

SELECTED TOPICS ON GDPR IN DOPING - IS THE HUNTER HUNTED?

GAISF - Maison du Sport International, Lausanne - June 19th 2018



Philippe Vladimir Boss

philippe.boss@bianchischwald.ch

GENEVA
—
ZURICH
—
LAUSANNE
—
BERNE

CONTENT



- GDPR and WADC
- Who's who of data protection in anti-doping
- Legal basis for data processing in anti-doping
- ISPPPI update
- Retention times and deletion rights

GDPR AND WADC

Double spotlight on your Organisation

PRELIMINARY

GDPR potentially impacts your Organisation:

- As subject to GDPR: at least if monitoring behaviors in the EU
- When applying WADC: GDPR is « specifically taken into account », but complying with ISPPPI does not automatically mean complying with GDPR

ISSUE

Adherence to ISPPPI is mandatory for compliance with WADC, even if your Organization is not subject to GDPR. However, in case of conflict (compliance with WADC would trigger GDPR sanction), ISPPPI not to be applied

but

Adherence to ISPPPI is not sufficient: non-compliance with GDPR triggers sanctions.

WHO'S WHO (I)

Identify Controller and Processor

REMINDER

Controller: alone or jointly with others determines the purposes and means of the processing of personal data

Processor: processes personal data on behalf of the controller



ISSUE

The Controller is responsible (« accountability ») for the lawfulness of the data processing, such as:

- consent
- provision of information
- access
- erasure

WHO'S WHO (II)

Identify Controller and Processor

MAPPING

- **WADA:** is a Controller as it determines the purpose (anti-doping) and means (testing and investigation). As well as when data is entered into ADAMS?
- **ADO in general:** is a Controller as it is responsible for adopting rules for initiating, implementing or enforcing sample collection and handling, laboratory analysis, TUEs, results management and hearings. Data transfers, based on proportionality, to other ADO's outside EU/Switzerland are very limited (Canada is admitted).
- **IF:**
 - is a (joint) Controller as it sets its own Anti-Doping Regulation;
 - is a Processor, even if it delegates the Testing. It will at least process the result of the Testing and the Sanction process: « Limited Processor ».

WHO'S WHO (III)

Identify Controller and Processor

- NADO's and MEO's:
 - might be considered as a Controller, depending on national laws/own regulation. For example, Swiss NADO (Antidoping Switzerland), on delegation of Swiss Olympic, acts to « develop a testing repartition plan » according various parameters (age, previous violations, possible incentive of the Athlete to dope etc...), which equals naming the Registered Testing Pool.
 - as a Processor, depending on its own Regulation: For example, Antidoping Switzerland is responsible for the Sampling process which is performed by Antidoping Switzerland's personnel. In general, data access to internal personnel limited on a « need-to-know » basis
- THIRD-PARTY AGENTS (for example external DCO's):
 - are not Controllers: unless for their own database (RH), and depending upon their margin of manoeuvre (ITA Regulation yet to be analyzed under GDPR).
 - are Processors, and must comply with ISPPPI and be bound by contract.

LEGAL BASIS (I)

for data processing in anti-doping

POSSIBLE LEGAL BASIS

- Consent
- Public interest
- Legitimate (private) interest

Must be provided before collecting data



In case of processing data concerning health, genetic data and (some) biometric data (Sensitive personal data), consent must be explicit and public interest must be substantial. For example, TUE requests will need explicit consent. On the contrary, whereabouts are « normal » Data.

LEGAL BASIS (II)

for data processing in anti-doping

CONSENT

is a delicate legal basis for Anti-Doping Data Processing as:

- it must be free: argument that the Athlete is bound to accept if he wants to compete;
- It must be active: providing samples is not sufficient;
- it must be specific: a separate consent for each process;
- consent may be withdrawn: difficulties regarding sample retention after testing;

PUBLIC INTEREST

It may hence depend upon whether the EU/National law where anti-doping activities are carried out specify anti-doping as public interest:

- in Switzerland, it may be based on art. 11.b of the Sport Promotion Act;
- in the EU, GDPR mentions doping as an « important reason of public interest », but only in the context of international transfer of data. A clear legal basis in EU/Member State law would be needed.

LEGAL BASIS (III)

for data processing in anti-doping

LEGITIMATE (PRIVATE) INTEREST

- This possibility is eliminated if anti-doping is considered a public interest;
- The « purposes of the legitimate interests pursued by the controller » appear difficult to achieve if Consent is refused/withdrawn;

* * *

Legal basis primarily on Public Interest, even if unsure. Lobbying will be needed to find a clear legal basis for processing anti-doping data as the poursuite of a public interest. Consent should be subsidiary.

Also note that, as personal data related to health or genetic data are processed on a large scale, Data Protection Impact Assessment shall be carried out by the Controller and the Supervisory Authority shall be consulted prior to the processing of Data.

ISPPPI UPDATE

A handbook, not a compendium

- **ISSUED** by WADA
(compulsory for WADC Signatories)

- **UPDATED** in June 2018 to « reflect »
(not comply with) GDPR

- **AMENDED**

- definitions for « Security Breach » and « Sensitive Personal Information »;
- accountability;
- legal basis for data processing;
- right to information on data processing and rights;
- security and control by Controllers;
- right to access the data.



RETENTION TIMES (I)

Sports glory never fades?

CHALLENGES TWO MAJOR PRINCIPLES OF GDPR

- right to erasure;
- in case of data processing based on consent, right to withdraw it.

LAWFUL, AMONG OTHER GROUNDS

- in case of « public interest in the area of public health »: seems too restrictive to consider in anti-doping context;
- for archiving, scientific, historical or statistical purposes: seems too limited to perform a sample analysis;
- « for the establishment, exercise or defense of legal claims »: seems adequate as the ADO may, should an ADRV appear *a posteriori*, file a claim for cancellation of results.

In any case, principle of proportionality shall be strictly observed.

RETENTION TIMES (II)

Sports glory never fades?

RETENTION TIMES ARE SUGGESTED, BUT NOT COMPULSORY.

- Athlete General Data: indefinitely
- Whereabouts: 18 months
- TUE approval forms: 10 years
- Testing documentation: 18 months if no indication of ADRV/10 year if indication of possible ADRV
- Samples: 10 years (indefinitely for scientific purposes)
- Test results: 10 years
- ADRV: indefinitely, which is questionable under Swiss law, if kept in Switzerland
- Athlete Biological Passport: 10 years





THANK YOU

BIANCHISCHWALD LLC
bianchischwald.ch

GENEVA
5, rue Jacques-Balmat
P.O. Box 5839
CH-1211 Geneva 11
P +41 58 220 36 00
F +41 58 220 36 01

ZURICH
St. Annagasse 9
P.O. Box 1162
CH-8021 Zurich
P +41 58 220 37 00
F +41 58 220 37 01

LAUSANNE
12, avenue des Toises
P.O. Box 5410
CH-1002 Lausanne
P +41 58 220 36 70
F +41 58 220 36 71

BERN
Elfenstrasse 19
P.O. Box 133
CH-3000 Bern 15
P +41 58 220 37 70
F +41 58 220 37 71