

## I. Articles

### SPORTS DATA – CATEGORIES AND LEGAL PROTECTION<sup>1</sup>

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**Abstract:** *The complex diversity of sports - driven by professionalization and commercialization, as well as rapid technological developments such as digitization and the internet - has led to an overwhelming amount of data. With the European General Data Protection Regulation (GDPR), data protection and security have come into focus for sports officials, not least because of the potential fines for violations. They are faced with the following questions in particular: What information qualifies as data according to the GDPR and the data protection laws of the federal government and states? Who is allowed to generate this data under what conditions? Who "owns" them? Under what conditions can they be used for what purposes? How must they be secured? When must they be deleted?*

*The answers to these questions must differentiate between sports officials, their relationship to the affected group of people, the type and function of the data, and the purpose of their collection and use. After briefly discussing the terms, an attempt is made to systematize the diversity of sports data in such a way that sports officials can get an overview of what they need to consider in order to fulfill their responsibilities.. To this end, some recommendations are made that focus on the fundamental principles of data protection and data security, as well as the legally prescribed options for lawful data processing..*

**Keywords:** *Sports data, Data Protection*

#### I. Introduction

Data are the new gold. The business concepts of Google, Amazon and Facebook, e.g., are based on data. What is the situation in sport, in particular in international commercialized sport in times of Internet and digitalization? – The complex diversity of sport has led to an almost unmanageable amount of data.

I would like to give a short survey with the view on the value of commercial use of sports data on one hand and the requirements of European data protection law on the other. It is up to the managers in sport organizations to solve this dilemma in a proper way. Otherwise they run the risk to be fined and to be obliged to pay damages.

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1. The article is based on *K. Vieweg, Sportdaten – Schatz und Schutz*, in: *K. Vieweg (ed.), Erlanger Sportrechtstagung 2023, 2024*, pp.33 – 51.

First I would like to describe the different categories of sports data and their possible economic use. Second it is necessary to have a look on the key requirements of the European data protection law. The European Commission is proud mentioning a so-called „Brussel effect“, which means that the European General Data Protection Regulations (GDPR), which came into force in May 2018, are a model for the data protection law world wide. I am afraid that it is necessary to make a question mark. However, data protection reflects the right of personality, which is a human right (Art. 12 UN Charta, Art. 7 et seq. Charter of Fundamental Rights of the European Union; Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms).

## II. Terms and Categories

### 1. Terms

*Personal data* within the meaning of data protection law are all information that relates to an identified or identifiable natural person ("data subject") (Art. 4 No. 1 GDPR). This includes not only sensitive but also general information that can be attributed to a natural person. It also does not matter on which medium the information is stored. This includes not only electronically stored information in computers, but also paper documents and files.

Art. 9 (1) GDPR lists particularly sensitive personal data, the processing of which is only exceptionally permissible. These are personal data that reveal racial and ethnic origin, political opinions, religious and philosophical beliefs, or trade union membership, as well as genetic data, biometric data for the unique identification of a natural person, health data, or data on the sex life or sexual orientation of a natural person.

*Sports data* can be described as personal data that are related to the manifestations and effects of sport in all its diversity. This includes in particular membership in sports organizations (clubs, associations, fitness studios), sporting activities in training and competition, the sports-relevant physical and mental condition of the affected athletes, the organization and media exploitation of sports events, as well as relationships with donors, sponsors, and partners from the business world.

The definition and delimitation problems concerning sports – including fishing, chess, and e-sport – continue with sports data. They cannot be addressed here. Game data, tracking data<sup>2</sup>, and performance data<sup>3</sup> are important subcategories of sports data.

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2. S. Karlin/L.Endrös, SpuRt 2019, 198 ff.

3. N. Winter, SpuRt 2020, 168.

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#### 2. Categories

The diversity and quantity of sports data on one hand, and the different admissibility requirements for the collection and use of this personal data by those responsible on the other hand, suggest an attempt of systematization that facilitates practical handling for those responsible and helps to avoid violations.

Systematization should ideally be based on the various occasions and purposes for collecting sports data. This results in the following categories in particular:

- *Organizational data*
- *Competition data*
- *Training data*

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4. S. Karlin/L.Endrös, SpuRt (Zeitschrift für Sport und Recht) 2019, 198 et seq.

5. N. Winter, SpuRt 2020, 168.

- *Whereabout data*
- *Medical examination data*
- *Other event data*
- *Occasion data*
- *Donor and sponsor data, as well as business partner data*

#### *a) Organizational Data*

Organizational data also referred to as administrative data refers to information that is relevant to the establishment and existence of a legal relationship of a certain duration between a sports organization and an affected person.

In addition to sports clubs and associations, legally independent sports leagues and any sports corporations, fitness studios, dance schools, and other sports providers and carriers (schools, universities, adult education centers, rehabilitation providers) should also be considered as sports organizations in a broader sense.

The recommendation of a 16-digit sports ID number<sup>6</sup> published by the German Institute for Standardization (DIN) in 2019 also counts as organizational data. For functionaries such as the board of directors according to § 26 of the German Civil Code (Bürgerliches Gesetzbuch BGB), the legally required information for registration is decisive, and for coaches, the ownership of the necessary license. A medical certificate (e.g. diving fitness) is required data in diving clubs, as well as information on firearm acquisition and possession in shooting clubs (§ 14 German Weapons Act). In professional sports, the relevant data ideally arise from employment contracts such as player contracts in football.

For sports associations, for example, inclusion in a squad or a national team, as well as inclusion in a testing pool for the German National Anti-Doping Agency (NADA), are considered personal organizational data.

#### *b) Competition Data*

In the professionalized and commercialized sports industry, competition data – or game data in the case of ball sports – with personal references have become the new currency in the digital age. Therefore, determining who "owns" this data and under what conditions it can be collected and utilized are central questions. Three approaches are primarily taken to answer these questions, based on the following legal positions<sup>7</sup>:

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6. The DIN SPEC 91396 " „Digitalisierung von Teilnehmererkennungen im Sport – numerischer Aufbau und Schnittstellendefinition“ "Digitization of participant identification in sports - numerical structure and interface definition" aims to create a comprehensive standard for the digital membership management of sports clubs and associations. See A 4 - Das DIN-Magazin Issue 02/19, p. 36 et seq. The digital membership administration based on a data protection-compliant cloud solution is offered to the approximately 12,000 Bavarian sports clubs through the BLSV-digital Basis platform, see DOSB-Presse No. 20 of May 12, 2020, p. 10.

7. See K. Vieweg, Die Auswertung von Fahrzeugdaten bei der Unfallanalyse - Rechtliche Grund-

- The general right to privacy, specifically data protection rights (regarding informational self-determination) of athletes.
  - Copyright of organizers, producers, and database creators.
- Property rights and the right to control access to the data.

Regarding their specific treatment under data protection laws, the following subcategories of competition data can be identified:

*aa) Participation Data*

Participation can refer to a specific competition determined by the organizer, time, and location, or an entire competition season. Participation data includes the identification of participants (name, possibly year of birth, club, etc.), meeting participation requirements (sporting qualifications, registration/nomination, eligibility/license, and consent to competition regulations). This category also includes the participation of referees, coaches, other support staff, and individualized spectators. Participation data for disabled athletes inevitably relates to their health conditions.

*bb) Event and Result Data*

Event data is specific to each sport and primarily holds statistical value. For example, in tennis, it includes games, sets, aces, and double faults, while in football<sup>8</sup>, it encompasses the number of goals, shots on goal, assists, ball contacts, fouls, and running distances.

Competition results – whether individual or cumulative for team results – are the central sports data. They are generated by the individual performance of athletes and have personal references. Occasionally, there is a discussion about whether the sporting performance qualifies for copyright protection<sup>9</sup>. In any case, the sports organizer, venue, measuring devices, organization, personnel, and IT contribute to determining the competition results, both in terms of individual performance and compiling the result lists, which determine individual rankings, for example. Therefore, it is reasonable to assume a co-ownership of the athlete and the organizer. This has consequences for the use, especially the disclosure through notices, press releases, and online presentations.

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lagen und Grenzen, in: Deutsche Akademie für Verkehrswissenschaft e. V. (Ed.), 45. Deutscher Verkehrsrgerichtstag 2007, Hamburg 2007, pp. 292-307; A. Ohly, Digitale Datenbanken aus immaterialgüter- und persönlichkeitsrechtlicher Sicht, in: K. Vieweg/H. Gerhäuser (Eds.), Digitale Daten in Geräten und Systemen, Köln 2010, pp. 123 et seq..

8. S. Karlin/L.Endrös, *SpuRt* 2019, 198 (198 et seq.).

9. C. Morgenroth, Interesse als Einfluss- und Entscheidungsfaktor im Sportrecht am Beispiel des Sportsponsoring, in: K. Vieweg (Ed.), *Akzente des Sportrechts*, Berlin 2012, p. 287 (300); rightly rejected S. Karlin/L.Endrös, *SpuRt* 2019, 198 (199).

*cc) Position and Movement Data*

Traditional position and movement data are remembered through the chess moves of famous grandmasters. In the digital age, sensor and chip-based wireless technology allows for the real-time generation of position and movement data, also known as tracking data<sup>10</sup>. In ski jumping, for example, a 30.7 g chip shows speed, flight height at each phase, the angle of the V-position, and ski edging<sup>11</sup>. In football, a chip sensor system developed by Kinexon and SAP is used, which displays position data, speed, and running routes<sup>12</sup>, among other things. The commercial value<sup>13</sup> of these data is unquestionable. Wearables<sup>14</sup>, mainly used in recreational sports, also provide position and movement data through location and step count.

*dd) Performance and Load Data (Fitness Data)*

The use of modern technologies enables the highly precise generation of heart rate and respiratory rate data, forming the basis for almost real-time performance and load analysis. These data can be a valuable decision-making tool for coaches, determining whether a player should continue playing or be replaced. These data are considered health data under Article 9 (1) of the GDPR and are subject to increased protection requirements.

*ee) Injury and Illness Data*

Injuries and performance deficits due to illness are common in competitive sports. Positive Covid-19 tests and associated quarantines had received special attention. Injury and illness data also include any surgeries and rehabilitation measures. All of this information is generally subject to medical confidentiality and constitutes particularly protected personal data under Article 9 (1) of the GDPR. In the case of an injury-related absence of a key player in a publicly traded football corporation, this may lead to an obligation to disclose information under Section 17 of the German Market Abuse Regulation, which must be considered in terms of data protection.

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10. *S. Karlin/L. Endrös*, *SpuRt* 2019, 198 (199).

11. *Frankfurter Allgemeine Zeitung* of December 28, 2017, p. 28.

12. *A. Höpner*, *Handelsblatt* of October 8, 2018 <https://www.handelsblatt.com/unternehmen/it-medien/sportanalyse-start-up-kinexon-ist-auf-dem-weg>.

13. Please refer to *S. Karlin/L. Endrös*, *SpuRt* 2019, 198 for more information.

14. Also see *A. Heuberger*, *Wearables*, in K. Vieweg (Ed.), *Festgabe Institut für Recht und Technik*, Cologne 2017, pp. 397 et seq.

*ff) Doping Analysis Data*

The results of doping tests, also known as competition controls<sup>15</sup>, are also considered health data under Article 9 (1) of the GDPR.

*gg) Voice Data*

Voice data includes interviews with athletes and coaches<sup>16</sup>, as well as their other comments on sporting events<sup>17</sup>. Coach instructions during timeouts, such as in handball, and soon also in the locker room during halftime, mark a new trend.

*hh) Photo and Film Data*

The mediatization of sports, especially events, has not only strengthened the importance of sports photography. Television and the internet act as drivers of the technical development of moving images, which also feature individual persons (athletes, referees, coaches, spectators). Even in these moving images produced for television and the internet, they are considered data. Their legal classification is a "classic" in sports law. The organizer has the right,<sup>18</sup> through the house right, to produce or have moving images produced.<sup>19</sup> The legal position of athletes is outlined by the German Art Copyright Act (Kunsturhebergesetz –KUG). It is crucial whether the athlete is considered a "person of contemporary history" within the meaning of § 23 KUG. The right to short reporting<sup>20</sup>, the right to moving images under § 19 (4) of the Copyright Act, and the discussion about creating a specific neighboring right for sports organizers<sup>21</sup> should be mentioned in this context. It is also reasonable to assume a co-ownership of the organizer and the producer of the broadcast signal.

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15. In addition, consider the data protection assessment by *K. Vieweg*, *Zivilrechtliche Beurteilung der Blutentnahme zum Zwecke der Dopingkontrolle*, in: Bundesinstitut für Sportwissenschaft (Ed.), *Blut und/oder Urin zur Dopinganalytik*, Schorndorf 1996, pp. 89-126.

16. Legendary *G. Trappatoni*: „Was erlaube Strunz? Ich habe fertig.“ "What does Strunz allow? I'm finished."

17. Legendary: The outbursts of *J. McEnroe*.

18. See *H. Waldhauser*, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, pp. 44 et seq.; *R. M. Hilty/F. Henning-Bodewig*, *Leistungsschutzrechte zugunsten von Sportveranstaltern? Rechtsgutachten*, Stuttgart 2007, pp. 54 et seq..

19. BGH, ZUM 1990, 522 f.; *H. Waldhauser* (fn. 17), pp. 68 et seq.; *Praxishandbuch Sportrecht/ Summerer* 4th ed., Munich 2020, V 3 para. 112.

20. BVerfG, 1 BvF 1/91 of 17.2.199 = BVerfGE 97, 228 ff; EuGH, Urt. vom 22.1.2013 (C-283/11) – Sky Österreich.

21. *R. M. Hilty/F. Henning-Bodewig* (fn. 17), pp. 67 et seq.

*c) Training Data*

Regarding training data, there are some parallels to competition data. The position and movement data, performance and load data<sup>22</sup>, as well as photo and film data, are of practical importance. These data are primarily collected and used for internal purposes. However, the use of performance and load data of a professional player in transfer negotiations and the use of voice, photo, and film data for educational materials should also be considered.<sup>23</sup>

*d) Whereabout Data*

Whereabout data without specific competition and training references play a significant role in doping control. Article 6 of the German NADA Code and the World Anti-Doping Agency's Anti-Doping Administration & Management System (ADAMS) require athletes to provide precise residence information in advance to enable surprise doping tests.

*e) Medical Examination Data*

Outside of competition and training, sports medical examinations can be conducted regularly or on an ad-hoc basis. Regular examinations include those of national team athletes, for example. Ad-hoc examinations include assessments of diving fitness and health checks related to the planned transfer of a professional football player. The collected data are subject to the special protection of Article 9 (1) of the GDPR.

*f) Other Event Data*

In addition to competitions, there are various events related to sports and corresponding sports data. These include training courses, conferences, New Year receptions, and celebrations (foundation festivals, anniversaries, honors). Participant lists, photos, and video recordings fall into this category of data.

*g) Occasion Data*

For individuals involved in sports, birthdays and family news, such as weddings or the birth of a child, are considered personal sports data.

*h) Donor and Sponsor Data, as well as Data from Business Partners*

Donations and sponsorships are essential in many areas of sports. The person-

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22. For an impressive contribution, see the team doctor of VfB Stuttgart *Prof. Dr. Dr. H. Striegel*, Sportmedizinische Daten im (Berufs-)Fußball, in K. Vieweg (Ed.), Erlanger Sportrechtstagung 2023, 2024, pp. 21-31.

23. The data protection issues are highlighted in the extensive study by *J. Niewalda*, Dopingkontrollen im Konflikt mit allgemeinem Persönlichkeitsrecht und Datenschutz, Berlin 2011, pp. 487-577.

al information about donors and sponsors (name, relationship to the supported sports organization, funding amount, etc.) can be referred to as donor and sponsor data. This category also includes data from personal partners in the business sector (media, marketing, etc.).

## IV. Recommendations

The German Olympic Sports Confederation (DOSB)<sup>24</sup> and some state data protection commissioners<sup>25</sup> have published valuable guidelines for practice. The primary recipients are those responsible in (sports) clubs. Scientific publications on specific sports data primarily address the issue of doping<sup>26</sup> and data generated in professional football<sup>27</sup>. An overarching methodological approach could involve compiling the legally prescribed approaches to lawful data processing and the relevant principles of data protection and data security for individual examination in a first step. In a second step, the specific sports data in question would need to be identified and listed in a register in accordance with Article 30 of the GDPR. The third step would then involve the specific assessment of permissibility on a case-by-case basis.

### 1. Starting point: The Legal Framework

The starting point for determining the lawfulness of processing personal data is Article 6 (1) of the GDPR, which is essentially a prohibition with permission reservation. It depends on whether one of the following conditions is met:

- The data subject has given consent, or
- the processing is necessary for the performance of a contract or for pre-contractual measures, compliance with a legal obligation, protection of vital interests, the performance of a task carried out in the public interest or in the exercise of official authority, or for legitimate interests pursued by the data controller or a third party.

The starting point for determining data protection principles is also Article 6 (1) of the GDPR. The underlying objective expressed therein is implemented through a series of data protection principles:

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24. DOSB (ed.), *Datenschutz: Handlungsempfehlungen für Vereine und Verbände* (24.11.2017).

25. Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen (ed.), *Datenschutz im Verein nach der Datenschutz-Grundverordnung (DS-GVO)*, August 2022.)

26. *J. Niewalda*, *Dopingkontrollen im Konflikt mit allgemeinem Persönlichkeitsrecht und Datenschutz*, 2011; *L. Mortsiefer*, *Datenschutz im Anti-Doping-Kampf*, 2010.

27. *Karlin/L.Endrös*, *SpuRt* 2019, pp. 198 et seq.; *N. Winter*, *SpuRt* 2020, pp. 168 et seq.

- The *principle of direct collection of personal data* from the data subject, as regulated in § 4 (2) sentence 1 of the German Federal Data Protection Act (Bundesdatenschutzgesetz BDSG) in its previous version, does not have an explicit equivalent in the GDPR. However, the GDPR distinguishes, with regard to transparency, between data collection from the data subject and data collection without the data subject's involvement. The obligations to provide information are regulated accordingly (Article 13 and 14 of the GDPR).
- According to the *transparency principle* (Article 5 (1) (a) of the GDPR), personal data must be processed in a way that is understandable for the data subject.
- The *principle of purpose limitation* (Article 5 (1) (b) of the GDPR) states that personal data should only be collected for specified, explicit, and legitimate purposes and should not be further processed in a manner incompatible with those purposes.
- The *principle of necessity* states that the collection, processing, and use of personal data is only permissible if it is necessary for the lawful fulfillment of the tasks of the data processing entity for the associated purpose.<sup>28</sup> While not explicitly stated, this principle is implemented in Article 25 (2) of the GDPR, which requires appropriate technical and organizational measures to ensure that only personal data necessary for the respective processing purpose is processed by default.
- The *principle of data minimization* (Article 5 (1) (c) of the GDPR) requires that personal data be adequate, relevant, and limited to what is necessary for the purposes of processing. Article 25 (1) of the GDPR refers to pseudonymization as a means of data protection through technological design.
- The *principle of accuracy of personal data* (Article 5 (1) (d) of the GDPR) includes ensuring the currency of information.
- The *principle of integrity and confidentiality of data* (Article 5 (1) (f) of the GDPR) aims to ensure an appropriate level of protection for personal data, including protection against unauthorized or unlawful processing, as well as accidental loss, destruction, or damage. This protection can be achieved through measures such as encryption, pseudonymization, or regular data backups (Article 32 of the GDPR).<sup>29</sup>

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28. In-depth analysis of the principle of necessity can be found in *Wolff*, in: *Wolff/Brink*, Beck OK Datenschutzrecht, Grundlagen und bereichsspezifischer Datenschutz, para. 25.

29. For informative details, see Fraunhofer IOSB/FH Bielefeld, Guide - Guidelines for data protection in scientific research on aspects of human-technology interaction, pp. 33 ff., as well as the TOM checklist for data security according to Art. 32 GDPR, available at <https://www.iosb.fraunhofer.de/servlet/is/Entry.77819.Display/>.

## 2. Practical Handling

### *a) Compilation of Identified and Processed Sports Data*

For those responsible for sports data, it is recommended to systematically record the sports data collected in their organization and document the relevant processing activities with the necessary awareness of the issues involved. This approach is in line with Article 30 of the GDPR. The broad definition of the term "processing" should be taken into account. According to this definition, processing includes any operation or set of operations performed with or without the aid of automated processes in connection with personal data. Article 4 No. 2 of the GDPR clarifies several phases: collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure, dissemination, alignment or combination, restriction, erasure, or destruction.

From the perspective of provision, for example, communication via email or WhatsApp<sup>30</sup> should be documented due to the security issues associated with it, even if encryption is used.

### *b) Specific Assessment of Permissibility*

The examination of the permissibility of processing sports data, with specific reference to Article 6 (1) of the GDPR, often encounters practical problems. Which personal data is truly necessary for fulfilling the contract with the data subject? When is processing necessary for the legitimate interests pursued by the data controller, without overriding the interests or fundamental rights and freedoms of the data subject? Have the requirements for obtaining the data subject's consent been met? According to Article 4 No. 11 of the GDPR, consent must be a freely given, specific, informed, and unambiguous indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of their personal data.

The difficulties in meeting the requirements for a legally compliant consent are well known. It is also clear that assessments of interests, especially as to their priority, can vary greatly. The example of the publication of doping sanctions illustrates this very clearly. Article 14.3.2 of the NADA Code provides for the publication of the final determination of a violation of anti-doping regulations, including information about the sport, prohibited substance or method, and the athlete's name. The DIS Sports Arbitration Rules allow the Deutsche Institution für Schiedsgerichtsbarkeit (DIS) to publish the arbitral award in Section

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30. The Federal Commissioner for Data Protection and Information Security, *U. Kelber*, has prohibited the use of the messenger service WhatsApp in a letter to all federal authorities. Despite end-to-end encryption, unencrypted metadata such as locations and identities of sender and recipient are generated; *Frankfurter Allgemeine Zeitung*, May 19, 2020, p. 21.

42, unless the parties have unanimously and timely excluded this possibility. In the special provisions for anti-doping disputes, Section 63 modifies this rule to require compliance with publication obligations arising from applicable anti-doping regulations. Accordingly, a decision finding a violation of anti-doping regulations should be published. The purpose of these provisions is, on the one hand, to inform the public<sup>31</sup> and, on the other hand, to promote general deterrence and desirable legal development. Whether these undifferentiated regulations can withstand a judicial review, which ultimately comes down to the constitutional principles of practical concordance and proportionality,<sup>32</sup> may be doubted.<sup>33</sup>

## Summary

The diversity and volume of personal sports data require systematization in order to comply with the requirements of the GDPR for data protection and data security in practice. It is proposed to create eight categories that should be handled differently, especially with regard to the assessment of permissibility. In a first step, it is recommended to clarify the legal framework, particularly outlined in Article 6 of the GDPR. The collected sports data should then be systematically recorded and the relevant processing activities documented. In the final specific assessment of permissibility, the existence of consent requirements and the weighting of the involved interests are often problematic in practice. Association regulations may require precautionary content control.

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31. The heading in the NADA Code is "14.3. Information of the Public".

32. *K. Vieweg*, Normsetzung und -anwendung deutscher und internationaler Verbände, Berlin 1990, pp. 230 et seq.; BGH *SpuRt* 1995, pp. 43 et seq. and *K. Vieweg*, *SpuRt* 1995, pp. 97 et seq..

33. *J. Adolphsen*, Internationale Dopingstrafen, Tübingen 2003, p. 205 denies a predominant interest in information about doping cases; detailed balancing of interests in *J. Niewalda* (Fn. 20), pp. 705 et seq.; rejecting online publications in the same, p. 713; also see *K. Vieweg/C. Röhl*, *SpuRt* 2009, pp. 192 et seq.. on online publications.