

November 19, 2008

MEMORANDUM

To: World Anti-Doping Agency (WADA)

From: Covington & Burling LLP

Re: ADAMS Database & EU Data Protection Law

We have been asked to assess whether the World Anti-Doping Agency's ("WADA") Anti-Doping Administration and Management System ("ADAMS") is compatible with the European Union's data protection regime, which currently comprises the EU's Data Protection Directive 95/46/EC (the "Directive"), EU Member State laws transposing the Directive, and related laws and regulations.

We conclude that ADAMS, as currently configured, is compatible with and should serve to facilitate compliance with EU data protection laws among those European-based anti-doping organizations ("ADOs") that choose to use it. These organizations, however, may need to implement additional measures, beyond those integrated into ADAMS, to ensure their full compliance with local data protection laws. ADAMS would not prevent ADOs from doing so.

Overview of ADAMS

ADAMS is a database developed by WADA to better enable it to perform its clearinghouse function with respect to anti-doping information, pursuant to its mandate under Article 14.5 of the World Anti-Doping Code (the "Code").¹ ADAMS operates in a modular format, meaning that ADOs can elect to use some or all of the ADAMS modules. There are separate ADAMS modules relating to, for instance, data on athlete whereabouts, therapeutic use exemptions, and sanctions. The database is operated by WADA in Canada and made available to ADOs around the world.

ADOs that use ADAMS may upload information, including personal data within the meaning of the EU's data protection regime, onto ADAMS relating to athletes within their own registered testing pool. ADOs are denominated the "custodian" of the information that they enter onto ADAMS, reflecting the substantial degree of control and oversight they exercise with respect to the information. Custodial control includes determining when other ADOs may access such information. ADAMS is configured so that athletes themselves are able to access, upload and, in appropriate cases, amend information appearing in ADAMS, such as their whereabouts data, and learn which ADOs have been granted access to their information. WADA, in its Code-mandated role as information clearinghouse, is able to access certain information uploaded onto ADAMS.

ADAMS & EU Data Protection Laws

¹ Article 14.5 of the WADA Code (2009) provides, in pertinent part, as follows: "WADA shall act as a central clearing house for Doping Control Testing data and results for International-Level Athletes and national-level athletes who have been included in their National Anti-Doping Organization's Registered Testing Pool. To facilitate coordinated test distribution planning and to avoid unnecessary duplication in Testing by the various Anti-Doping Organizations, each Anti-Doping Organization shall report all In-Competition and Out-of-Competition tests on such Athletes to the WADA clearinghouse as soon as possible after such tests have been conducted."

At the threshold, we observe that ADAMS remains merely a technical platform for the collection and processing of information and, as such, cannot itself comply with European data protection law. Rather, the more appropriate inquiry is whether ADAMS serves through its design features to facilitate compliance with such law by its institutional users, who themselves are subject to such laws. We thus reviewed whether ADAMS would assist European ADOs to comply with their applicable laws or, alternatively, might be a barrier to compliance. We conclude that ADAMS should assist ADOs in their efforts to comply with such laws, although would not in itself bring them into full compliance, which remains an unrealistic expectation. We discuss some of the more salient features of ADAMS below.

- Processing of Information in a Transparent Manner

European laws require European ADOs to inform athletes about the processing of their personal data. This obligation applies regardless of any data management system used by ADOs, and ADAMS does not prevent ADOs from discharging this responsibility. On the contrary, ADAMS helps ADOs to comply with this requirement. For instance, ADOs can utilize model “notices” that WADA has prepared to inform athletes about the handling of their data in ADAMS -- notices that ADOs are free to use or amend to comply with their local laws. Athletes may access, upload and, in some cases, amend their data directly, and are furnished with on-screen “layered” notices. WADA also makes resources available for responding directly to any athlete queries. Other measures, beyond the above, are in place to ensure that ADAMS remains transparent.

- Processing Information that is Necessary and Proportionate

European ADOs need to ensure that they collect and process information that enables them to administer Code-compliant anti-doping programs. ADAMS appears to have been designed with the specific aim of enabling ADOs to capture and process information needed to discharge their obligations under the Code. ADAMS is not designed to collect additional information serving little or no anti-doping purpose or otherwise beyond the requirements of the Code, and so in this sense operates in line with proportionality rules. ADOs, moreover, are free to use only some ADAMS modules, if they desire to do so. Nothing in ADAMS would appear to compel ADOs to process more information than necessary.

- Processing Information with a Proper Legal Basis

European laws require there to be a lawful or legitimate basis for the collection and processing of athlete personal data. ADAMS itself cannot constitute such a legitimate basis; rather, European ADOs will need to assess on what basis they are permitted to obtain and use the athlete data that they upload onto ADAMS (or any other database they happen to use). This could range from establishing that these activities serve a substantial public interest or an ADO’s own legitimate interests, are needed to comply with applicable laws or with contractual duties owed to the athlete or, potentially, occur with the consent of the athlete.² There is nothing intrinsic in ADAMS that would preclude European ADOs from establishing an appropriate legal basis for their activities under European law.

² WADA has made it possible for ADAMS users to collect athlete consent and EU data protection law allows personal data to be processed on this basis. European data protection regulators, however, have interpreted this legal basis narrowly and appear to disfavor its use in practice, despite it featuring in the law. In light of this, European ADOs may be required to consider an alternative legal basis under EU law. There presently remains only limited European case law endorsing this restrictive interpretation of the law by European regulators.

- Processing Information with Adequate Security

European laws call for appropriate or adequate security measures to protect personal data from unauthorized disclosures. With respect to ADAMS, WADA has designed ADAMS to reflect state of the art security. The security of ADAMS is provided by a variety of technological, organizational and other measures. These include, to name only a few, user access and authentication controls, variable access rights and user privileges, auditable user activity logs, user lock-outs and encrypted transmissions. WADA has implemented internal training, confidentiality agreements, and standard operating procedures to ensure confidentiality, along with contractual controls, environmental measures and other measures. These measures appear to meet, and arguably exceed, European standards, and to the extent any ADO's local laws impose additional security requirements, ADAMS would appear to be compatible with those.

- Disclosures and International Transfers of Information

European laws restrict transfers of personal data from the EU to countries outside the EU whose national laws do not provide "adequate" protection. And, at present, only a limited number of countries, including Canada and Switzerland, have benefited from an adequacy determination. WADA operates ADAMS in Canada, and in that respect, may benefit from Canada's adequacy determination. Otherwise, European ADOs would be eligible to disclose data to WADA, and other ADOs using the ADAMS database, on other grounds, should that be necessary or appropriate, for instance on the basis that it serves an important public interest, is necessary to fulfill contractual duties owed to the athlete, athlete consent or, possibly, data transfer agreements. ADAMS does not preclude ADOs from making an election between these various grounds for permissible transfers. On the contrary, ADAMS offers ADOs specific tools to manage and limit their disclosures.

- Enabling Rights in the Information

Finally, European laws provide that individuals, including athletes, enjoy certain rights in and to their personal data, including the right to obtain information about the handling of their data. ADAMS appears to facilitate compliance with these requirements through features that allow athletes to have direct access to certain data, and to learn which ADOs have accessed their data. In addition, ADAMS provides a means by which athletes can contact their ADO custodian to exercise their rights.

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Based on the foregoing, ADAMS reasonably can be expected to facilitate an ADO's compliance with key components of European data protection laws through its various design features, such as on-screen disclosures to athlete users and strong security measures. At a minimum, ADAMS should not prevent ADOs from complying with their local laws, to the extent such laws impose additional requirements beyond those already provided for by ADAMS.