thereby "adding value to the patterns according to which it is organized".[52] In relation to data protection, the charity/business distinction may be less obvious, as the GDPR does not distinguish between such types of data controllers (only law enforcement agencies fall outside its scope). Nevertheless, inspiration may be drawn from previous exercises in assessing the reach of the autonomy of SGBs, and that of the law, respectively.

Brussels, Belgium
July 2019

Jacob Kornbeck[53]

[50] Soros G (2018) Only the EU can break Facebook and Google's dominance. The Guardian, Thursday 15 Feb 2018 15.31 GMT, https://www.theguardian.com/business/2018/feb/15/eu-facebook-google-dominance-george-soros. Accessed 25 July 2018.

[51] Weatherill S (2017) Principles and Practice in EU Sports Law. Oxford University Press, Oxford, p 284.

[52] Weatherill S (2017) Principles and Practice in EU Sports Law. Oxford University Press, Oxford, p 356.

[53] Jacob Kornbeck is a civil servant in the European Commission, yet opinions expressed in this Foreword are strictly personal and do not reflect any official position of the Commission.

Case Law

CAS 2017/A/5379 Alexander Legkov v. International Olympic Committee (IOC). Operative Award Dated: 1 February 2018. Reasoned Award Dated: 23 April 2018. http://www.tas-cas.org/fileadmin/user_upload/Award__5379__internet.pdf.

CJEU, David Meca-Medina and Igor Majcen v Commission of the European Communities', case C-519/04, 18 July 2006. P. ECR 2006 I-06991. ECLI:EU:C:2006:492.

CJEU, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González. Request for a preliminary ruling from the Audiencia Nacional, case C 131/12, 13 May 2014. ECLI:EU:C:2014:317.

CJEU, 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', case C-415/93, 15 December 1995. ECLI:EU:C:1995:463.

ECtHR, Joined cases Fédération nationale des associations et des syndicats sportifs (FNASS) et al. v France and Longo v France', application nos. 48151/11 & 77769/13, 18 January 2018. ECLI:CE:ECHR:2018:0118JUD004815111 (Judgment only available in French).

LG München I, 26.02.2014—37 O 28331/12. OLG München, 15.01.2015—U 1110/14. BGH, 07.06.2016—KZR 6/15. Currenly listed by the Federal Constitutional Court (BVerfG) as an open case (Az. 1 BvR 2103/16).

Postscript October 2019

On 18 October 2019, the World Anti-Doping Agency (WADA) published a series of proposed drafts of the 2021 World Anti-Doping Code (Code) and International Standards, to be presented for discussion by stakeholders during the Fifth World Conference on Doping in Sport (Katowice, Poland, 5–7 November 2019) in view of subsequent endorsement respectively by WADA's Executive Committee (ExCo) (International Standards) and Foundation Board (Code) at the conclusion of the Conference on 7 November 2019:[54]

1. 2021 World Anti-Doping Code[55]
2. International Standard for Code Compliance by Signatories (ISCCS)[56]
3. International Standard for Laboratories (ISL)[57]
4. International Standard for the Protection of Privacy and Personal Information (ISPPPI)[58]

[54] Source: Email from WADA, 18 October 2019: WADA publishes proposed drafts of the 2021 Code and International Standards. URLs added.

[55] https://www.wada-ama.org/en/resources/the-code/proposed-2021-world-anti-doping-code.

[56] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-code-compliance-by-signatories.

[57] https://www.wada-ama.org/en/resources/laboratories/international-standard-for-laboratories-isl-2019-newly-approved.

[58] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-the-protection-of-privacy-and-personal.

5. International Standard for Testing and Investigations (ISTI)[59]
6. International Standard for Therapeutic Use Exemptions (ISTUE)[60]
7. International Standard for Education (ISE) (New)[61]
8. International Standard for Results Management (ISRM) (New)[62]

On the same occasion, WADA also released an Implementation Guide for stakeholders[63] which explains the history behind the Code, etc., while highlighting the most salient (in WADA's view) changes from the 2015 to the 2021 framework, as well as a legal Opinion by Judge Jean-Paul Costa, former President of the European Court of Human Rights.[64]

Also on 18 October 2019, the European Data Protection Board (EDPB) "adopted its response to the Council Working Party on Sports' request regarding the ongoing review process of the World Anti-Doping Code. In its letter, the Board recalls two WP29 opinions on the previous versions of the WADA code. The letter points out that progress has been made in relation to the safeguards on privacy and data protection provided by the new version of the Code and its Standards, but that some important concerns remain."[65]

A look at the text of the letter[66] confirms that many open questions subsisted at the time of writing the present Postscript October 2019. While it is not possible, in this framework, to assess the implications of these recent developments, readers should be aware that the findings of this book (including the Foreword) now need to be read in conjunction with the new WADA framework, and that the EDPB (as successor of the Article 29 Working Party) took the view that there were still outstanding issues.

[59] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-testing-and-investigations.

[60] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-therapeutic-use-exemptions.

[61] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-education.

[62] https://www.wada-ama.org/en/resources/the-code/proposed-2021-international-standard-for-results-management.

[63] https://www.wada-ama.org/en/resources/the-code/2021-world-anti-doping-code-and-international-standard-framework-development-and.

[64] https://www.wada-ama.org/en/resources/the-code/legal-opinion-on-the-2021-code-by-judge-jean-paul-costa.

[65] https://edpb.europa.eu/news/news/2019/european-data-protection-board-fourteenth-plenary-session_en.

[66] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_letter_out2019-0035_wada_4.pdf.

Contents

Abbreviations

AAF	Adverse Analytical Finding
ABP	Athlete Biological Passport
ADHD	Attention Deficit Hyperactivity Disorder
ADOs	Anti-Doping Organisations
ADRVs	Anti-Doping Rule Violations
AEPSAD	Spanish Anti-Doping Authority
AIMS	Alliance of Independent Recognised Members of Sport
AIOWF	Association of International Olympic Winter Sports Federations
APF	Adverse Passport Finding
APMU	Athlete Passport Management Unit
ARISF	Association of the IOC Recognised International Sports Federations
ASOIF	Association of Summer Olympic International Federations
ATF	Atypical Finding
BCO	Blood Control Officers
CAS	Court of Arbitration for Sports
CJEU	Court of Justice of the European Union
CPISRA	Cerebral Palsy International Sports and Recreation Association
DPIA	Data Protection Impact Assessment
DPO	Data Protection Officer
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EPO	Erythropoietin
EQAS	External Quality Assessment Scheme
ESAs	Erythropoiesis-Stimulating Agents
FIAU	Federation International Amateur Sambo en Unifight
GDPR	General Data Protection Regulation
GH	Growth Hormones

GHRFs	Growth Hormone Releasing Factors
IBSA	International Blind Sports Federation
ICCPR	International Covenant on Civil and Political Rights
IFMA	National Amateur Sports Ass. of St. Helena, Muaythai
IFs	International Sport Federations
ILAC	International Laboratory Accreditation Cooperation
iNADO	Institute of National Anti-Doping Organisations
INAS	International Sports Federation for Persons with an Intellectual Disability
IOC	International Olympic Committee
IPC	International Paralympic Committee
ISL	International Standard for Laboratories
ISPPPI	International Standard for Privacy and Protection of Personal Information
ISTI	International Standard on Testing and Investigations
ISTUE	International Standard for Therapeutic Use Exemptions
ITF	International Tennis Federation
IWAS	International Wheelchair and Amputee Sports Federation
IWBF	International Wheelchair Basketball Federation
IWRF	International Wheelchair Rugby Federation
KNLTB	Royal Dutch Lawn Tennis Association
LOC	Local Organizing Committee
MEOs	Major Event Organisers
NADOs	National Anti-Doping Organisations
NF	No Finding
NG	National Governments
NOC-NSF	Nederlands Olympisch Comité—Nederlandse Sport Federatie
NOCs	National Olympic Committees
NPC	National Paralympic Committee
NSFs	National Sport Federations
OCOGs	Organising Committees for the Olympic Games
OECD	Organisation for Economic Co-operation and Development
RADOs	Regional Anti-Doping Organisations
RMA	Results Management Authority
T-DO COMP	Advisory Group on Compliance
T-DO ED	Advisory Group on Education
T-DO LI	Advisory Group on Legal Issues
T-DO SCI	Advisory Group on Science
TUEs	Therapeutic Use Exemptions
UDHR	Universal Declaration of Human Rights
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code