

Austrian Anti-Doping Arbitration Committee lacks entitlement to refer questions to the ECJ

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The European Court of Justice was asked to consider whether the Austrian Anti-Doping Authority (**NADA**) was in breach of the General Data Protection Regulations (**GDPR**) by publishing anti-doping decisions, including the identity of the offending athlete, on their website.

The European Court of Justice (**ECJ**) ultimately did not consider the GDPR point and found as a preliminary point that the Austrian Independent Arbitration tribunal (**USK**) which referred the matter was not an independent court or tribunal within the meaning of Article 267 Treaty of the Functioning of the European Union (**TFEU**). Therefore, USK did not have standing to issue a referral under the Article 267 procedure.

Background

NADA considered that a competitive athlete had breached anti-doping rules and submitted a request for the examination of the athlete's case to the Austrian Anti-Doping Legal Committee which upheld the infringement.

The athlete applied to USK to review the decision of the Austrian Athletic Federation (**ÖDAR**) and for the decision be amended so that alleged anti-doping violations and penalty imposed were kept confidential and not posted the website. USK upheld the decision of ÖDAR. On the issue of public publication, USK stayed the proceedings and refer the question to the European Court of Justice.

The primary question referred was whether data on a specific person who has committed an anti-doping violation constitutes "data concerning health" within the meaning of Article 9 GDPR. This provision states that the processing of any information that falls within the scope of Article 9 is prohibited.

The Advocate General remarked that the processing of personal data in this context did not constitute an activity of processing EU Law and that the EU did not have the competence to

regulate sport. However, the Court was not bound by the decision of the Advocate General. We previously considered the Advocate General's opinion [here](#).

Could the USK make a preliminary reference to the ECJ?

When the ECJ considered the matter, the key issue raised related to the admissibility of the request for a preliminary ruling before the ECJ.

Article 267 TFEU states that in order to make preliminary references to the Court, the body making the reference must be classified as a "court or tribunal". The Court held that it would take into account the below factors when deciding whether a body falls within the scope of Article 267:

1. whether it is a body established by law
2. whether it is permanent
3. whether its jurisdiction is compulsory
4. whether it applies rules of law
5. whether it is independent

Applying the criteria laid down under Article 267, the Court held that USK met criteria (1) - (4). However, the analysis of the Court focused on whether the body was independent and set out two requirements:

The body must exercise its judgment wholly autonomously and not subordinate to any other source.

The body must be impartial and be absent of any interest in the outcome of the proceedings. A guarantee of irremovability should apply, that members of a court or tribunal should only be removed under specific rules and procedures.

The ECJ held that USK was not independent because the decision to remove the members of the USK is a matter solely for the Federal Minister for Arts, Culture, Civil Service and Sport without precise criteria or precise guarantees having been established in advance. National legislation does not ensure that the members of the USK are protected from external pressure, be it direct or indirect, that is liable to cast doubt on their independence, and so does not satisfy the external aspect of the requirement for a court or tribunal to be independent and cannot be classified as a "court or tribunal" within the meaning of Article 267 TFEU.

Significance and impact

This decision is of relevance for arbitral tribunals across Europe. Giving a government the

executive power to remove members of an arbitral tribunal without precise criteria or appropriate guarantees in advance will preclude that tribunal's ability to refer questions of EU to the European Court of Justice.

Furthermore, the question of whether data on a specific person who has committed an anti-doping violation constitutes "data concerning health" remains an open question.

The full judgment is available [here](#).

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Key Contacts



[Paddy Murphy](#)

Managing Associate

[Ireland](#)

E: paddy.murphy@ogier.com

T: [+353 1 584 6311](tel:+35315846311)



[Clara Burlacu](#)

Trainee Solicitor

[Ireland](#)

E: clara.burlacu@ogier.com

T: [+353 1 584 6307](tel:+35315846307)

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