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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

The following expert opinion evaluates the legal weight of the aforementioned Opinion of the "Article 29 Data Protection Working Group" of the European Commission (hereinafter termed the Working Group) and comes to the conclusion that this Opinion is neither permissible nor binding in a legal procedural sense and that it is not convincing in terms of its essential content. Legal decisions must be made. The Working Group is requested to confirm in their opinion for legal reasons, that the International Data Protection Standard of the World Anti-Doping Code is a sustainable and appropriate data protection regulation and to provide suggestions as to its further refinement.

I. General principles and legal environment of the expert opinion:

1. Opinion 3/2008 of the Working Group dated 1 August 2008 (hereinafter termed the Opinion) was drawn up at the request of the Directorate-General for Education and Culture of the European Commission. It does not refer to the International Standard for the Protection of Privacy and Personal Information of the World Anti-Doping Code (hereinafter: International Standard) effective since January 1, 2009, but rather to its draft version. Certain warnings in the Opinion have already been taken into consideration in the final version of the International Standard.

2. In Germany, sport, including competitive and elite sports, is considered to be non-governmental. Consequently, combating doping is a public concern, but will be realized, by mandate of the German Parliament and the German Federal Government and the individual *Länder*, first and foremost as a self-governing task of the German sports, meaning their associations and NADA. Because legal federal control and enforcement instruments are not available, except for the authority to enforce public health requirements and prevention of damages relevant to criminal law, only the appeal to the voluntary participation of the stakeholders and the sport-internal sanctions of violations can be taken into consideration.

The German NADA is consequently, irrespective of the involvement of the federal state and the individual *Länder*, an organization under private law, to which the rules of data protection in the non-public area apply. This may be organized differently in other countries of the world, where state bodies, i.e. organizational forms under public law, are entrusted in part with combating doping in sport. In this case, the data protection regulations for the public area apply. The harmonized International Data Protection Standard, as elaborated and made binding by the World Anti-Doping Agency (WADA), is in keeping with this variety of regulatory forms. WADA and their rules do not prefer any of the models.

3. All free models of human coexistence appeal initially to the voluntary commitment of the stakeholders, to comply with the rules as they are valid and necessary for the individual development. These socially accepted rules of propriety, mutual respect and fairness can be codified only with difficulty; for each individual, they arise from reason and moral order.

Only when an inalienable need exists, will these social rules be codified, declared to be mandatory and then monitored and sanctioned by the government. The principle of maximum freedom, which on its own necessarily includes the understanding of its limits, but also the principle of subsidiarity demand a fundamental restraint of governmental intervention always and as long as it appears to be possible to manage without legal regulations and to trust in the voluntary discernment of the parties.

He who calls for the state and ultimately for the police in essentially all cases where voluntarily functioning restrictions are applied to free choice develops a model where society and state are the same and where the authorities are ascribed comprehensive competence and gapless control. If governmental control is preferred over societal, specialized, specific and on free choice based prevention and control models, it will then be only a small step to universal competence to state-internal data consolidation,.

A free societal system also includes the freedom of contract and limitation of the competence of authorities to control abuse, i.e., whether agreements violate laws or morals. If the freedom of contract is negated with the argumentation that it would be better to create a law and to shift the sanctioning of violations from the private / contractual plane to the public / policing plane, then this argumentation requires not just good but excellent reasons.

In this discussion, the argument that principles of data protection would require a statutory regulation is completely unsuitable because data protection is the doctrine of informational self-determination. The informational self-determination includes the control of the individual of information relating to him and its processing.

It cannot be the task of the free and constitutional state to demand a state regulation instead of the voluntary, educated and responsible decision of the individual to the handling of his data. Data protection much exceeds its mandate when its representatives demand legal provisions instead of relying on the voluntary solution by common consent. This would be a purely political opinion and certainly not motivated by the civil rights.

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; the celibate is the prerequisite to bindingly work as a Catholic priest for the Catholic church. This list could be continued. The social sector too requires that the concerned person discloses sensitive data: if private data to cohabitation or financial or health circumstances are not disclosed, social services or insurance protection will be denied: as a result, this person would starve. Nobody would think to defame as immoral or violating civil rights these links between specific duties and prohibitions and their control and punishment due to data protection reasons.

Also in endorsement agreements, the party concerned, i.e. the athletes, bind themselves to a prohibition of doping as an example and integral element of a competitively fair appearance and the corresponding verification systems. But even actors or models bind themselves to physical properties and considerable restrictions in their lifestyle and nutrition. A violation results in an exceptional right to immediate dismissal.

Data protection regulators must understand that personal data are a commodity, a consideration in legal life. Data processing is a component of many agreements even in the very private and personal area. This is a standard and common process that should not cause any excitement or call for state regulation. This will apply in particular when the person concerned person is obliged to be accessible for the purpose of verifying his unquestionable contractual and healthy behaviour, and could leave the system at any time. It is emphasized that the respective notifications are deleted when the date has passed without a test being performed . Hence, it would be irrelevant and inappropriate to talk about a "movement or whereabouts profile". Actually, I would suggest that the language of the privacy protectors would be somewhat pacified and "disarmed".

The data protection regulators do not have a general political mandate; they are only authorized to monitor the data processing appropriate for the respective system and to bind those systems to the legal provisions; whether they like the system itself, whether it enforces far-reaching obligations and thus requires far-reaching controls (and thus data processing) is not to be evaluated by the data protection regulators but by the groups concerned. In particular, when these parties have agreed worldwide to a system of absolute voluntary participation (namely, even to sanctions having effects solely within the system) at appropriate and high data protection standards.

Inasmuch as the data protection regulators refer to the principles of data avoidance, proportionality, security, purpose etc., this is considered as helpful and valuable; because any system can be improved. Hence, should there be possibilities and methods for a less extensive control – by, for example, dispensation of surprise, unannounced tests, because the cover-up opportunities (alas, used frequently) could be uncovered - WADA, being open to all suggestions, would voluntarily adjust the processes. For this reason, constructive criticism is very welcome.

4. Some contemplation shows that the demand for a legal basis for anti-doping prophylaxis and combating doping instead of a contractual solution has constitutional problems and is – regrettably – not thought through. Because the international sport with equal conditions for all internationally competing athletes cannot be regulated on a national legal basis. This, too, is a reason for voluntary association solutions, ensuring a unified and thus fair application of the behavior rules worldwide, using the rules set out by WADA. State systems on the other hand, create an unequal and thus in a mutual comparison of the athletes unfair application system.

In addition: even state-run control systems require necessarily a worldwide active data center; thus, even a statutory solution would not decrease the issues of an international data exchange.

From state-statutory solutions should be abstained also, because experience tells us that such a policing system would not result in less data or a reduced interference than the system of voluntary checks.

As a result, the respective national legislation can neither resolve the issue fairly not would a system of national laws be able to assure data protection benefits.

If data protection regulators demand a legal basis for a voluntary agreement-based process for ostensibly data protection reasons, then the "tail wags the dog".

5. The International Standard elaborated by WADA applies both to WADA itself and to all the national Anti-Doping Agencies associated with it, i.e. also to the German NADA, irrespective of the binding nature of and its compliance with the relevant national data protection legislation. The International Standard is therefore binding as the minimum measure of legal data protection. In view of the fact that athletes and coaches from countries without binding and appropriate data protection regulations are also involved in sport at world level, the International Standard in the field of elite sports guarantees them – for the first time – the required protection of their personal rights and privacy. This specific progress in the field of international data protection merits a positive assessment and support by the Working Group and the Commission.

6. One cannot disregard the fact that the data protection directive creates an appropriate and binding balance between the freedom of data movement on the one hand and the protection of personal rights and privacy on the other. If national or international regulations were to constrain the level of free data movement to an extent beyond that offered in the directive, this would be as injurious to the laws of the European Union as the infringement of personal rights through the abuse of the legal data protection principles expressed in the directive.

II. The competence of the Working Group in relation to the Opinion is problematic.

According to Art. 29 of Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter referred to as directive), the Working Group is an internal, independent advisory body without its own decision-making or even enforcement competence; it is set up within the scope of the EU Commission. It comprises of one representative from each member state, one representative of the European Data Protection Commissioner as well as a representative of the Commission. It decides its recommendations and opinions by a simple majority and submits them to the Commission and to the committee supporting it in accordance with Art. 31 of the directive.

The legal tasks of the Working Group are set out definitively in Art. 30 DsRL:

#### Article 30

1. The Working Party shall:

(a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures;

(b) give the Commission an opinion on the level of protection in the Community and in third countries;

(c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms;

(d) give an opinion on codes of conduct drawn up at Community level.

2. If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly.

3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.
4. The Working Party's opinions and recommendations shall be forwarded to the Commission and to the committee referred to in Article 31.
5. The Commission shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall also be forwarded to the European Parliament and the Council. The report shall be made public.
6. The Working Party shall draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries, which it shall transmit to the Commission, the European Parliament and the Council. The report shall be made public.

The rules of procedure of the Working Party, dated 18 February 2008, do not exceed the statutory tasks but instead repeat them in Art. 1. Whether the Working Party has the competence to deliver an opinion on the internal code of conduct of a worldwide, non-governmental association is not evident from the Directive, without stretching the list of competencies beyond the actual wording and opening up a new sphere of activity for the Working Party. This problem will not be discussed in detail here as yet.

This much is emphasized however: The World Anti-Doping Code is neither a "national measure" in the meaning of Art. 30 Para. 1 (a) of the directive – the Working Party expressly bases its Opinion on this provision – nor does it affect the "level of protection in the Community and in third countries" in the meaning of (b); this is because the Code is not a state or country-specific code of conduct. An amendment of this Directive or an additional Community measure as per (c) is no more relevant than a code of conduct at Community level as per (d). Furthermore, divergences between the laws and practices of member states are not at issue; neither is the equivalence of protection within the Community as per Paragraphs 2 and 3.

In its Opinion, the Working Party also asserts a general advisory competence in relation to rules and standards that are contractual, i.e. are at best indirectly influenced by national or Community law. This competence is not provided for as such in the Directive, if one follows the clear wording. Rather the Directive limits the competence of the Working Party to reviewing state rules and standards and their general implementation for which the state is responsible.

Just for its missing democratic legitimization, the Working Group can only assume internal advisory activities and – differing from the German Federal Data Protection Authority, who will then have to take responsibility – cannot claim any general consulting and publishing mandate. The advisory activity cannot exceed general rule sets. Neither can they advise individuals or groups, nor may they scrutinize contractual rules set by the private sector.

Nonetheless, from a professional and sports policy perspective, the Opinion is in certain aspects helpful and useful for the formation of opinions by NADA and WADA and for supporting their work. The issue of obviously missing competence should therefore not be overstated: constructive dialogue between NADA should – always in the interests of the personal rights of the affected athletes and their coaches – be continued with the German Federal Commissioner for Data Protection and Freedom of Information (BfDI), particularly with respect to the questions of international data protection, and with the State Commissioner for Data Protection and Freedom of Information of North Rhine Westphalia having the competency for the monitoring, with respect to the questions raised in the Opinion. The same surely applies to WADA. This will also mean that WADA

looks for options to keep the burden for the athletes concerned as low as possible, depending on the technical and organizational circumstances. The principle of proportionality between the quantity and intensity of data and the desired and indispensable purity of the sample and their results will result in a continuous adaptation of methods: but as long as it is business as usual that some athletes, usually advised by "specialists", can use and use intelligent methods for the adulteration of announced sampling, unannounced sampling will be necessary. And for this, the accessibility of the concerned parties must be assured.

III. The level of data protection in the third country must not be "equivalent", merely "adequate" (principle of Art. 25 Directive).

1. NADA is a private (non-governmental) body within the context of § 2 Para. 4 Federal Data Protection Act (BDSG); as it does not perform a public-administration role in the context of anti-doping measures, it is also not a public body under § 2 Para. 3 BDSG. German data protection legislation is authoritative for non-public bodies in terms of their internal data processing and for the transmission of personal data collected and saved by it.

The BDSG complies by and large with the higher-ranked stipulations of the European Union (perhaps apart from the question of "full independence" of the national control bodies; this question is currently the subject of an infringement procedure). The reasonable directive-compliant interpretation of the data protection provisions offered is normal in Germany.

In the other member states of the EU and the EEA, the same level of data protection prevails *de jure* as in Germany; therefore Community law and national law do not conflict with the transmission of personal data within the EU and the EEA (§ 4 Para. 1 BDSG), if the other provisions applicable to transmission are taken into consideration (two-stage check).

2. The data processing offices for the ADAMS database are the national Anti-Doping organizations as the collecting and transmitting offices, and WADA as the office that is saving and evaluating the data. The latter is located in Montreal, Canada. Data processing procedures outside the EU, in particular, the transmission of personal data to third countries outside the EU are governed by § 4b Paras. 2 and 3 BDSG as basic standards; these provisions are indisputably in compliance with Community law, i.e. with Arts. 25 and 26 of the Directive.

3. At the heart of the legal evaluation is the undefined legal term, "adequate level of protection" (German: "angemessenes Schutzniveau"; French "un niveau de protection adéquat") in the recipient country. This adequacy does not mean equivalence and especially not equality, because this would then mean that data could only be exported to countries with the exact same level of data protection as the EU.

The level of data protection is considered adequate if the basic protections are complied with, that is when the basic rights to protection of the person and privacy are guaranteed by the relevant legal system. To this end, the following key principles of data protection legislation are checked:

- the purpose and limitation of purpose
- the data quality and its proportionality
- the transparency of processing
- data security
- the right of the person affected to have access to the data, to correct it and object to it
- rules regarding the further transmission to other third states and
- special protection mechanisms for sensitive data.

This check corresponds (at least) to the "In particular rule" of § 4b Para. 4 BDSG. It has priority over the regulations of national law due to its higher ranking.

IV. The review of the level of data protection has already been completed with a good result.

#### 1. The consent as legal basis

Border-crossing traffic of personal data is required for the development of international trade (this includes the exchange of internationally active athletes in international competitions): the verification, whether an **adequate level of protection** exists in a data-receiving third country, must be assessed under **consideration of all circumstances**, see consideration reason 56 of the Directive. Exceptions to the prohibition of transmission to a third country without adequate level apply in the case that the person concerned granted his/her **consent**, see consideration reason 58, clause 1. This is also reflected in Art. 25, para. 1 and in Art. 26, para. 1 lit. of the Directive.

According to constitutional principles, it must be expected of the Working Group that they exactly comply with the aforementioned legal rules. In particular, the consent as legitimization with its statutory dogmatic central role cannot be ignored or interfered with by formulating higher requirements for their effectiveness than is the case for data processing within the Union: For years, German athletes have been subjected to anti-doping checks and thus to a processing of specific data on the basis of their consent. The German data protection authorities never objected to this. This can only mean that the voluntary decision of the athletes in question was considered of decisive importance. The same importance must then logically be attached to the same voluntary decision of the persons concerned for international data transfers.

## 2. Determination of an adequate data protection level in Canada

Taken together it must be considered that an adequate data protection level exists in Canada and the province of Quebec (WADA is headquartered in Montreal). This results from the discussion below where the following issues integrated and discussed:

- a) the consent as general legal basis,
- b) the authority of the Working Group and the Commission to verify national law in third countries,
- c) the processing of health data;
- d) the transmission from Canada to other third countries;
- e) the fact that up to now, no member state prohibited the data transmission via the ADAMS system and finally,
- f) the question whether WADA is subject to the regional legislation of the Province of Quebec or the national legislation of Canada.

In their admissible opinion 2/2001 of 26 January 2001, the Working Group provided a principally positive vote for the appropriateness of the national Canadian data protection laws. There as well, the consent of the concerned person is emphasized as legal basis. The informed and responsible consent given by the person without system-adverse pressure is the best legitimation to be found in respect to data protection.

For the purpose of Art. 25 para. 2 of the Directive 95/46/EG, Canada is considered as a country with an adequate level of protection for the transmission of personal data from the Community to recipients subject to the Personal Information Protection and Electronics Documents Act (PIPEDA) (as decided by the Commission on 20 December 2001, 2002/2EC, based on the aforementioned vote of the data protection group). The legal provisions existing in Canada for the transmission of personal data to third countries are part of the adequacy determination. .

Because the national legislation of Canada does not provide a binding framework for the regional / provincial legislations, no conclusive vote for has been taken, as a consequence of this limitation, on whether data protection is assured in processing subject solely to regional laws of the individual provinces but not national law.

Art. 3 and 4 of the ruling of 20 December 2001 contain restrictions, however: Art. 3 authorizes the authorities in the member states of the Union to suspend data transmission to Canada if the execution of the Canadian data protection laws cannot be assured in practice. Art. 4 provides for a report after three years about the development of the conditions in Canada, in particular whether the legislation of the individual provinces has developed to "provisions mostly corresponding to Federal law".

The adequacy of the data protection regulations applicable in Canada was determined in a formal process by the EU Commission (committee procedure according to Art. 31 of the Directive; see Art. 25 Para. 6) on the basis of the aforementioned principles and resulted in the Commission Staff Working Document of 22 November 2006 (SEC (2006) 1520): all key principles of an adequate level of data protection, as determined by the Commission following a careful review and preparation by the Working Party, were found to have been fulfilled for Canada. Inasmuch as the decision of 20 December 2001 contains possible restrictions in respect to this determination, they will be maintained.

In respect to the legislation of the Province of Quebec, the document provides: As a result if this process, the laws of Quebec ... have been found similar to the federal Canadian Act through an Order-in-Council." If a final decision of the Commission in this question is still missing, this only means that this decision may no longer be delayed and

must soon be made. This has to happen before the Working Group deals with WADA and its rules.

In respect to the processing of health data, the document states without any limitations: "The legislation in force in Quebec was already considered in line with the federal Canadian Act".

Following decisions must be made:

a) Due to WADA being headquartered in Montreal, it may be questionable from a European point of view, whether the laws of Quebec or the national laws of Canada are applicable. However, deciding this potentially difficult (consider the competency issues in the federal structure in Germany) legal question, cannot be the task of the Working Group or the Commission; rather, this question can only be answered and must only be answered by the Canadian authorities. In this respect, the Working Group should refrain from a statement and request a decision from the Canadian authorities. Nothing should remain open.

b) If the Quebec provincial law (and not national law) is applicable for data processing by WADA, the Working Group must verify this applicable law for its adequacy with the data protection level of the Directive and instigate an abstract general decision for the data protection law of Quebec to be made by the Commission. A decision made must be binding. It would be difficult to qualify the extraordinary data protection legal system of Quebec so far below the data protection level of the Directive that its adequacy would be denied.

c) If this decision were to deny the adequacy, a clear statement that the consent by itself is sufficient as a legal basis for a transmission to Canada and WADA's processing of the data there is even more necessary.

If the Working Group intends to deviate from this legal principle, it must be justified by law. For the case, that this justification is successful, a vote of the Canadian authorities must be requested whether WADA is subject to the national law PIPEDA or Quebec provincial law when processing data. Only in this latter case, the Working Group must decide whether this regional law is "substantially similar" to the national law.

d) In no way, the recommendations of the Working Group may be containing open questions, either with the political goal to attempt a derivation of the discrimination of the consent solution from purported ambiguity in the legal system, or to have legal doubts with this solution or even to presume that the voluntary state is not assured. If such doubts or presumptions are formulated and justified properly and reported to the commission, WADA will be obliged to disprove them.

From the previous recommendations of the Working Group, the legal situation and (potentially required) decision in respect to the substantial adequacy of Quebec law to Federal law are not clear enough. Neither NADA nor WADA can be affected in their necessary work because of the missing clarity in these decisions. This is unconscionable, because the German authorities as well have not yet pronounced a transmission ban to NADA. This would open legal procedures.

e) Finally, the national authorities would have to state whether individual contractual regulations between WADA and the national anti-doping authorities within the Union are admissible (see VI.).

V. In future too, the athletes and their coaches shall expressly agree to the transmission of their data to WADA and thus establish another legal basis.

The problems explained – and resolved – under points I, II, III and IV. do not occur if the affected party expressly agrees to the data being transmitted to a third country. This is because, in this case, even if the third country does not have an adequate level of protection in place, the BDSG, in § 4c Para. 1, (in agreement with Art. 26, para. 1 of the Directive) stipulates that the consent of the affected party serves as legitimation of the transmission. Given that the entire data processing system of NADA and WADA is based on the consent and active knowledge of the affected parties, a reference by the Working Party to this simple legal basis would have been helpful.

The written declarations of consent used by NADA are framed such that every affected party can see how exactly his data is being used, i.e. that it is also being forwarded to WADA and that from there it can be forwarded to other national Anti-Doping Organizations once a material cause for this exists within the framework of the purpose of data processing. This is done not only to create legitimation but primarily to create the desired transparency. This applies both to the unremarkable normal case as well as to the case where an internal or public procedure is being initiated.

VI. Contracts are another sufficient legal basis for data processing by WADA.

In addition to data transmission on the basis of an adequate level of data protection and on the basis of consent, the Directive also recognizes the legitimacy of data transmission to a third country on the basis of “sufficient guarantees”: on the one hand, the individually negotiated data protection contract, which was reviewed by the national data protection authority and which requires the latter’s approval in order to be effective (§ 4c Para. 2 BDSG and Art. 26 Para. 2 of the Directive) and the alignment of the transmission contract with the standard contractual clauses of the EU Commission (see also the Safe Harbor Principles for the USA) on the other. These come into consideration when no consent has been given but data transmission to a country without an adequate level of protection is still necessary. The considerations of the Working Group with respect to such exigencies would be helpful and welcome.

VII. The consent is entirely voluntary.

One serious point of the Working Party’s Opinion must be clearly answered, regardless of the latter’s competence and of the authority of its Opinion: the consent of the parties affected will in future continue to be given in full knowledge of the facts and, as before, without duress.

This is because – upon completion of its data protection regulation and under the supervision of a completely independent Data Protection Office – NADA will, in future, inform every affected athlete and coach of all possible uses to which their data may be put and, in particular, of the fact that the data will be transmitted to WADA, and will make this disclosure prior to gathering any data. The consent is thus given in writing, on time, validly and in an informed manner.

With respect to Art. 6.1, the Working Party expressed the opinion that the sanctions that can be imposed if a participant refuses to comply with his notification obligations would lead one to conclude that the consent is not issued without duress. This view is not shared by the writer for the following reasons:

Every sanction system serves to ensure compliance with established rules in a functioning social system. The consequences incurred as a result of a breach of the rules must be framed such that they engender in the affected party a sufficiently strong incentive to comply with the rules. This also applies to the situation where data which is required for the operation of the system is demanded from the affected party. The

question as to the necessity of data, which is more than just convenient and less than indispensable, is decided by those people who are responsible for the functioning of the system.

Thus for example, all social assistance law is based on the principle that the affected party discloses (often sensitive) data and that he can only receive the requested, often vital social assistance under these circumstances. If he does not provide the data, the assistance is refused. In many industrial relations scenarios, it is also necessary for the employee to provide his private data (criminal record, training/education record, performance assessments, family circumstances, 24-hour contact details): if he refuses or fails to do this from the outset, he then loses his job. There are many more examples.

In a strict legal sense, it is not the harshness of the consequences that is critical in the issue of voluntary consent but rather the relationship between the means and purpose: to evaluate this, a legal classification of the desired purpose of data processing and its proportionality, a legal classification of the sanction system, likewise according to the principle of proportionality, and furthermore a legal classification of the relationship between the purpose and the sanction is required. If a person submits to a system of performance controls, because he knows that without these controls the system would become unstable and no longer correctly measurable, i.e. it would become unjust, and that this would consequently threaten his attractiveness and reputation, then that person must also accept that a certain, appropriate amount of data has to be processed in order to deliver the required and meaningful personal basis for system measurement and balancing.

If the purpose of data processing is desired by the legal system, as can be assumed in the case of combating doping, and if it, by necessity, requires full and complete monitoring in the context of unexpected controls, then data processing with respect to a person's whereabouts to an extent that is suitable, required and appropriate, is not socially intolerable. Data protection is not an end in itself but is instead aligned to the actual reality of life: if a procedure involving less data would yield the same result, then this would be realized. In particular, because the sanctions remain within the system and do not have consequences outside this sphere, there can be no objection to the purpose/means relationship. Add to this the fact that every sanction takes place in a guaranteed process with the right of appeal before the ordinary courts, i.e. in a manner regulated in accordance with state law. No legal objection or social detriment can be derived from this. This is particularly true given that WADA has committed itself to deleting the whereabouts data as quickly as possible, where athletes have complied with their notification obligation, and that consequently no profiles of their movements are being built up.

It would only be possible to speak of "duress", if consequences were threatened that originate and take effect outside the system, as is always the case with force or torture but can also occasionally happen where a sanction can impact on an area of a person's life outside the regulated area.

If however a legally desired purpose is involved and data processing is limited to this purpose and if the consequences of refusing to provide this data only comprise disqualification from the system, the purpose of which is being pursued, such a sanction is socially adequate. It is lawful as long as every sanction can be legally challenged and ultimately appealed before neutral state courts.

Conclusion:

Happily the Working Group of the EU Commission expressly supports the efforts of WADA to establish, with great legal expertise and considerable effort, a worldwide data protection ordinance in the fight against doping in sport. The significance of this work, from the point of view of the global protection of personal rights and privacy cannot be overstated. In this context, petty and more often disruptive comments from participants should not be considered. Instead, the important issues should be brought into sharper focus and the significance of global sport in the dissemination and securing of the aforementioned human rights should be highlighted.

Proposed decision:

Although only the EU Commission and the committee, according to Art. 31 of the Directive are addressed and not German or international offices, (Art. 30 Para. 4 DsRL), even if as per Ordinance (EU) No. 1049/2001 it is accessible to the public and may therefore be debated and even if it has been made available on the internet in accordance with Art. 11 of the rules of procedure of the Working Party, I suggest that the existing opinion by WADA is forwarded to the Working Group to be considered in their further forming of an opinion.

The regulated and unified battle against doping can be conducted only with the prerequisite that worldwide unified, fair and in all phases foreseeable processes of prophylaxis and control are agreed. The data protection in these procedures is assured when all participants in international and national competitions are guaranteed a data protection adequate under European law. This is the case.

Dresden, 3 April 2009

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