European Data Protection Board

To: The Presidency of the Council of the EU

Brussels, 9 October 2019

Ref: OUT2019-0035

By email only

Dear Madam or Sir,

The Article 29 Working Party adopted two Opinions in 2008 and 2009 (WP156 and WP 162) on certain relevant provisions of the World Anti-Doping Code and the International Standards completing the Code. In 2013, the Article 29 Working Party sent a letter to WADA (Ref. Ares (2013)289160 - 05/03/2013) with a number of observations and concerns with regards to the Code and its International Standards.

The European Data Protection Board (EDPB), as successor of the Art.29 Working Party, has attentively followed the activities of the World Anti-Doping Agency, and particularly the different phases in the revision process of both the World Anti-Doping Code and of the International Standards.

With this letter, in the context of the third and final stage of the public consultation organised by WADA, the EDPB firstly acknowledges that essential progress has been made in relation to the safeguards on privacy and data protection provided by the Code and its Standards and that a few of the Article 29 Working Party's remarks outlined in its earlier opinions and in its letter to WADA have been taken into account during the revision process of the anti-doping rules. Nevertheless, on the occasion of the third and final stage of the public consultation organised by WADA, we would like to raise some remaining concerns regarding these documents, particularly in respect of the latest modifications brought to them by WADA. These concerns mainly relate to aspects already highlighted in the previous contributions of the Art. 29 Working Party, such as the issue of the lawfulness of data processing based on consent, the application of the International Standard for the Protection of Privacy and Personal Information vis-à-vis the Code and/or the other applicable laws laying down rules setting a lower level of protection for privacy and personal data, as well as the retention periods and the automatic and unselective publication of anti-doping rule violations on the Internet.

The EDPB will not reiterate all the remarks mentioned in the earlier contributions of Article 29 Working Party already endorsed, but if they have not been considered in the different phases of the current revision process, they should be considered as having been restated with this letter. In addition, you will find further remarks on the compliance of the WADA Code and its International Standards with the General Data Protection Regulation (hereinafter GDPR) annexed to this letter.

The EDPB makes these observations in light of the level of protection offered by the GDPR, currently in force.

Andrea Jelinek
Chair of the European Data Protection Board

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The EDPB calls upon WADA to take into account its remarks, which are aimed at safeguarding a level of data protection equivalent to that of the EU, but also, more fundamentally, at promoting the highest possible level of data protection in the interest of all individuals concerned.

The EDPB remains at WADA's disposal for any further information or explanation regarding its observations.

Yours sincerely,

Andrea Jelinek

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Remarks and comments on the compliance of the WADA Code and its International Standards[1] with the GDPR[2]

Address the issue of Data Controller/Data processor (cf. Art. 29 WP's second Opinion 4/2009, 2.2)

As mentioned in the Second Opinion 4/2009 of the Art. 29 WP[3], there is still no reference in the Code nor in the Standards concerning the issue of data controller/data processor for any particular processing. It could be of particular relevance to address this issue, especially regarding non-EU-bodies acting as data controller in the EU or non-EU-bodies collecting data of EU individuals.

Extending the scope to recreational-level Athletes is an interference (cf. Art. 29 WP's second Opinion 4/2009, 3.1)

With regard to the term "Athlete" which refers to any Person who competes in sport at the international or at the national level, the Code specifies that any Anti-Doping Organization (hereinafter ADO) has discretion to apply anti-doping rules to Athletes who are neither International-Level Athletes nor National-Level Athletes, and thus to bring them within the scope of the Code and of its International Standards. Thus, the definition allows each National ADO, if it chooses to do so, to expand its antidoping program beyond International- or National - Level Athletes to competitors at lower levels of Competition or to individuals who engage in fitness activities but do not compete at all.

Moreover, according to the Code, if a particular anti-doping rule violation is committed by any Athlete over whom an ADO has elected to exercise its authority to test and who competes below the international or national level, then the consequences set forth in the Code must be applied. In this regard, it should be highlighted that the Code and its International Standards lay down a complex set of rules which requires Athletes and Athlete Support Personnel to furnish a significant amount of Personal Information to ADOs and WADA, such as those related to Testing and Sample analysis, Whereabouts information, Athlete Biological Passport, Therapeutic Use Exemptions, Anti-doping rule violations, etc.

In accordance with the data protection legislation principles of proportionality, necessity and data minimisation, the related processing activities carried out by ADOs and WADA should not go beyond what is strictly necessary and proportionate for the purposes of preventing and fighting against doping in sport (cf. the 2005 UNESCO International Convention which has been ratified by the majority of the EU Member States in order to endorse the work of WADA at international level). In this context, it is essential that in deciding to extend their anti-doping program to sportsmen and sportswomen who compete below national level, National ADOs rely on a proper and rigorous assessment of the relevant risks of doping in a sport or in a sport discipline in accordance with the tools provided by the Code and

[1] International Standard for the Protection of Privacy and Personal Information (ISPPI) and International Standard for Testing and Investigation (ISTI).

[2] 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)

[3] 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 fight against doping in sport by WADA and (national) anti-doping organizations.

its Standard with a view to identifying high risk athletes to be targeted for controls (cf. International Standard for Testing, notably 4.2 and 4.3).

In the light of the above, the Board considers that extending the scope of the Anti-doping Code and its International Standards to recreational-level Athletes (who engage in fitness activities but never compete) would be seen, as a general rule, as a disproportionate interference with the right to privacy and to protection of personal data of the concerned Athletes.

The Standard is not legally binding (cf. Art. 29 WP's Letter to WADA of 5th March 2013)

The International Standard for the Protection of Privacy and Personal Information (hereinafter ISPPI) in its Article 4.1 mentions the principle according to which the common minimum set of rules established by the standard applies to all ADOs (including WADA) without prejudice to stricter rules or norms they may have to observe pursuant to their applicable data protection and/or privacy legislation. However, the comment related to the same Article clarifies that ADOs (including WADA) must comply with the said set of rules, provided that such compliance does not breach other applicable laws. In cases where such compliance may cause an ADO (or WADA) to breach other applicable laws, those laws shall prevail (see also, in the same direction, Article 5.1).

This means that the Standard which completes the World Anti-Doping Code with regard to data protection and/or privacy issues, is not legally binding. In particular, where applicable laws lay down provisions contrary to the safeguards on privacy and data protection provided by the Standard, these safeguards will not take precedence. This would not be a problem when the national applicable law sets a higher standard of protection for personal data than the one set forth in the Standard but it would be a cause of concern, if the ADO is obliged to apply a law setting a lower level of protection.

In these cases, it could be of particular relevance to require that the concerned ADO has to refer the matter to WADA and to the other ADOs without delay, so that these latter can take the appropriate measures in order to properly protect the data and/or the privacy of the affected Athlete or other concerned Person.

Communicating the DPO's contact information should be mandatory (cf. Art. 29 WP's Letter to WADA of 5th March 2013)

The ISPPI in its article 4.5 provides for the designation of a "Person" by ADOs and WADA who is accountable for compliance with the Standard and local applicable laws, included data privacy laws. This person may be regarded as a Data Protection Officer (DPO) as described in the articles 37 to 39 of GDPR and should not be personally responsible in case of non-compliance with the GDPR[4].

Notably, the Board regrets that the communication of the DPO's name and contact information is not mandatory and subject to a request from the Athlete or from the other concerned Person. Conversely, the communication of the DPO's contact details should have to be ensured to data subjects - as nevertheless required by Article 7.1 of the ISSPI - in order to make Athletes and other concerned Persons aware of existence of a DPO as well as of the chance to contact him/her with regard to all issues related to the processing of their personal data.

[4] Guidelines on Data Protection Officers ('DPOs'), p.4

The principle of data minimisation must not be derogated

Regarding Article 5.3 of the ISSPI, we regret that the principle of data minimisation outlined in this provision may be derogated if "otherwise permitted or required by the Code". This means that the safeguards on privacy and data protection set forth in the Standard will not be applicable if the rules of the Code lay down provisions which are contrary to them and -what is even more serious - that the Code itself does not seem to be fully in line with the Standard. As mentioned in Art. 29 WP's earlier opinions, we are strongly in favour of the decision to promote the protection of privacy and personal data in the context of anti-doping activities which transpires in the Standard.

Nevertheless, we wonder whether the ISSPI will ensure effective compliance with the rules governing the protection of individuals' fundamental rights and freedoms, considering that the provisions outlined in the Standard will not even take precedence over the Code.

Clarify the grounds for processing (cf. second Opinion 4/2009, 3.3 and Art. 29 WP's Letter to WADA of 5th March 2013)

We observed that the ISPPI in its Article 6 mentions different legal grounds to process personal data. Processing of personal data may be either based on a "valid legal ground") or on the "Participant's or other Person's consent". It is not however entirely clear under what circumstances a" valid legal ground" or a "consent" should be required. This point should be clarified.

Regarding consent, as mentioned in the Article 29 WP's second Opinion 4/2009, 3.3, the requirement of such a consent to process personal data (Art 6.1 ISPPI), included sensitive data (Art. 6.3 ISPPI) does not comply with article 6, 7 and 9 of GDPR. Indeed, although the ISSPI requires that such a consent "shall be informed, freely given specific and unambiguous" the sanctions and the negative consequences attached to a possible refusal by participants to consent to the processing of their personal information as required for the purposes of the Code may prevent them to give a truly free consent (in this regard, see Article 6.2 of the ISSPI). Therefore, the validity of such consent is problematic.

Moreover, consent requirement to process criminal convictions, sanctions and offences (Art. 10 ISPPI) is not a valid legal ground according to Article 10 GDPR. Indeed, the processing of such data may be carried out only under the control of official authority or if suitable safeguards are provided under national or EU law. Therefore, ADOs are not allowed to process such data, neither by publishing them on the Internet nor by processing them in other registrations unless national law or EU law allow it and if suitable safeguards are provided.

Regarding a "valid legal ground", a more appropriate lawful basis would be compliance with a legal obligation to which the controller is subject, in accordance with article 6(1)(c) GDPR.

Ensure appropriate information to data subjects (cf. Art. 29 WP's Letter to WADA of 5th March 2013)

Regarding the information to be provided to data subjects, in line with the wording of the other rules set forth in the Standard, it is appropriate to mention WADA, along with the ADOs, as one of the entities which has the responsibility to meet to this obligation in its capacity as controller.

Moreover, in relation to the elements that should be communicated to the Person to whom the personal data relates, we suggest aligning the list outlined in Article 7.1 of the ISSPI to the provisions of Articles 13 and 14 of the GDPR whether personal data have been obtained from the data subject or not..

In the latter case, where ADOs (including WADA) receive Personal Information from Third Parties, and not directly from Athletes or other concerned Persons, Article 7.2 of the ISSPI provides that data subjects have to be informed "as soon as possible and without undue delay".

In this regard, to ensure a higher degree of protection for individuals, we suggest fixing a more precise deadline, such as the expression “but at the latest within one month” or, if the personal data are to be used for communication with the data subject, “at the latest at the time of the first communication to that Person to whom the Personal Information relates” or if a disclosure to another recipient is envisaged, “at the latest when the personal data are first disclosed”.

Lastly, the derogation to the obligation of providing such notice outlined in Article 7.2 should be reworded in stricter terms in order to ensure that notice to data subjects may be delayed or suspended where providing such notice “is likely to render impossible or seriously impair” an anti-doping investigation or the integrity of the anti-doping process.

Disclosures of personal data have to be linked to doping (cf. Art. 29 WP’s Letter to WADA of 5th March 2013)

As to the conditions under which the disclosure of data by ADO’s/WADA to Third Parties is authorised, Article 8.3. c) of the ISSPI does not specify whether the "criminal offence" or the "breach of professional conduct rules" must be qualified as doping or at least be doping-related, or whether it is any "criminal offence" or "breach of professional conduct rules". As mentioned in Art. 29 WP’s letter to WADA of 5th March 2013, we are of the opinion that it cannot be any criminal offence or breach of professional conduct rules, and that they have to be closely linked to doping. These limitations should be added to the text.

Use a stricter deadline for notification of security breaches (cf. Art. 29 WP’s Letter to WADA of 5th March 2013)

With regard to the deadline for the notification of Security Breaches to the affected data subjects, Article 9.5 of the ISSPI requires that they must be informed by the responsible ADO/WADA “as soon as reasonably possible once the ADOs or WADA becomes aware of the details of the Security Breach”. In this context we suggest however using a stricter deadline, such as the expression “without undue delay” that would contribute to ensure a higher degree of protection for individuals, particularly when this provision has to be applied in different legal and cultural contexts.

Consider data protection impact assessment prior to the processing

The ISPPI in its article 9.6 plans that ADOs and WADA “shall regularly assess their processing of sensitive data information and whereabouts information to determine the proportionality and risks of their processing (…).”

We would also recommend taking into consideration the Article 35 GDPR and the EDPB guidelines concerning the realisation of a data protection impact assessment "*prior to the processing*"[5], which could be suggested to ADOs/WADA, where not necessary under applicable laws, as a best practice. This tool allows controllers to take measures to address the risks to the rights and freedoms of the data subjects in relation to all processing operations which present high risks to those rights and freedoms and, therefore, not necessarily only when the processing concerns Sensitive Personal Information or Whereabouts Information.

Define maximum retention times (cf. second Opinion 04/2009, 3.5. and Letter to WADA of 5th March 2013)

Maximum retention times have been set up in the Annex A of the ISPPI: respectively 18 months and 10 years, depending on the nature of the data and the necessity and proportionality to keep those data. However, for some particular data, no maximum retention time has been defined which is not consistent with the principle of storage limitation. Indeed, it is planned to retain some data indefinitely (for instance, whereabouts only in case of disciplinary ruling or other ABP documents, disciplinary ruling data).

The possibility to retain such sensitive data for an indefinite time is not compliant with the legislation on data protection set forth in the GDPR. A maximum retention time should be defined according to the principles of necessity and proportionality. It should also be considered that, according to Article 4.4. of the ISSPI, ADOs/WADA shall maintain under their responsibility a record of the Processing which will also describe, amongst other elements, the period for which the Personal Information will be stored or the criteria used to determine this period. The same indications have also to be provided to data subjects according to Article 7.1 of the ISSPI. Concerning the retention time of samples which are considered as sensitive data under GDPR, the Annex A of the International Standard Protection on Privacy and Personal Information (ISPPI) indicates that « *samples [which] are anonymous, (…) may be retained indefinitely for scientific purposes* ».

In this regard, we would like to stress the impossibility to definitively de-identify urine or blood samples due to its biological nature. Indeed, biological samples (urine/blood samples) contain the person's DNA and the re-identification of the athlete cannot be excluded in any event. This is also the reason why a maximum retention period for samples shall be fixed to protect athlete's privacy.

According to Article 4.7.3 of the International Standard for Testing and Investigations**,** in order to define a retention strategy, ADOs should take into account *« the possible need for retroactive analysis in connection with the Athlete Biological Passport program* », « *new detection methods to be introduced in the near future relevant to the Athlete, sport and/or discipline* » or « *any other information made available to the Anti-Doping Organization ".* However, these criteria are not sufficient to justify an indefinite retention of samples. An adequate retention period for samples should be considered. For example: Is the retention of a sample for an indefinite period still relevant once an athlete retired or after expiration of the limitation period for proceedings?

[5] Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/6, p.17

The right of access to personal information is derogated (cf. Art. 29 WP's second Opinion 4/2009, 3.2.6)

The ISSPI in its Article 11.1 provides that, in certain cases, data subjects are not entitled to exercise the right of access to personal information. As highlighted in Art. 29 WP's second Opinion 4/2009, the derogation is formulated in particularly vague terms and it does not, on the face of it, appear to be in conformity with the data protection legislation set forth in the GDPR. In this respect, we confirm that there would not a priori be a reason to withhold access to information on data in connection with «*the integrity of the anti-doping system or ADOs'/WADA's ability to plan or conduct No Advance Notice Testing or to investigate and establish anti-doping rule violations or other legal claim*».

In addition, Article 11.2 provides that in certain circumstances, the ADOs/WADA are not obliged to answer access request if it "*imposes a disproportionate burden on the Anti-Doping Organizations/WADA in terms of cost or effort given the nature of the Personal Information in question*". As already mentioned, Art. 29 WP's second Opinion 4/2009, this exception does not appear to be in conformity with the data protection legislation.

In relation to both article 11.1 and 11.2, the Boards notes that any restriction of the right of access is only allowed if it conforms to the provisions of Article 23 of the GDPR which authorises Member States to adopt legislative measures aiming to restrict the scope of this obligation insofar as this restriction respects the essence of the fundamental rights and freedoms of individuals and is a necessary and proportionate measure in a democratic society. Therefore, the refusal of exercise of the right of access by the data subjects, set out in Article 11.3 of the ISSPI, is permissible only under the conditions of Article 23 of the GDPR, which must be interpreted strictly.

Lastly, the Board stresses once again that the Code should contain a right of remedy and a right of compensation for the damage suffered by the Athletes or other concerned Persons as a result of a processing operation incompatible with the Standard.

Publication on the Internet must be proportionally (Art. 29 WP's second Opinion 4/2009 3.6 and Letter to WADA of 5th March 2013)

Regarding the unselective and automatic publication of all anti-doping rule violations on the Internet for the duration of one month or the duration of the athlete's ineligibility, provided by Articles 14.3.2 and 14.3.5 of the Code, we still refer to the Art.29 WP's second Opinion 4/2009 (par. 3.6) and the letter to WADA of 5ht March 2013 concerning the proportionality to use Internet as a proper diffusion channel for reporting publicly all anti-doping rule violations, without regard to the specific facts and circumstances of the case.

Similar concerns can be raised with regard to Article 14.4 of the Code that provides that ADOs may publish statistical reports of their Doping Control activities, showing the name of each Athlete tested and the date of each Testing.

As the Article 29 WP has outlined in its previous contributions, the Board suggests that public reporting should not be automatic and mandatory but, according to the principles of necessity, proportionality and data minimisation, should depend on the facts and circumstances of the case. As for the aspects that could be considered in order to determine whether the publication of an anti-doping rule violations is proportionate, we still refer to the elements mentioned by Article 29 WP in the letter to WADA of 5ht March 2013.

Establish appropriate safeguards when re-using data for research

The WADA Code provides for the possibility to make further researches on samples after the written athlete's consent has been obtained (Article 6.3 WADA Code). This could be consistent with Article 9.2 of the GDPR (consent is required to process sensitive data – unless the consent cannot be specific, informed and unambiguous or it is not freely given, for example because the data subject has no genuine or free choice or is unable to refuse or withdraw consent at any time without detriment). However, re-use of health data for research purposes may be subject to appropriate safeguards for the rights and freedom of data subjects, in accordance with Article 89 of the GDPR.

The Code mentions in its Art 19.2 that "*relevant anti-doping research may include, for example, sociological, behavioural, juridical and ethical studies in addition to medical, analytical and physiological investigation*". We express doubts about the necessity and the legitimacy for further researches on samples in the anti-doping fight as described in Article 19.2 of the Code. WADA should be more precise in in the defining what may include "relevant anti-doping research" on samples as well as in identifying the purposes of analysis of samples such as in Article 6.2 of the Code.

Transfer of personal data to Law Enforcement Authorities (Letter to WADA of 5th March 2013)

With regard to transfers made from an EU ADO to the ADAMS database, as they take place in the context of the adequacy decision with Canada concerning the PIPEDA (and subsequent onward transfers to foreign law enforcement authorities or disclosures in the context of the laws governing access by law enforcement or national security authorities), the EDPB recalls that this adequacy decision shall remain in force until amended, replaced or repealed, if necessary, by a new Commission Decision as provided for under the GDPR (Article 45.9). Provided that the outcome of the ongoing assessment of the adequacy decision in question confirms that the level of protection ensured by the PIPEDA is adequate, also in relation to onward transfers and to access to these data by public authorities, notably for law enforcement and national security authorities, the EDPB is of the view that transfers taking place on this basis will continue to be valid.

As to the conditions under which the disclosure of data by ADO's/WADA to Third Parties is authorised, the EDPB notes that such disclosures within the same legal framework are subject to the applicable national laws and regulations, as it is further explained in the comment accompanying Article 8.3. c) of the ISSPI. In view of the importance of that condition, it would thus seem to be preferable to clarify this aspect in the Art. 8.3 c ISPPI, rather than in the comment.

Also, Art. 8.3 c) ISPPI does not specify whether the "criminal offence" or the "breach of professional conduct rules" must be qualified as doping or at least be doping-related, or whether it is any "criminal offence" or "breach of professional conduct rules". As mentioned in Art. 29 WP's letter to WADA of 5th March 2013, we are of the opinion that it cannot be any criminal offence or breach of professional conduct rules, and that they have to be closely linked to doping. These limitations should be added to the text.