

Ireland: Sport Ireland Bill 2014: changes & impact

Important changes to the governance of sport in Ireland will be effected by the recently published Sport Ireland Bill 2014, once it is enacted. Two existing public bodies, the Irish Sports Council (ISC) and the National Sports Campus Development Authority (NSCDA), will be dissolved and replaced by a new entity named Sport Ireland (or Spórt Éireann in the Irish language). Although many of the provisions of the Bill are focused on giving Sport Ireland the same statutory functions and powers as are currently vested in ISC and NSCDA and providing for the transfer of property, employees, rights and liabilities to Sport Ireland, the Bill also contains interesting new developments. In particular, there will be significant changes to the regulation of anti-doping in Ireland and, potentially, to the sponsorship of sport.

The amalgamation of ISC and NSCDA has been on the cards for some time, as it was included as one of a number of cost saving proposals in the Irish Government's 2011 Public Service Reform Plan. ISC already has a broad range of statutory functions and powers and Sport Ireland will generally have the same functions and powers, plus NSCDA's functions and powers in connection with the operation and further development of a national sports campus.

Changes to anti-doping provisions

The express statutory anti-doping functions and powers of Sport Ireland will be broader than those currently conferred on ISC under the Irish Sports Council Act 1999. The 1999 Act provides for limited functions regarding 'doping in sport,' which are based on the definition of 'doping in sport' that is set out in the Strasbourg Anti-Doping Convention¹. The Bill contains additional functions in this regard, which incorporate the much broader definition of 'doping in sport' that appears in the UNESCO Anti-Doping Convention². These changes are significant, since they will render Sport Ireland less vulnerable to arguments that could be made regarding ISC's vires in connection with its current anti-doping activities. They are particularly notable when considered against the backdrop of ISC having recently been held by the Irish High Court to have acted ultra vires in a different context.

In the case of *John Byrne v. ISC*³, a decision by ISC to appoint the former Irish Director of Corporate Enforcement to investigate allegations of improper conduct by a member of ISC in connection with the allocation of public funding to sports governing bodies was held to have been ultra vires. Since ISC is a creature of statute, it only has such powers as are conferred on it by statute (either expressly, or by implication based on principles of statutory interpretation). The High Court held that ISC's decision to appoint an investigator was ultra vires, since ISC does not have an express power to do so, nor could such a power be implied on the basis that it is necessary for, or incidental to, the performance of ISC's functions under the 1999 Act.

Although ISC's anti-doping activities have expanded over time on the basis that it is the public body that was designated by the Government in 2008 as Ireland's national anti-doping body for the purpose of the implementation of the UNESCO Anti-Doping Convention, no changes were made to the 1999 Act to provide for this. As a result, its vires to perform some of its current anti-doping activities is open to challenge. The decision in the Byrne case clarified the importance of there being an explicit statutory basis for the activities of ISC and its

successor, Sport Ireland and may have driven the inclusion of more explicit anti-doping functions and associated powers in the Bill.

Data protection

The Bill also includes new provisions which seem intended to clarify the legal basis on which personal data will be processed for anti-doping purposes. At present, it is questionable whether the processing of personal data for anti-doping purposes is fully compliant with Irish data protection law.

It is a fundamental requirement of data protection law that the processing of personal data should be covered by the consent of the relevant data subject, or by an alternative 'legitimising condition' for the processing of personal data. The current version of the Irish Anti-Doping Rules seems to be intended to operate on the basis that all participants in Irish sport are deemed to have consented to any processing of their personal data, including sensitive personal data, for the purpose of the implementation of the Rules. For the purpose of data protection law, however, in order to be effective, consent must be freely given, specific and informed. In an employment context, it is well established that consent purportedly given by an employee to the use of their personal data by their employer for a specific purpose will not be construed as 'freely given' if the employee had no option but to give their consent in order to maintain their employment. By analogy, it is doubtful whether participants in sports have 'freely given' their consent to the collection and use of their personal data for anti-doping purposes, where they would not be allowed to participate in their chosen sport without giving such consent.

An alternative 'legitimising condition' for the processing of personal data, including sensitive personal data, is where the processing is necessary for the performance of a statutory function. The new data protection provisions in the Bill seem intended to clarify that Sport Ireland will process personal data in connection with anti-doping based primarily on this legitimising condition, rather than on the questionable deemed consent of participants in sport. The Bill also makes it clear, however, that Sport Ireland must comply with other data protection principles regarding the processing of personal data, including by ensuring that its processing activities are not excessive and by 'having regard to the fundamental rights and fundamental freedoms of the data subject concerned.' In addition, Sport Ireland is required to consult with the Irish Data Protection Commissioner before publishing and implementing agreements, policies, plans and procedures for the sharing of information relating to doping in sport with third parties, such as the Garda Síochána (the Irish police) and other anti-doping organisations. It is becoming increasingly common for Irish legislation to include obligations on public bodies to consult with the Data Protection Commissioner regarding the development and implementation of information sharing policies and procedures in order to give effect to 'privacy by design' principles.

Other changes

The Bill also contains new statutory functions regarding the promotion of best practice for the protection of children in sport and the development of coaches at all levels of sport. The latter will give a formal legislative basis to the recent subsuming of Coaching Ireland into ISC.

Sport Ireland will have the same powers regarding entering into sponsorship agreements as are currently vested in ISC and NSCDA, subject to one new restriction. Sport Ireland will be prohibited from entering into any sponsorship arrangement which would be 'inconsistent with Government policy (including specific guidelines on sponsorship).' Bearing in mind that there has been considerable public debate in Ireland recently regarding the sponsorship of sport by alcoholic drinks brands, it remains to be seen whether this provision may be used by the Government to restrict the sponsorship of Sport Ireland's activities and premises by certain industries via 'soft'

law in the form of policies and codes of conduct, in the event that it does not enshrine such restrictions in legislation.

The Bill contains a relatively novel legislative requirement for Sport Ireland and the Minister for Transport, Tourism and Sport to enter into a 'service level agreement' regarding the performance of Sport Ireland's statutory functions. Although service level arrangements are common in commercial services agreements, Irish public bodies generally do not enter into service level agreements with Government Ministers or Departments. The intended legal effect of these provisions is unclear. Leaving aside contractual rights and obligations that will arise under such an agreement, it is notable that the Bill provides that it will be a condition of the advance of public funds by the Minister to Sport Ireland that Sport Ireland 'shall seek at all times to meet the terms of the agreement.' Such wording begs more questions than it answers. According to the Government's legislation programme, the Sport Ireland Bill is scheduled to be enacted before the end of 2014.

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1. Anti-Doping Convention of the Council of Europe. ETS No 135, Strasbourg, 16.XI.1989.
2. International Convention against Doping in Sport. Paris, 19 October 2005.
3. Byrne v. Irish Sports Council [2013] 8 JIC 0603.

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