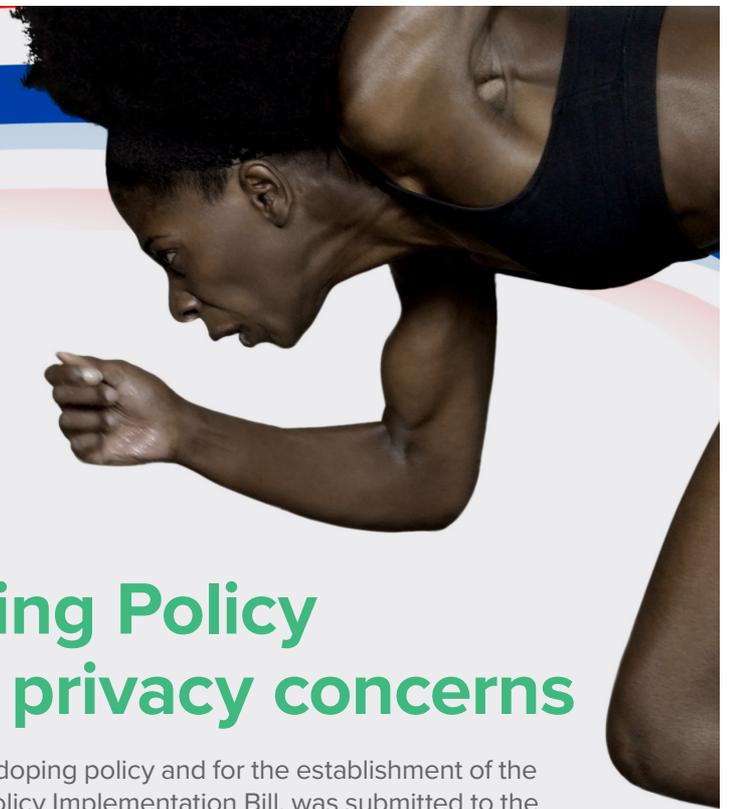




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The Dutch Anti-Doping Policy Implementation Bill: privacy concerns

The Bill on regulations for the implementation of the anti-doping policy and for the establishment of the Doping Authority, otherwise known as the Anti-Doping Policy Implementation Bill, was submitted to the Dutch Lower House on 19 September 2016¹. The aim of the Bill is to strengthen action against doping in sport². The Bill has been drafted because there are doubts about whether the consent given by athletes constitutes an adequate basis for the processing of personal data in the context of doping controls. In order to allow it to process data in an alternative way in the context of doping controls, the Doping Authority is to become a legal entity governed by public law with a statutory task. There has been some criticism of the bill from the field. Michiel van Dijk and Amajanti van de Beek of CMS assess the criticism and whether the Bill will provide the solutions required or whether it may actually raise more questions and difficulties.

Current situation

At present, action against doping is primarily the task of the sports world itself and such policy is based on private law rules. Traditionally, the sports world in the Netherlands has adopted the association as its preferred legal form. Certain rules are imposed on the basis of membership of the association. Law covering associations and the association form provide a great deal of latitude in terms of the formulation of membership rights and obligations. Constitutional law also enshrines freedom of association³. This freedom of association is not unlimited or unrestricted: it is bound by a number of legal rules⁴, an example being voting rights for members required by law⁵. This can result in conflicts between the various rules that also apply to the association and the statutory rules by which the association is bound. For example, an association can be subject to rules of the game or other types of rules that are generally imposed at the international level. These global rules safeguard the uniformity and recognisability of the sport⁶. The members of the association have no choice other than to 'accept' these rules, despite the fact that members could theoretically avail themselves of

their voting rights under law to 'vote them down.' *De facto*, then, mandatory voting rights are in this respect illusory. Although this conflict is not generally felt to exist in practice, it is legally relevant to establish statutory safeguards to ensure that sports associations make, for example, formal and regulatory arrangements so that members comply with the rules of the game.

In the Netherlands and globally, sports are therefore subject to strict rules that prohibit the use of doping. These rules apply to both elite and grassroots sports. The anti-doping rules are stated in the doping regulations of the sports association of which the athlete is a member, either directly (as a member or as a licenceholder) or indirectly through a club. The doping regulations of sports associations are copies of the Dutch National Doping Regulations, which is a translation produced by the Anti-Doping Authority of the Netherlands (the 'Doping Authority') of the World Anti-Doping Code (the 'Code'). It is clear that, despite the voting rights required by law, members of elite sports associations have no influence whatsoever on the doping regulations.

The Code is binding on the World Anti-Doping Agency ('WADA'), the International Olympic and Paralympic Committees, International Federations, national Olympic and Paralympic Committees, organisers of major sporting events and national anti-doping organisations⁷. The Netherlands, and most other countries, have accepted the Code by ratifying the UNESCO International Convention against Doping in Sport. The signatories of this convention agree to comply with the principles of the Code⁸.

The doping regulations require elite athletes to comply with specific provisions. Dutch elite athletes who have been included in a national testing pool are required, for example, to provide whereabouts information so that doping control officers know where they can be found. Samples of bodily material are taken from athletes during doping controls. The Doping Authority collects the samples and other personal data and processes them with a view to identifying doping. Doping controls are an infringement of athletes' privacy. This infringement is necessary for the fight against doping in sport and to safeguard important values such as fair play and



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to protect the health of athletes. Doping controls must comply with the regulations that apply at the national and international levels on privacy protection⁹. In the Netherlands, the processing of personal data for anti-doping purposes is based on the unequivocal consent granted by the athlete. This legal basis can be found in Article 8(a) and Article 23(1)(a) of the Dutch Data Protection Act. Consent is considered to include: 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'¹⁰.

The Article 29 Working Party, a working party established by the European Privacy Directive¹¹, has stated a number of opinions about the legal basis for the processing of personal data in the context of doping controls. The Working Party also looks at the requirement of consent referred to above as the basis for the processing of data relating to elite athletes. It concluded that the sanctions and effects of any refusal to grant consent for the processing of data in the context of doping controls are so severe for elite athletes that consent cannot be considered to have been given freely¹². The Article 29 Working Party stated the following grounds for its conclusion:

'The consent to the processing of data collected in the context of the execution of the obligations of the World Anti-Doping Code is neither free nor informed. The sanctions attached to a possible refusal by participants to subject themselves to the obligations of the Code (communication of localisation data, medical anti-doping controls) prevent the Working Party from considering that the consent would be, in any way, given freely. The Working Party also raises doubts as to whether the consent would be informed¹³.'

If an athlete evades a control or refuses to cooperate with the control procedures without compelling reasons, this constitutes a refusal and therefore a doping rule violation¹⁴. The standard sanction for a violation of this kind is a four year suspension¹⁵. The Working Party therefore believes that the data processing arrangements do not adequately comply with the requirements that apply on the basis of the European Privacy Directive and the

Dutch Data Protection Act¹⁶. An additional important factor is that the doping control procedures also involve the processing of medical information, which implies more stringent requirements than those that apply to personal data¹⁷. Although the European Court of Justice will ultimately have to decide to what extent the Article 29 Working Party has been correct in seeing a risk, the Dutch Minister of Health, Welfare and Sport is of the opinion that the basis for data processing constitutes a risk and therefore needs to be firmer¹⁸.

Anti-Doping Policy Implementation Bill

The explanatory memorandum¹⁹ states that the Bill provides first of all for certain rights and obligations of the athlete in the field of the fight against doping in addition to those currently in place. In short, athletes must ensure that they are acting in accordance with the rules and the doping regulations to which they are subject, and elite athletes are required to provide the Doping Authority with whereabouts information. Both provisions are in the interest of doping free sport. In addition, athletes may oppose the collection of specimens²⁰. However, if athletes oppose a doping control, the consequences for the athlete remain the same as in the current situation: the refusal constitutes a doping violation by the athlete.

In addition, the Bill also provides for the establishment of an independent administrative authority under public law with responsibility for combating doping in sport, implementing the doping control procedures, the collection and investigation of information about possible violations of doping regulations and education about doping²¹. The basis for the processing of personal data is therefore Article 8(e) of the Dutch Data Protection Act: 'if the data processing is necessary for the proper performance of a public task by the relevant administrative authority or the administrative authority to which the information is provided²².' Because the Doping Authority is an independent administrative authority, the associated rules of public law then apply²³. The Bill also sets out the competences of the Doping Authority. However, the doping regulations continue to apply in full. For example, Article 5(2) of the Bill states that the tasks of the Doping Authority must

be implemented in accordance with the Code (which is a private law instrument)²⁴. This results in a hybrid system of public and private law rules²⁵. Finally, the Bill provides for the exchange of information between administrative authorities and anti-doping organisations²⁶.

Criticisms

The bill has been a target of criticism (sometimes severe) from various quarters. Before the Bill was sent to the House by the Minister of Health, Welfare and Sport, the Dutch Data Protection Authority (College bescherming persoonsgegevens, now Autoriteit Persoonsgegevens), the Dutch Court of Audit and the Advisory Department of the Council of State were asked to comment on the draft Bill. There was also a round-table discussion on 16 January 2017 at which various parties from the sports world set out their views²⁷.

The Dutch Data Protection Authority set out its views about the draft Bill on 8 September 2015²⁸. It had several criticisms to make and amendments were then made to the Bill. Despite these changes, the Data Protection Authority still has a number of criticisms. First of all, it has pointed out that the processing of athletes' personal data by sports organisations is still based upon athlete consent²⁹. The Council of State has also noted that the Bill offers no solution with respect to the processing of personal data by the disciplinary body of the sports association that is responsible for investigating doping violations and imposing the associated sanctions³⁰. If the consent of the athlete is insufficient as a basis for the processing of personal data by the Doping Authority, that will also be the case for the processing of data by the disciplinary body, according to the Council of State in its recommendations dated 26 May 2016³¹.

Furthermore, the Data Protection Authority is critical of the fact that the Doping Authority performs its tasks in compliance with the Code because the Code assumes a minimum level of data protection that can be upgraded in national legislation. The Authority found that there was no further elaboration in public law terms of the frameworks that infringe athletes' privacy and with which athletes are faced in the context of the implementation of the anti-doping policy.

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This implies that the Dutch legislature has failed to make an assessment of its own of the proportionality and subsidiarity of the infringement of athlete privacy in the context of doping controls. The Authority also argued that there should be better legal safeguards for the protection of athlete privacy³².

Another difficulty in the Bill is that it is assumed that the anti-doping policy is implemented by the Doping Authority only. This is not the case. Doping controls can also be conducted, for example, by commercial service providers³³. In addition to the criticisms listed above, various parties have criticised the Bill on other grounds.

The solution?

The Article 29 Working Party identified a certain risk in the context of the processing of personal data for doping controls. It remains to be seen whether there is actually a risk since the European Court of Justice has never

made a decision in this respect. Let us suppose that there is actually a risk.

Civil law rules apply in the world of sport. In this system, the Code plays a leading role in the fight against doping in sport. Sports organisations are required to comply with the Code. The Anti-Doping Policy Implementation Bill attempts to sketch out a framework for safeguarding the rules of the Code and strengthening the position of the Doping Authority. The Bill primarily serves to resolve a single potential problem, namely the processing of the personal data of athletes in the context of doping controls by the Doping Authority. However, in view of the criticisms of the Bill, not all the difficulties have been resolved.

The Article 29 Working Party has already criticised the Code several times. It was of the opinion, for example, that WADA’s proposals for the 2015 Code failed to safeguard the necessary and proportionate balance between WADA’s

goals and respect for fundamental rights³⁴. As has already been stated here, sports organisations, anti-doping organisations and athletes are required to comply with the Code. On the other hand, the right to privacy, for example, should be respected. It is an established fact that doping controls represent an infringement of athlete privacy. This is needed to keep sport fair. It is unlikely that a national act can eliminate all privacy objections if it has to take into account international rules under association law on the one hand and European legal rules on the other. If sports organisations and the Doping Authority have to choose between compliance with the rules of the Code and legal rules, they will find themselves in an uncomfortable balancing act. It is therefore desirable to look for a solution to the problem at the international level, at which time the first question must be whether there is actually a problem at all. In any case, the national Bill fails to provide adequate solutions at present to obviate the potential risk.

1. Dutch Parliamentary papers II 2015/16, 34543, 1 and Dutch Parliamentary papers II 2015/16, 34543, 2.
2. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 3.
3. Article 8 of the Dutch Constitution and Article 11 of the ECHR.
4. H.T. van Staveren, Sport en Recht, Nieuwegein: Arko Sport Media 2007, p. 35.
5. Article 2:38 of the Dutch Civil Code in conjunction with Article 2:25 of the Dutch Civil Code.
6. Van Staveren 2007, p. 35.
7. Article 23.1.1 of the Code.
8. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 4 and <https://www.wada-ama.org/en/unesco-convention-ratifications>
9. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 2.
10. Article 1(i) of the Dutch Data Protection Act (freely translated).
11. Directive 95/46/EC of the European Parliament and of the 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.
12. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 2.
13. Article 29 Data Protection Working Party. Opinion 3/2008.
14. Article 5 Dutch National Doping Regulations 2016.
15. Article 39 Dutch National Doping Regulations 2016.
16. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 2.
17. Dutch Parliamentary papers II 2015/16, 34543, 4, p. 8 and Articles 16, 21 and 23 of the Dutch Data Protection Act.
18. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 3.
19. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 3.
20. Article 2 Anti-Doping Policy Implementation Bill, Dutch Parliamentary papers II 2015/16, 34543, 2.
21. Article 5 Anti-Doping Policy Implementation Bill, Dutch Parliamentary papers II 2015/16, 34543, 2.
22. Freely translated.
23. Dutch Parliamentary papers II 2015/16, 34543, 3, p. 10.
24. Article 5(2) Anti-Doping Policy Implementation Bill, Dutch Parliamentary papers II 2015/16, 34543, 2.
25. Dutch Parliamentary papers II 2015/16, 34543, 4, p. 4.
26. Article 12 Anti-Doping Policy Implementation Bill, Dutch Parliamentary papers II 2015/16, 34543, 2.
27. The views of these parties (position papers) and the minutes of this round-table discussion can be found in Dutch on <https://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2016A04719>
28. Advisory report from the Dutch Data Protection Authority, annex to Dutch Parliamentary papers 2015/16, 34543, 3.
29. <https://autoriteitpersoonsgegevens.nl/nl/nieuws/ap-kritisch-over-wetsvoorstel-antidopingbeleid>
30. Dutch Parliamentary papers II 2015/16, 34543, 4, p. 10.
31. Dutch Parliamentary papers II 2015/16, 34543, 4, p. 10.
32. <https://autoriteitpersoonsgegevens.nl/nl/nieuws/ap-kritisch-over-wetsvoorstel-antidopingbeleid>
33. M. Olfers, Position Paper M. Olfers t.b.v. hoorzitting/rondetafelgesprek Wet uitvoering antidopingbeleid d.d. 16 January 2017 and H. Ram, Position paper rondetafelgesprek Wet uitvoering anti-dopingbeleid.
34. Letter from the Article 29 Working Party addressed to World Anti-Doping Agency, regarding the third stage of WADA’s consultation in the context of the review of the World Anti-Doping Code and its International Standards, 5 March 2013 and Annex.