UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

cases ADT 05.2016 and 02.2017

UCI v. Mr. Jure Kocjan

Single Judge:

Mr. Ulrich Haas (Germany)

Aigle, 28 June 2017

INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (hereinafter referred to as "the Tribunal") in application of the UCI Anti-Doping Procedural Rules (hereinafter referred to as "the ADT-Rules") in order to decide upon violations of the UCI Anti-Doping Rules (hereinafter referred to as "the ADR") committed by Mr. Jure Kocjan (hereinafter referred to as "the Rider"), as alleged by the UCI (hereinafter collectively referred to as "the Parties").

I. FACTUAL BACKGROUND

2. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Single Judge has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Judgment refers only to the necessary submissions and evidence to explain his reasoning.

3. The Rider is a professional cyclist of Slovenian nationality. He is affiliated to the Slovenian Cycling Federation ("SCF") and a License-Holder within the meaning of the ADR. The Rider started his professional cycling career in 2006. At the time of the doping test in 2012, the Rider was contracted to the team Type 1 – Sanofi.

4. On 8 March 2012, the Rider provided a urine sample (number 3029970) as part of an out-of-competition control in Borger, Netherlands. The control was carried out by a Doping Control Officer on behalf of the UCI. On the Doping Control Form, the Rider declared that he had taken no medication during the seven days prior to the sample collection and that the sample had been taken in accordance with the regulations.

5. The urine sample provided by the Rider was then analyzed in the WADA-accredited Laboratory in Cologne (hereinafter referred to as the "Laboratory"), Germany. The analysis for Erythropoiesis-Stimulating Agents (hereinafter referred to as "ESAs") was conducted in accordance with the WADA Technical Document on the analysis and reporting of EPO, version in force from 21 September 2009 to 1 March 2013 (hereinafter referred to as "TD EPO2009"). The sample was reported as negative for Recombinant Erythropoietin (hereinafter "rEPO").

6. In 2015, the UCI decided to submit the Rider's sample for re-analysis be the Laboratory according to the new Technical Document governing the analysis of ESAs (hereinafter referred to as "TD EPO2014"), in force as of 1 September 2014, and informed the Rider thereof. As there was not enough urine left in the A-sample to conduct such analysis, the B-sample was split to create new "A" and "B" samples (hereinafter referred to as "NA" and "NB").

7. On 11 January 2016, the Laboratory opened the Rider's B-sample, split its volume into two bottles and resealed the NB-sample. This happened in the presence of an independent witness appointed by the Laboratory. Even though invited to do so on several occasions the Rider failed to communicate whether he himself or a representative would attend this procedure.

8. On 11 January 2016, the Laboratory analyzed the Rider's NA-sample. The Laboratory reported an Adverse Analytical Finding (hereinafter "AAF") for rEPO. rEPO is a prohibited substance listed under class S2 Peptide Hormones, Growth Factors, Related Substances and Mimetics of the 2012 and 2016 versions of the WADA Prohibited List adopted by the UCI. According thereto, rEPO is prohibited at all times (in- and out-of-competition).

9. On 28 January 2016, the Rider was notified of the AAF by the UCI. He was also informed of the mandatory provisional suspension imposed on him.

10. In addition to informing the Rider, the UCI also informed the SCF, the Slovenian Anti-Doping Organization (hereinafter referred to as "the SLOADO"), the Rider's Team for 2016 and the WADA of the Rider's AAF.

11. On 2 February 2016, the Rider's counsel informed the UCI that the Rider was requesting the analysis of the NB-sample. Furthermore, he requested to receive the documentation packages for the NA-sample and the NB-sample.

12. On 16 February 2016, the UCI sent the document package of the analysis of the NA-sample to the Rider's counsel.

13. From 14 – 16 March 2016, the Laboratory analyzed the Rider's NB-sample. The Rider's representative witnessed the opening of the NB-sample. This ESAs analysis was again conducted in accordance with the TD EPO2014.

14. In its report dated 17 March 2016, the Laboratory declared that rEPO has also been found in the Rider's NB-sample.

15. On 18 March 2016, the UCI notified the Laboratory findings to the Rider. By the same communication, the UCI offered the Rider a second opportunity to submit an explanation and / or provide substantial assistance. Furthermore, the UCI asserted in its letter that the Rider had committed an anti-doping rule violation (hereinafter referred to as "ADRV") for the Presence and Use of rEPO under Articles 21.1 and 21.2 of the UCI ADR 2012.

16. On the same day, the Rider requested to be provided with the documentation package for the NB-sample analysis. The UCI informed the Rider that it stayed the deadline to submit an explanation, pending the production of the NB-sample analysis documentation package.

17. On 8 April 2016, the UCI sent the respective documentation package to the Rider. The Rider was granted until 22 April 2016 to submit his explanations.

18. On 19 April 2016, the Rider provided his explanation to the UCI. He requested that the proceedings against him be closed.

19. Since the explanations provided by the Rider on 19 April 2016 were similar to the ones raised in a parallel proceeding pending before the Tribunal concerning the cyclist Ms. Klemencic and considering that Ms. Klemencic was represented by the same counsel as the Rider, the UCI decided to stay the results management process of the Rider's case until the Tribunal had rendered its decision in the Klemencic case.

20. On 20 May 2016, the Tribunal rendered its decision in the Klemencic case. On 15 June 2016, Ms. Klemencic filed an appeal against the decision of the Tribunal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS").

21. On 19 September 2016, the Rider's counsel requested that the results management of the Rider's case be resumed despite Ms. Klemencic's appeal to the CAS.

22. On 30 September 2016, the UCI informed the Rider that it considered the ADRV to be established. The UCI offered the Rider an Acceptance of Consequences pursuant to Article 8.4

of the ADR. The UCI advised the Rider that disciplinary proceedings would be initiated in case he did not agree with the proposed Acceptance of Consequences.

23. On 6 October 2016 and 13 October 2016, the Rider discussed the possibility of providing substantial assistance with the UCI. Subsequently, the UCI sent the Rider a draft of a collaboration agreement on 4 November 2016. The following day, the Rider discussed the details of this draft agreement over the phone with [redacted] who works as an attorney-at-law for the Legal Anti-Doping Services (a specific unit of the UCI conducting the legal assessment of potential doping cases).

24. On 7 November 2016, the Rider informed the UCI that he would not provide substantial assistance.

25. On 14 November 2016, the Rider wrote [redacted] an e-mail that reads as follows:

> *"I would like to inform you, that I recorded our last phone conversation when you said I am free to race, will keep my house and my bike shop, will have no cash penalty if I am ready to cooperate and testify, aside that everything will remain confidential.*
>
> *It sounds like a threat so I am giving you 48h to find a way, that is acceptable for both of us. After deadline, everything goes public …".*

26. The following day, [redacted] wrote an email to the Rider and his counsel, in which he contested to have threatened the Rider. Furthermore, he informed them that he could not negotiate an Acceptance of Consequences in the way requested by the Rider.

27. On 25 November 2016, the UCI referred the Rider's rEPO case to the Tribunal (hereinafter the "First Case" or "First ADRV"). In its referral to the Tribunal, the UCI requested the following:

- *Declaring that Mr. Kocjan has committed an Anti-Doping Rule Violation.*
- *Imposing on Mr. Kocjan a period of ineligibility of two years.*
- *Disqualifying all the results obtained by Mr. Kocjan from 8 March 2012 until the day he was provisionally suspended.*
- *Ordering Mr. Kocjan to pay a fine of* [redacted]
- *Ordering Mr. Kocjan to pay the costs of results management incurred by the UCI (2'500.- CHF) and the costs incurred for Out-of-Competition Testing (1'500.- CHF).*
- *Ordering Mr. Kocjan to reimburse the costs of the B-sample analysis (2'100.- EUR) and of the two documentation packages (1'900.- EUR).*

28. On the same day, the UCI charged the Rider with a second ADRV for Tampering and / or Attempted Tampering based on his e-mail of 14 November 2016 (hereinafter referred to as the "Second Case" or "Second ADRV"). The UCI informed the Rider that it qualified his menace to publicly release the (secretly) recorded telephone conversation with [redacted] as a conduct contrary to the ADR. By the same communication, the Rider was invited to provide explanations regarding this Second ADRV.

29. On 29 November 2016, the Rider replied by stating that he was available for a phone call if the UCI wished to discuss the matter.

30. On 1 December 2016, the Rider wrote to the UCI and denied having committed Tampering and / or Attempted Tampering.

31. On 9 December 2016, the Rider's counsel filed a statement of defense before the Tribunal in the First Case, in which he also addressed the charge for Tampering and / or Attempted Tampering.

32. On 16 January 2017, the UCI referred the Rider's Second Case to the Tribunal for determination. The UCI, furthermore amended its previous prayers of relief and now seeks (based on the First and the Second Case) that the Tribunal decide on the following requests:

A. To issue a procedural order

- *Consolidating the present proceedings with the UCI ADT 05.2016 case, currently pending before the Tribunal.*

B. To issue an award

1. If the request for consolidation is granted (principalement):

- *Holding that Mr. Kocjan has violated Article 2.1 and Article 2.2 of the UCI ADR 2016 (Presence and Use of a prohibited substance in a rider's sample).*
- *Holding that Mr. Kocjan has breached Article 2.5 of the UCI ADR 2016 (Tampering or Attempted Tampering with any part of the Doping Control).*
- *Imposing on Mr. Kocjan a period of ineligibility of eight years.*
- *Ordering Mr. Kocjan to pay the UCI a fine of* [redacted]
- *Ordering Mr. Kocjan to pay the costs of results management incurred by the UCI of CHF 5'000.- (i.e. CHF 2,500.- for each consolidated case).*
- *Ordering Mr. Kocjan to pay the costs incurred for Out-of-Competition Testing (CHF 1'500.-).*
- *Ordering Mr. Kocjan to reimburse the costs of the B-sample analysis (2'100.- EUR) and of the two documentation packages (1'900.- EUR).*

2. If the request for consolidation is rejected (subsidiairement):

- *Holding that Mr. Kocjan has breached Article 2.5 of the UCI ADR 2016 (Tampering or Attempted Tampering with any part of the Doping Control).*
- *Imposing on Mr. Kocjan a period of ineligibility of eight years.*
- *Ordering that the period of ineligibility of eight years replaces the period of ineligibility imposed on the Rider pursuant to the Tribunal's decision in the case UCI ADT 05.2016, if any.*
- *Ordering Mr. Kocjan to pay the costs of results management incurred by the UCI (CHF 2'500.-).*

II. PROCEDURE BEFORE THE TRIBUNAL

33. In accordance with Article 13.1 ADT-Rules, the UCI has initiated proceedings before this Tribunal through the filing of a petition to the Secretariat on 25 November 2016 in the First Case. Before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an Acceptance of Consequences within the meaning of Article 8.4 ADR and Article 2 ADT-Rules. The Offer of Acceptance was rejected by the Rider on 7 November 2016.

34. On 25 November 2016, the Secretariat of the Tribunal appointed Mr. Ulrich Haas to act as Single Judge in the first proceedings in application of Article 14.1 ADT-Rules.

35. In application of Article 14.4 ADT-Rules, the Rider was informed on 25 November 2016 that disciplinary proceedings had been initiated against him before the Tribunal in the First Case. Furthermore, the Rider was informed that a deadline until 12 December 2016 had been granted to submit his answer (hereinafter referred to as "Answer") in conformity with Articles 16.1 and 18 ADT-Rules.

36. On 9 December 2016, the Rider submitted his Answer in the First Case.

37. On 12 December 2016, the Tribunal acknowledged receipt of the Rider's Answer of 9 December 2016.

38. On 16 January 2017, the UCI filed its petition to the Secretariat in the Second Case in accordance with Article 13.1 ADT-Rules. The petition included a procedural request to consolidate both proceedings, implying that the two cases are dealt with by the same Single Judge.

39. On the same day, the Secretariat of the Tribunal appointed Mr. Ulrich Haas to act as Single Judge in the Second Case in application of Article 14.1 ADT-Rules.

40. In conformity with Article 14.4 ADT-Rules, the Rider was informed on 27 January 2017 that disciplinary proceedings had been initiated against him before the Tribunal in the Second Case. Furthermore, the Rider was informed that a deadline until 13 March 2017 had been granted to submit his Answer in the Second Case in conformity with Articles 16.1 and 18 ADT-Rules. In addition, the Rider was invited to provide the Tribunal with his comments regarding UCI's request that both proceedings be consolidated.

41. On 8 February 2017, the Tribunal informed the Parties of the Single Judge's decision that in view of the Rider's failure to file any observations within the prescribed deadline the UCI's request to consolidate the First and the Second Case was granted.

42. On 17 February 2017, the Rider submitted his Answer in the Second Case.

43. On 27 February 2017, the Tribunal acknowledged receipt of the Rider's Answer in the Second Case. Furthermore, the Parties were advised that in accordance with Article 17.1 ADT-Rules the written proceedings were completed and that a hearing by video-conference would be held in this matter.

44. The Single Judge conferred repeatedly with the Parties to find a suitable hearing date. Unfortunately, no suitable hearing date could be found. Finally, with letter dated 7 June 2017, the Rider declared that "*he lost his confidence and faith in impartial, fair and adequately expeditious trial in this matter*" and that, therefore, the Rider "*waives his right to a hearing and that he decided that he'll make the so far proceedings known and available to the general public …*".

45. With letter dated 8 June 2017, the Tribunal acknowledged the Rider's letter dated 6 June 2017 and informed the Parties of the Single Judge's decision not to hold a hearing in the present matter and that he will render his judgment on the basis of the Parties' written submissions.

III. JURISDICTION

46. The jurisdiction of the Tribunal in the First and the Second Case follows from Article 8.2 ADR and Article 3.1 ADT-Rules according to which "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

47. Furthermore, Article 3.2 of the ADT-Rules provides the following:

> *"Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction."*

48. Neither of the Parties raised any objection to the jurisdiction of the Tribunal within said time limit. Therefore, the Tribunal has jurisdiction to decide on both Petitions.

IV. APPLICABLES RULES

49. The question which rules are applicable must be assessed separately for the First Case and the Second Case

1. With respect to the First Case

50. Article 25 of the ADR 2015 provides the following:

> *"25.1 These Anti-Doping Rules shall apply in full as of 1 January 2015 (the "Effective Date").*
>
> *25.2 The retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall only be applied retroactively if the statute of limitation period has not already expired by the Effective Date.*
>
> *Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case." (emphasis added)*

51. Considering that the Rider's sample was collected in March 2012, i.e. prior to the Effective Date, but has been brought forward by the UCI as an alleged ADRV on 25 November 2016, i.e. after such Effective Date, the First Case shall be governed by the substantive anti-doping rules in effect at the time when the alleged ADRV occurred, namely the ADR 2012, unless the principle of "lex mitior" applies.

2. With respect to the Second Case

52. The Second Case relates to facts that clearly occurred after the Effective Date. However, these facts display also a very close connection to the First Case, since they occurred during the Doping Control process related to the First Case that is to be adjudicated according to the ADR 2012. The question, thus, arises whether the Second Case should be adjudicated according to the ADR

2012 or ADR 2015. The Single Judge finds that even if the Second Case cannot be looked at in isolation (see below), it is the ADR 2015 that apply.

V. THE FINDINGS OF THE TRIBUNAL WITH RESPECT TO THE FIRST CASE

53. Article 21.1 ADR 2012 reads as follows:

> *"The following constitute anti-doping rule violations: 1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen."*

54. Furthermore, Article 21.1.2 ADR 2012 reads as follows:

> *"Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample."*

1. Is there an A and a B sample?

55. Whether the Rider can be charged with a violation of Article 21.1 ADR 2012 in the case at hand is disputed between the Parties. The Rider submits that the provision does not apply, since it presupposes that – in principle – the presence of a prohibited sample is confirmed in both the A and the B sample. The Rider submits, however, that in the First Case there was no A sample left and that a splitting of the B sample does not lead to an A and B sample within the meaning of Article 21.1.2 ADR 2012. Consequently, the prerequisites of Article 21.1.2 ADR 2012 are not fulfilled in the present case according to the Rider.

56. Article 21.1.2. ADR 2012 obviously has a substantive aspect. The latter consists in that an ADRV in the form of presence of a prohibited substance can only be established through two independent analyses on samples provided by an athlete in a WADA-accredited laboratory. Only if the results of a first analysis can be reproduced by an independently conducted second analysis a Rider shall be charged with "Presence". The prerequisite for two independent analyses serves the purpose of protecting the Rider from manipulations occurring in the laboratory, i.e. – e.g. – that the samples are swapped, manipulated or not analyzed according to the applicable standards.

57. In principle, the A and B samples are obtained from a single sample at the time of sample collection. The container with the Rider's urine is split after passing the sample into an A and a B bottle. In order to make sure that both samples stem from the same Rider they are sealed under the supervision of the Rider. The applicable rules, however, do not state that the splitting of the Rider's sample must – exclusively – occur at the time of sample collection in order to obtain an A and a B sample. Instead, in the Single Judge's view the ADR 2012 indicate to the contrary. Article 200 ADR 2012 provides that a sample may be reanalyzed (at any time) for the purpose of Article 120 ADR. Article 201 ADR 2012 provides that the analysis shall be performed in accordance with the applicable International Standards.

58. Article 5.2.2.12.1.2 of the International Standard for Laboratories 2012 (hereinafter ISL 2012) provided a special procedure in case no urine is left in an A sample for possible retesting purposes. As the Panel in CAS 2016/A/4648 stated (para. 110):

> *"In this provision … the procedure in connection with the splitting of the 'B' sample in case no urine sample remained in the 'A' sample for possible retesting is meticulously described including the important guarantees for safeguarding the Athlete's/Rider's fundamental and basic rights to a fair and due process. … At the opening of the 'B' sample the laboratory shall ensure that the sample is adequately homogenised before splitting the 'B' sample, and it shall divide the volume of the 'B' sample into two bottles in the presence of the Athlete/Rider/representative or an independent witness. The splitting of the 'B' sample shall be documented in the chain of custody, and the Athlete or the Athlete's representative shall be invited to seal one of the bottles using a tamper-evident method. If the analysis of the First Bottle reveals an AAF, a confirmation shall be undertaken if requested by the Athlete/Rider using the second sealed bottle."*

59. It follows from the above that the applicable rules in force in 2012 already provided for the possibility of two independent analyses in case only one sealed sample (B sample) was available. The only question to be answered, thus, is whether the "First" and the "Second Bottle" so obtained qualify as an A and a B sample within the meaning of Article 21.1.2 ADR 2012. This must be answered in the affirmative, if such procedure provides the same safeguards as the splitting of the sample at the time of the sample collection. This, however, is obviously the case, since the B bottle is sealed before splitting and, therefore, guarantees that no manipulation occurred since the time of the taking of the sample. Furthermore, the splitting of the sample in two different containers is made under the supervision of the Athlete/Rider at the laboratory just in the same way as at the time of the sample taking. To conclude, therefore, the NA and the NB sample obtained from the splitting of the B sample constitute A and B samples within the meaning of Article 21.1.2 ADR 2012.

60. In coming to this conclusion the Single Judge sees himself comforted by the CAS jurisprudence (CAS 2016/A/4648) where the Panel found as follows (para. 113):

> *"In conclusion, the Panel wishes to emphasise that the substantive anti-doping rule violations both in the UCI ADR 2012 and 2015 evolved the Rider's personal duty to ensure that no Prohibited Substance entered his or her body, and that the Rider was responsible for any Prohibited Substance … found to be present in her sample. This ADRV was exactly what the Cologne Laboratory concluded had occurred, when both the First and the Second Bottle were analysed for the presence of EPO. Therefore, the Panel finds that an ADRV pursuant to Article 21.1 of the UCI ADR 2012 has been established to the comfortable satisfaction of the Panel, regardless of the fact that the method of retesting and splitting of the 'B' Sample was not specifically mentioned in the UCI ADR 2012 provision, as the UCI ADR 2012 must be read in conjunction with the ISL 2012, which specifically addressed the case, in which no urine remained in A samples for possible retesting."*

2. Is a Prohibited Substance Present in the NA and the NB sample

a) The Burden and Standard of Proof

61. Article 22 ADR 2012 provides as follows:

> *"The UCI … shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI … has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts*

or circumstances, the standard of proof shall be by a balance of probability, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof."

62. Furthermore, Article 24 of the ADR 2012 provides as follows:

> *"WADA-accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*
>
> *If the License-Holder rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding."*

63. In the case at hand the UCI has discharged its burden of proof that *prima facie* an ADRV has been committed by the Rider by submitting the respective analyses reports for the NA and the NB sample that show the presence of rEPO. Consequently, the burden of proof shifts to the Rider to rebut this presumption by showing on a balance of probabilities that
    - there was a departure from the ISL; and
    - that such departure could have reasonably caused the adverse analytical finding.

64. The above prerequisites have further been specified in CAS jurisprudence. The CAS Panel in 2013/A/3112 found in this respect as follows (para. 85):

> *"Therefore, the Panel deems a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis. Further, the Panel remarks that such athlete's rebuttal functions only to shift the burden of proof to the anti-doping organization, which may then show, to the Panel's comfortable satisfaction, that the departure did not cause a misreading of the analysis."*

65. In relation to when an (established) departure may have reasonably caused the adverse analytical finding the CAS panel in 2014/A/3476 found as follows (para. 155):

> *"Having considered the parties' submissions and the relevant aspects of the applicable rules referred to in support of those arguments, the Panel considers that Rule 33.3(b) requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the ISL departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible."*

b) The Burden of Presentation and Substantiation

66. The burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court / tribunal (see also CAS 2011/A/2384&2386, no. 249). It is, in principle, the obligation of the party that

bears the burden of proof in relation to certain facts to also submit them to the court / tribunal in a sufficient manner (SFT 97 II 216, 218 E. 1). The party that has the burden of proof, thus, in principle has also the burden of presenting the relevant facts to the tribunal. Only if the party has satisfied its burden of presentation, the question related to the burden of proof may arise (provided that the fact has been contested by the other party).

67. The ADR 2012 are silent on how specific and detailed the presentation of facts must be in an individual case. Since this question is of a procedural nature, the Single Judge takes – insofar – guidance in the jurisprudence of the Swiss Federal Tribunal (hereinafter referred to as "SFT") with respect to civil procedures before state courts. According thereto submissions of facts are substantiated within the above meaning if the factual submissions are detailed enough to determine and assess the applicability of the legal position derived from a particular provision (SFT 4A_42/2011, 4A_68/2011, E. 8.1). Consequently, the party having the burden of presentation must present the facts in a manner that allows subsumption under the prerequisites of the provision in question (SFT 4A_501/2014, E. 3.1).

c) The Rider's Allegation

aa) With Respect to the ISL

68. The Rider makes reference to the expert opinion produced by Prof. Vladka Čurin Šerbec and submits – in essence – that the Laboratory committed the following "violations":

- The B sample had been opened prior to the arrival of Prof. Čurin Šerbec and a part of it had already been used in January 2016. Furthermore, the sample was a bit turbid.
- No information was provided concerning the transportation of the sample to the lab (transport conditions, e.g. cold chain). The corrected data on the doping control form lacked the signature of the officer.
- The pH and specific gravity were not measured.
- "*Concentrations of endogenous EPO in urine samples … is not known*."
- Immunopurification is one of the main steps in the procedure. Antibodies that bind endogenous EPO as well as rEPO are used in this step. It is important to know how this binding occurs and which antibodies are used for this purpose. The expert was not allowed to see the description on the packaging element containing a device with the antibodies. Nonetheless, the expert was able to see the description and learned that the antibodies on the strip were "*of mouse monoclonal origin*".
- On 16 March 2016, the detection of EPO was performed. After the first exposition, the band where the B sample was applied was very weak in comparison to the other samples.
- "*The reaction was then recorded after different times …; controls became so intensive that they were not acceptable for the interpretation of the results anymore, whereas the B-sample (a sample of interest) became more intensive (like other samples, representing controls, at the very beginning)*."
- Whilst the expert was asked to wait in an office, the final picture was prepared with a software "*which manipulated with backgrounds and bands to get the curves which were then comparable … - this procedure reminded of the arranging of the final results*".
- The expert was informed that a smear (which is not an analytical term) above the lines was the indication for the possible presence of rEPO and that the anti-doping laboratory in Seibersdorf would be contacted for a second opinion.
- Furthermore, the shape of the curve of the B sample was different from the shape of the curve of the sample that had been tested in January 2016.

- In 2015, concerns about the use of monoclonal antibodies – which forms the basis for EPO testing – were expressed in the most prestigious journal Nature.
- "*Storage of A/B bottle, page 4: no data about storage conditions between 10.3.2012 and 12.3.2012 are available in documentation; a mistake on the chain of custody form, pages 8 and 9: time is corrected by the officer and not signed (page 8) and date is corrected by the officer and not signed (page 9); no data about transportation conditions are available. No pH and specific gravity were measured*." This constitutes a violation of ISO 17025 5.7.3. and 5.8.1.
- The picture depicted on page 19 of the documentation package that the Rider had received differs significantly from another picture on page 20, the latter having been used as the basis for the analysis. The latter picture is "*obviously different picture from the original and reminds on the manipulation of the results*". Therefore, the laboratory manipulated the results for the interpretation. This constitutes a violation of ISO 17025 5.10.1.
- During this testing procedure only two positive quality controls were used, whereas in the first testing of the B sample in January 2016 three positive controls were included into the testing procedure.
- Dr. C. Reichel was involved in the development of the computer software program that is essential for the understanding of the obtained laboratory data. It is clear that a person involved in the development of such a program has an interest in it working smoothly, i.e. effectively detecting the presence of forbidden substances. The same Dr. C. Reichel was appointed to give the final opinion on the result that was produced by his program. In other words, he decides whether the result was positive or negative, meaning whether the program works or not. This is an evident conflict of interest.

69. In addition to the above, the Rider points to the following other five "violations" of the ISO 17025:
    - *"ISO 17025 5.4.4: Non-standard methods: … The method developed shall have been validated appropriately before use. f) Reference standards and reference materials required. (How can the laboratory assure reference standards if the volume of urine, which is used for the negative control as well as a diluent for the positive controls, is limited and changes from person to person?)*
    - *ISO 17025 5.4.5.2: The laboratory shall validate non-standard methods, laboratory-designed/developed methods… Interlaboratory comparisons. (How, if every laboratory has different methods according to TD2014EPO?)*
    - *ISO 17025 5.7.3: The laboratory shall have procedures for recording relevant data and operations relating to sampling that forms part of the testing or calibration that is undertaken. These records shall include sampling procedure used, …, environmental conditions… (Data is missing for the transportation and storage of the sample.);*
    - *ISO 17025 5.8.3: Upon receipt of the test or calibration item, abnormalities or departures from normal or specified conditions, as described in the test or calibration method, shall be reported. (There was no data about the transportation conditions.);*
    - *ISO 17025 5.10.3.2.: e) details of any environmental conditions during sampling that may affect the interpretation of the test results. (Again, no data available).*"

bb) With Respect to the Reasonable Link with the AAF

70. The Rider submits that – based on the expert opinion as well as on the facts and documents – a "serious" possibility exists that the results of the analysis are invalid. According to the Rider, the Laboratory departed from the applicable rules, standards and technical documents. Such departure could reasonably have caused the AAF and "*therefore falsely positive result*".

Furthermore, the Rider submits that all of the above facts not only cast a poor light on the proceedings of the Laboratory, but also contaminate the results of both analyses. Therefore, these cannot and should not form the basis for any sanction against the Rider. According to the Rider, the procedural defects (Articles 3.2.2 and 3.2.3 WADC) that have occurred are substantial to the finding of an ADRV and should invalidate it.

71. With reference to the above-mentioned conflict of interest the Rider submits that "[t]*his additional circumstance of partiality of a key person, dr. C. Reichel involved in the process of determining an AAF, more so when considering other deviations from laboratory and other regulations, obviously constitute the existence of a conflict of interest and thus cast a reasonable doubt about the correctness and reliability of the results obtained*." Furthermore, the Rider submits that the relevant circumstances (e.g. lack of ethics, deviations from the rules of the profession, inaccuracy) create a situation in which the final laboratory result is probably false, but obviously at least doubtful and should therefore be proclaimed as inadmissible due to all of the faults and irregularities presented. The very quantity of deviations, omissions and serious technical failures of the Laboratory amount to: "… *a level which may call into question the entire doping control process*" and therefore the situation is – according to the Rider – at least similar to the legal situation in the case CAS 2001/A/337 from 22 March 2002.

d) Conclusions of the Tribunal

72. The Single Judge finds that the Rider's allegations are simply not sufficiently substantiated within the above meaning. The Rider does not refer to a single provision of the ISL that has allegedly been breached. This, however, is the very first condition that must be fulfilled in order for the Rider to discharge his burden of the presentation of facts. Since the Rider wants to derive his legal position from a rule that requires a deviation from the ISL, the Rider must explain which provision of the ISL and how it has been breached. It is simply not sufficient to dump a bucket of generic allegations with no link to the applicable provisions on the table of the Single Judge and expect the latter to make any sense out of it. This is all the more true, considering that the Rider is assisted by legal counsel. Insofar as the Rider refers – *inter alia* – to (alleged) violations of the ISO 17025 this is of no avail in the present context and within the scope of the ADR 2012. This is all the more true considering that the Laboratory is in possession of the ISO 17025 accreditation. The Rider's submission that a breach occurred, because the "*B sample had been opened prior to the arrival of Prof. Čurin Šerbec*", is simply not true. The reproach in reality refers to the "splitting procedure" on 11 January 2016 to which the Rider had been invited, but had chosen not to appear.

73. To conclude, therefore, the Single Judge finds that the Rider failed to show on a balance of probability that there were any departures from the ISL. The Rider has not provided one specific reference to a provision of the ISL or other applicable International Standard that might have been violated by the Laboratory. Despite the principle of *iura novit curia* resp. *iura novit arbiter*, the Rider must fulfill some minimum conditions when presenting the facts of the case. This (low) threshold has not been met in the case at hand.

74. Not only did the Rider fail to substantiate his factual allegation with respect to a possible departure of the ISL. He also did not explain how the individual breach of a provision of the ISL could have reasonably caused the AAF. The allegations of the Rider are generic in nature, speculative and completely insufficient to establish or even to demonstrate a link between the individual breach of a provision in the ISL and the AAF. This is, in particular, true for all allegations made by the Rider that Prof. Čurin Šerbec did not receive proper information from the laboratory personnel, when she interviewed them for further information or with respect to alleged documentation failures. Also with respect to Dr. Reichel's alleged conflict of interest the

Single Judge notes that the Rider's allegations consist of pure speculations without any factual basis. The same is true for the Rider's allegation that "*the set of circumstances*" looked at as whole may have led to "*probably false*" results. Again, this is unsubstantiated and purely hypothetical and does not reach the required threshold according to which "*the suggested causative link must be more than merely hypothetical"* (CAS 2014/A/3487 par. 155).

3. Summary

75. Since the Rider was unable to rebut the presumption, the Single Judge finds that the ADRV in the form of "Presence" (Article 21.1 ADR 2012) has been established in the First Case. Whether the Rider in addition to this ADRV also committed another ADRV in the form of "Use" (Article 21.2 ADR 2012) can be left open, since even if this were the case, it would not materially affect the outcome of this Decision.

VI. THE FINDINGS OF THE TRIBUNAL WITH RESPECT TO THE SECOND CASE

1. The Applicable Legal Framework

76. Article 2.5 ADR 2015 provides as follows:

> *"Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization, or intimidating or attempting to intimidate a potential witness."*

77. The Definition of the term Doping Control process provides as follows:

> *"All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings."*

78. The comment to Article 2.5 ADR 2015 provides as follows:

> *"Comment to Article 2.5: For example, this Article would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, or altering a Sample by the addition of a foreign substance. Offensive conduct towards a Doping Control official or other Person involved in Doping Control which does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organizations."*

79. The Definition of the term Tampering provides as follows:

> *"Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring."*

2. Did the Event in Question occur during the Doping Control Process?

80. The behavior for which the Rider is being charged in the Second Case occurred during the "Acceptance of Consequences" phase (Article 8.4 UCI ADR 2016). This phase is covered by the

term “Doping Control” within the above meaning as it happened after the “test distribution planning” but before the “ultimate disposition of any appeal”.

3. Did the Rider Attempt to Tamper with the Doping Control Process?

a) The threshold for (Attempted) Tampering

81. It follows from the examples listed in Article 2.5 UCI ADR 2015 that whether a certain behaviour qualifies as tampering must be assessed in the individual context. The behaviour must be such that it possibly impacts the “Doping Control process”. Whether this is the case depends on the stage of the specific “Doping Control process”. It must be noted that any Rider has the right to a first-instance hearing and a right to make submissions therein and defend his or her case. Furthermore, a Rider has a right to appeal the first-instance decision and to make any submission that he or she deems appropriate. In addition, a Rider is allowed in his or her defence to concentrate on or advance in particular arguments that are beneficial to his or her cause. The exercise of these procedural rights, therefore, does not constitute tampering from the very outset. All of these actions are not “improper” within the meaning of the definition provided for the term “tampering”. Instead, they constitute behaviour well within the boundaries of legitimate defense.

82. Furthermore, it should be noted that the adversarial procedure enables the other party to put the Rider’s submission to a test by, for example, cross-examining the testimony given by the athlete and / or his or her witnesses and experts. The technical arrangements of the process before the first-instance tribunal and before the CAS are, thus, such that the outcome of the process is not easily affected by the submissions of one of the Parties. Instead, the adversarial system ensures, in principle, that false, inaccurate or incomplete testimony by one party can be rebutted by reliable evidence of the other party. The adversarial process is, thus, an important instrument in truth-finding. In summary, the Single Judge finds that in view of the above any behaviour of a Rider in the context of a judicial proceeding must, therefore, meet a high threshold in order to be qualified as tampering within the meaning of the above provision.

83. The Single Judge feels himself comforted in his (restrictive) view when looking at the previous version of the ADR, i.e. the ADR 2012. According thereto an increased sanction could be imposed in the presence of aggravating circumstances (Article 305). Here too, the CAS jurisprudence displayed reticence when treating an athlete’s behavior in the context of the proceeding as an aggravating behavior, since the sword of Damocles of an increased sanction in a case where a panel is not prepared to accept the athlete’s submission would render his or her defense and, thus, access to justice disproportionately difficult. This is all the more true since a comparable sanction is not foreseen for the sports organization charging the athlete with an ADRV.

84. These concerns have been expressed, in particular, in the case 2013/A/3080, where the panel found as follows (para. 70 *et seq*.):

> *“As to the question whether Ms Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. In light of the above, the Panel deems that it is not sufficient to establish an aggravating circumstance the mere fact that an athlete has relied on factors which are found not to be sufficient to explain the anomalies in his or her APB. If there were circumstances which showed to the comfortable satisfaction of the Panel that the threshold of what can be deemed to be a legitimate procedural defence*

is clearly exceeded, then this factor would be relevant. However, it was not suggested during the appeal that there was any principle of Monegasque law (the relevant law) which rendered it unlawful to take such a defence into account as an aggravating factor.

The position in this case was that the Athlete advanced various facts which she suggested could be responsible for the results found on the analysis of the various Samples. Although it was suggested that there were inconsistencies and improbabilities in the Athlete's account of her whereabouts over the summer of 2010 and the bout or bouts of malaria she claimed to have suffered, the subject was not explored in any detail by the IAAF at the hearing. For example, it appeared at one stage that the IAAF might have been going to suggest that the supposed medical records produced on behalf of the athlete were not what they purported to be, but this point was not pursued.

The further point which arose was that it could have been suggested that the cessation of the use of a Prohibited Substance or Method somewhere between one and three weeks before the events which the athlete was targeting amounted to deceptive conduct to avoid detection. The same point arose in CAS 2012/A/2773 IAAF and Hellenic Amateur Athletic Association v Kokkinariou, on which the IAAF placed great reliance. The Sole Arbitrator did not find it necessary to determine the point in that particular case but observed at para. 129:

> *'The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result, an aggravating circumstance is likely to require a further element of deception. However, since IAAF Rule 40.6 is already engaged, this point may be left open in this case.'*

85. The Single Judge concurs with the view expressed in CAS 2013/A/3080. The Single Judge holds that the threshold of legitimate defense is trespassed and, thus, a "*further element of deception*" is only present where the administration of justice is put fundamentally in danger by the behaviour of the athlete. A mere nuisance, extra work or a waste of time caused by a rider to the detriment of the prosecuting authority does not meet this threshold. The view held here is also backed by the comment to Article 2.5 ADR 2015 according to which "offensive conduct" towards an anti-doping official does not *per se* qualify as tampering.

86. However, the threshold is clearly exceeded where a party to the proceedings commits a criminal offense with the intent of obstructing justice in his or her favour. Such level of criminal energy displayed exceeds the level of a mere nuisance. That such situations are intolerable can also be followed from Art. 123 of the Swiss Code on Procedure before the Federal Tribunal or Art. 328 of the Swiss Code of Civil Procedure. According to these provisions a decision that has *res judicata* effect and, thus, is no longer appealable through ordinary means of recourse can be nevertheless quashed and annulled if it has been reached through a criminal offense to the detriment of the other party. A decision – even if *res judicata* – cannot be upheld, if it is the result of criminal behaviour. The SFT stated in this respect as follows (ATF 118 II 199, 202):

> "*… if an award relies on factual findings distorted by criminal behaviour ... in disregard of the real situation without fault, the absence of any reassessment would consecrate a clear violation of the fundamental principles of procedure*."

b) Did the Rider Exceed the Boundaries of Legitimate Defense?

87. The Single Judge, thus, has to determine whether or not the Rider in the case at hand stepped outside the boundaries of legitimate defense within the above meaning. As mentioned above such boundaries are defined by criminal law. Since the Doping Control process in the case at hand is under the authority of the UCI and considering that the UCI is domiciled in Switzerland,

the Single Judge will first and foremost look at the Swiss Criminal Code ("SCC") for determining the boundaries of legitimate defense.

88. Article 179ter SCC provides the following:

> "*Any person who, as a participant in a private conversation, records the conversation on a recording device without the permission of the other participants, […] is liable on complaint to a custodial sentence not exceeding one year or to a monetary penalty.*"

89. Article 179ter SCC requires that the offender be a "participant" in the conversation. Furthermore, the conversation needs to be "private", whereas any oral exchange regarding information or an opinion constitutes such "private conversation" within the meaning of this provision, regardless of whether it happened in person or by telephone (ANDREAS DONATSCH, StGB Orell Füssli Kommentar, Art. 179bis N 2; GÜNTER STRATENWERTH/WOLFGANG WOHLERS, Schweizerisches Strafgesetzbuch Handkommentar, Art. 179bis N 2). Moreover, the offender must "record" the conversation. Finally, Article 179ter SCC is only applicable if the offender acted intentionally and without any legal grounds of justification.

90. The Rider in his email dated 14 November 2016 declared that he recorded the telephone conversation with [redacted]. If that were true, this would constitute a violation of Article 179ter SCC, since the Rider is a "participant" in a "private" telephone conversation within the above meaning. Furthermore, looking at the tone of the email it appears obvious that the Rider did this "intentionally". Finally, there are no grounds that may justify such recording. In his email the Rider states that he felt threatened by the UCI ("*when you said I am free to race, will keep my house and my bike shop, will have no cash penalty if I am ready to cooperate and testify… It sounds like a threat* …"). However, such diffuse feelings of threat may not constitute valid justification. By no means do they reach the threshold of necessity ("Notstand"), since such situation of necessity may only be assumed in rare and exceptional circumstances (BSK StGB-VON INS/WYDER, Art. 179bis N 25). This is all the more true, since the alleged threat felt by the Rider was the consequence of legitimate and rightful actions by the UCI based on transparent rules. Thus, in view of the above and taking account of the jurisprudence of the SFT[1], the Single Judge holds that the Rider had no legitimate grounds to record the telephone conversation. To conclude, the Single Judge finds that if the Rider secretly recorded the telephone conversation he committed a criminal offense according to Article 179ter SCC.

91. The Rider later distanced himself from the contents of his own e-mail to [redacted] dated 14 November 2016. He stated that his previous declaration was untrue and that he had in fact not recorded the conversation. The Rider stated (para. 18): "*I understand that recording is not allowed and I have to admit, that my e-mail regarding the recording of the conversation in question was not true. I did not record it. I wrote that out of my frustration the case dragging for so long and due to my suspension, losing the contract with my cycling team from USA, being unemployed for almost one year, without any means of earning, not allowed to race, I felt utterly feeble and powerless. I do apologize for that, sincerely*." However, even assuming that the Rider is telling the truth and that he had not recorded the telephone conversation, the Single Judge finds that this does not change the outcome of the analysis. In such event the Rider simulated a criminal offense. Furthermore, such simulation appeared absolutely credible to the anti-doping official at the time and thus, cannot be treated any differently from a scenario in which the Rider actually committed the criminal offense.

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1 See, e.g. BSK StGB-VON INS/WYDER, Art. 179bis N 25; SFT Decision 6S.162/2006 C. 8.

92. The Rider tried to profit from the (simulated) criminal offense by intimidating [redacted] and thereby influencing the Doping Control process. This clearly follows from the ultimatum that the Rider set to the anti-doping official. In addition, the email was clearly intended to push the doping official in a certain direction. This follows from the wording in the email according to which "*a way*" should be found "*that is acceptable for both of us*". In case the anti-doping official did not find such "solution", the Rider menaced to release the recording (obtained through a criminal offense). The menace and the underlying criminal offense sounded credible. The doping official had no other alternative than to believe what the Rider was saying the truth. All of this clearly qualifies as "… *bringing improper influence*", i.e. an influence on the Doping Control process that is clearly outside the boundaries of legitimate defense.

93. In the view of the Single Judge the fact that [redacted] did not act upon the Rider's threat cannot be held in his favor, since Article 2.5 ADR 2015 does not require the act of tampering to be successful. Instead, the provision clearly states that also an attempt falls within the scope of application of Article 2.5 ADR 2015. The fact that the Rider today regrets having sent the email by qualifying the latter as "inappropriate" and ambiguous is of no avail. It surely does not constitute a voluntary withdrawal from an ADRV. Neither was the Rider's behavior justified by any other consideration. The Rider submits that "[a]*fter months of delaying the whole case by UCI for no reason …, forcing me to cooperate, making and breaking promises, after I cooperated and provided UCI important information just so that the case would be close and I could start with normal life, after threats I will lose my house and bike business if I won't accept the agreement, sending this kind of e-mail to* [redacted] *was, in my opinion, at that time, the only way to stop this agony, fast and once and for all.*" This, however, is a self-serving declaration without any merits. The Rider further submits that he is puzzled how his message could be misunderstood to constitute a threat, since in his email he clearly indicated that he wanted a solution "*acceptable for both of us*". The Single Judge agrees with the UCI that this "*claim is difficult if not impossible to square with the clear wording of his email of 14 November 2016*". Contrary to what the Rider submits, the sentence is not ambiguous or "*to put it mildly, could use improvement and redraft*". The sentence is blunt clear in that the Rider wanted the UCI anti-doping official to stray off the clear path enshrined in the ADR 2012 and bend the rules in his favor. The Single Judge finds that the wording "*acceptable for both of us*" cannot disguise the fact that the Rider clearly wanted a better outcome for himself to the supposed detriment of the UCI.

94. It may be true that the Rider today regrets having done so ("… *I would like to stress, that it was never my intention to threaten or influence anyone …Again, the incriminated e-mail sent in emotional state I was in, without due reflection, and written in a language that is not my mother's tongue was never meant to have any other meaning, than my request to swift ending of the process*…"). Unfortunately, however, this conclusion comes at a rather late point in time and cannot undo the (attempted) tampering that has been willingly and intentionally committed by the Rider.

c) Summary

95. To conclude, the Single Judge finds that the Rider has committed a second ADRV in the form of attempted tampering within the meaning of Article 2.5 ADR 2015.

VII. THE CONSEQUENCES

1. Ineligibility

a) The (Standard) Period of Ineligibility in the First Case

96. The Period of Ineligibility in the First Case must be determined on the basis of the ADR 2012. According thereto the starting point for the applicable Period of Ineligibility is two years (Article 293 ADR 2012).

b) The (Standard) Period of Ineligibility in the Second Case

The standard period of ineligibility for (attempted) Tampering is – according to Article 10.3.1 ADR 2015 – 4 years. However, Article 10.3.1 ADR 2015 is only applicable to a First ADRV. Thus, the Single Judge must examine whether the provisions on "multiple offenses" apply to the Second Case.

aa) Is the Second Case a 2nd ADRV?

97. In analyzing the question, the Single Judge needs not to determine whether the ADR 2012 or the ADR 2015 apply, since both provisions are insofar identical. Article 309 ADR 2012 provides in this respect as follows:

> *"For purposes of imposing sanctions under articles 306 to 308, an anti-doping rule violation will only be considered a second violation if it is established that the License-Holder committed the second anti-doping rule violation after he received notice pursuant to Chapter VII (Results Management), or after the UCI or the National Federation made reasonable efforts to give notice, of the first anti-doping rule violation."*

98. Article 10.7.4.1 ADR 2015 reads:

> *"For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the UCI can establish that the Rider or other Person committed the second anti-doping rule violation after the Rider or other Person received notice pursuant to Article 7, or after the UCI made reasonable efforts to give notice of the first anti-doping rule violation."*

99. According to both sets of provisions the Tampering offense in the case at hand was committed after the Rider was notified of his First ADRV. Thus, the Second Case constitutes a Second ADRV.

bb) What is the Proper Regime on Ineligibility?

100. It appears questionable which rules as to consequences shall apply with respect to the Second ADRV. At first sight it is the ADR 2015 that are applicable also to consequences, since it is the ADR 2015 that are applicable to the merits of the Second Case.

101. Article 10.7.1 ADR 2015 provides in this respect as follows:

> *"For a Rider or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of:*
> *a) six months;*
> *b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or*

c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6."

102. Thus, if one were to apply the ADR 2015 the period of Ineligibility for the Second Case would be 8 years.

103. The Single Judge, however, is hesitant to apply Article 10.7.1 ADR 2015 to the case at hand. These doubts stem from Article 305 ADR 2012. This provision reads as follows:

> *"If in an individual case involving an anti-doping rule violation other than a violation under article 21.7 (Trafficking or Attempted Trafficking) or article 21.8 (Administration or Attempted Administration) it is established that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the License-Holder can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation."*

104. It follows from the comment to Article 10.6 of the WADC 2009 on which Article 305 ADR 2012 was based that "*deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation*" constitutes such aggravating circumstances. Article 305 ADR 2012, thus, provides in a nutshell that "*deceptive and obstructing conduct*" in the context of a Doping Control process governed by the ADR 2012 does not lead to the imposition of a separate period of Ineligibility with respect to such reproachable conduct. Instead, the consequences for such behaviour "only" lead to an increased sanction with respect of the ADRV that is the object of the Doping Control process. The CAS has applied Article 10.6 WADC 2009 (and its equivalent provisions in the rules of the international federations) also where the "*deceptive and obstructing conduct*" in the course of the Doping Control process qualified as (a second offense in the form of) Tampering. The CAS, thus, regarded Article 10.6 WADC 2009 within its scope of application as a *lex specialis* that trumps the provisions on multiple infractions (CAS 2015/O/4128).

105. Whether in the case at hand the Tampering committed by the Rider shall be dealt with at the level of "Consequences" as a separate (2nd) ADRV (under the new rules) or as an aggravating circumstance in the context of a First ADRV (falling under the ADR 2012) is a difficult question to answer. The Single Judge finds, however, that the links of the tampering charge in the Second Case are so closely connected to the Doping Control process governed by the ADR 2012, that the period of Ineligibility shall be determined jointly for the First and the Second Case under Article 305 ADR 2012. In doing so the Single Judge is not limited by the submissions of the Parties, since Article 26 ADT-Rules provide that "[t]*he Single Judge shall determine the type and extent of the sanction(s) and consequences to be imposed according to the circumstances of the case, in accordance with the ADR*."

c) The proper Period of Ineligibility for Both Cases under Article 305 ADR 2012

106. The Tampering offense committed by the Rider clearly constitutes "*deceptive or obstructing conduct*", since its very purpose was *"to avoid* [proper] *adjudication*". Article 305 ADR 2012 provides for a sliding scale of sanctions between 2 and 4 years of Ineligibility. The Single Judge finds that the behaviour and the criminal energy displayed by the Rider is grave and warrants a clear reaction by the sporting authorities. Such conduct well outside the boundaries of legitimate defense cannot be tolerated. In the view of the Single Judge there are no mitigating factors in favor of the Rider that could be taken into account in the context of Article 305 ADR 2012. The Single Judge, therefore, finds that the appropriate Period of Ineligibility for the First

and the Second Case is 4 years. In coming to this conclusion, the Single Judge also notes that no issues of *lex mitior* arise here. The ADR 2015 have abolished Article 305 ADR 2012. Consequently, under the ADR 2015 there is no longer a *lex specialis* that trumps the application of the provision on multiple sanctions. Since the application of the ADR 2015 would lead to a far harsher sanction (in total 10 years for the First and the Second Case), no issues of *lex mitior* arise in the case at hand.

d) No Reduction for Substantial Assistance

aa) The Submission by the Parties

107. The Rider submits that the Period of Ineligibility should be reduced as he had provided substantial assistance. The Rider further submits that he had been cooperating with the UCI and provided useful information. According to the Rider the UCI had verbally confirmed to him that his information was useful. Furthermore – according to the Rider – the UCI allegedly promised to conclude and close his file. The Rider submits that despite of the above, the UCI subsequently retracted from its previous agreement and sent the Rider a draft contract lacking this verbal agreement. The UCI, on the other hand, disputes that the Rider provided substantial assistance and that it made any promises to the Rider regarding the handling of the case.

bb) The Findings of the Tribunal

108. The onus of proof that the Rider provided substantial assistance or that the UCI promised to reduce the period of ineligibility based on substantial assistance rests with the Rider. In the case at hand there is nothing on file that would indicate that a reduction of the otherwise applicable sanction is warranted either under the ADR 2012 or the ADR 2015.

e) Commencement of the Period of Ineligibility

109. The Single Judge notes that the ADR 2012 are applicable with regard to the commencement of the period of ineligibility with respect to the First and the Second Case. Articles 314-319 ADR 2012 provide in the relevant part as follows:

> *"Commencement of Ineligibility Period*
>
> *314. Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing panel decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*
>
> *Delays not attributable to the License-Holder*
>
> *315. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping violation last occurred.*
>
> *[…]*
>
> *Credit for Provisional Suspension*
>
> *317. If a Provisional Suspension or a provisional measure pursuant to articles 235 to 245 is imposed and respected by the license-Holder, then the License-Holder shall receive a credit*

for such period of Provisional Suspension or a provisional measure against any period of Ineligibility which may ultimately be imposed."

110. In application of the above rules the Single Judge decides that the Period of Ineligibility shall start on the date on which this decision becomes effective. However, the Rider shall receive credit for the period of provisional suspension that he has been serving since 28 January 2016. The request of the Rider that the sanction be back-dated as early as sample collection, i.e. March 2012, because the sample was retested four years after the actual sample collection, is denied. The decision to retest the Athlete's sample cannot be considered as a "*substantial delay not attributable to the License-Holder*". The Single Judge is comforted in his view by the CAS decision 2016/A/4648, in which the Panel held as follows (no. 151):

"Having carefully analysed the original intent behind the provision regarding delays not attributable to a Licence-Holder … the Panel concurs with the findings of the Single Judge, since it cannot be the purpose of Article 315 to fix the commencement of the period of ineligibility to the date of sample collection in 2012, which in effect would render the sanction for the ADRV meaningless, since the Rider would already have passed the two-year sanction period in March 2014. That result would not sit well with the possibility of retesting an athlete's urine sample under an improved testing regime for the detection of EPO. …"

111. All other procedural delays (in these rather complex proceedings) are already taken care of by the fact that the Rider receives credit for the provisional suspension since 28 January 2016. Thus, no additional harm has been inflicted on the Rider by the course of these proceedings that warrants any extra compensation.

2. Disqualification

112. Article 313 ADR 2012 provides that all other competitive results the Rider obtained from the date his positive sample was collected (whether In-Competition or Out-of-Competition) through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified.

a) The Position of the Parties

113. With regard to the First ADRV, the UCI submits that the results of the Rider since 8 March 2012 until he was provisionally suspended (28 January 2016) should be disqualified. The Rider disagrees and argues that such a long disqualification as suggested by the UCI would even exceed the 2-year period of ineligibility.

b) The Findings of the Tribunal

114. The Single Judge finds that disqualifying the Rider's results between March 2012 and January 2016, combined with a 4-year period of ineligibility effectively starting on 28 January 2016 would amount to a very long period in which the Rider is deprived of any sporting results. Such a decision cannot be taken lightly and must be reviewed in light of the principle of "fairness" enshrined in Article 313 ADR 2012. The Single Judge concurs insofar with the findings of the Panel in the case CAS 2016/A/4648, where the latter stated as follows: (para. 155):

"*Having analysed Article 313 of the UCI ADR 2012 and the fact that this case is extraordinary given the long lapse of time between the sample collection in March 2012 and the retesting in September 2015, this Panel agrees with the Single Judge that a disqualification which effectively would amount to the Rider having no sporting results for a five and a half year period would seem unfair."*

115. In exercising his discretion the Single Judge takes into account that rEPO is a substance that is not used inadvertently, but intentionally and purposefully in order to enhance sporting performance. Furthermore, general experience dictates that in order to achieve performance enhancing effects rEPO must be applied more than once. This is not contradicted by the fact that the Rider did not test positive with respect to other doping controls that have taken place between March 2012 and January 2016, since rEPO has a fairly small detection window. The Single Judge also takes note of the fact that CAS has allowed for periods of disqualification of results up to 2 years in addition to standard periods of ineligibility (cf. CAS 2013/A/3362). In view of all of the above the Single Judge finds that all competitive results obtained by the Rider from 8 March 2012 until (and including) 8 March 2014 shall be disqualified. The Rider's results obtained thereafter until his provisional suspension on 28 January 2016 shall stand.

3. Mandatory Fine and Costs

116. Article 326 ADR 2012 provided as follows:

> *"In addition to the sanctions provided for under articles 293 to 313 anti-doping violations shall be sanctioned with a fine as follows.*
>
> *1. The fine is obligatory for a License-Holder exercising a professional activity in cycling and in any event for members of a team registered with the UCI.*
>
> *a. Where a period of Ineligibility of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the License-Holder normally was entitled to for that whole year in which the anti-doping violation occurred. The Amount of this income shall be assessed by the UCI, provided that the net income shall be assessed at 70 (seventy) % of the corresponding gross income. The License-Holder shall have the burden of proof for the contrary. For the purpose of the implementation of this article the UCI shall have the right to receive a copy of the complete contracts of the License-Holder from the License-Holder or any other person or organization maintaining the contracts, for example the auditor appointed by the UCI and National Federation. If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half.*
>
> *Comment: 1. income from cycling will include for example the income from image rights;*
> *2. suspension of part of a period of Ineligibility of two years or more has no influence on the application of the clause above.*
>
> *[…]*
>
> *2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.*
>
> *3. In other cases than those under paragraphs 1 and 2 the imposition of a fine is optional.*
>
> *4. In observance of paragraphs 1 and 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned.*
>
> *5. Except where paragraph 1a) is applied, no fine may exceed CHF 1,500,000.*
>
> *Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules."*

117. Article 10.10 ADR 2015 provides as follows:

"In addition to the Consequences provided for in Article 10.1-10.9, violation under these Anti-Doping Rules shall be sanctioned with a fine as follows.

10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3.

[Comments: 1. A member of a Team registered with the UCI shall be considered as exercising a professional activity in cycling. 2: Suspension of part of a period of Ineligibility has no influence on the application of this Article].

The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. In the Event that the anti-doping violation relates to more than one year, the amount of the fine shall be equal to the average of the net annual income from cycling that the Rider or other Person was entitled to during each year covered by the anti-doping rule violation.

[Comment: Income from cycling includes the earnings from all the contracts with the Team and the income from image rights, amongst others.]

The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise.
Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:

1. *Nature of anti-doping rule violation and circumstances giving rise to it;*
2. *Timing of the commission of the anti-doping rule violation;*
3. *Rider or other Person's financial situation;*
4. *Cost of living in the Rider or other Person's place of residence;*
5. *Rider or other Person's Cooperation during the proceedings and/or Substantial Assistance as per article 10.6.1.*

In all cases, no fine may exceed CHF 1,500,000.
For the purpose of this article, the UCI shall have the right to receive a copy of the full contracts and other related documents from the Rider or other Person, the auditor or relevant National Federation.

[Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules]."

118. The Single Judge agrees with both Parties that Article 10.10 ADR 2015 shall be applicable in light of the principle of *lex mitior,* because it allows for greater flexibility than Article 326 ADR 2012.

119. According to Article 10.10.1.1 ADR 2015, a fine shall be imposed if a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional ADRV within the meaning of Article 10.2.3. As the First Case concerns an ADRV for rEPO, the Single Judge considers the offence to be "intentional" within the meaning of this provision.

120. With respect to the calculation of the fine, the UCI submits that – based on the Rider's 2012 employment contract – the Rider was entitled to an annual gross income from cycling of [redacted]. Therefore, according to the UCI, a mandatory fine of [redacted] should be imposed unless the Rider can establish that a reduction of the fine would be justified by the criteria set out in Article 10.10.1.1 UCI ADR.

121. The Rider does not dispute the above figures in relation to his income in 2012, although the Single Judge notes that the Rider's remuneration is stipulated in Dollars rather than in Euros. The Rider submits that the Tribunal should consider and apply the following mitigating circumstances: Since the beginning of the year 2016, from his temporary suspension on, the Rider has been unemployed. During the year 2016, he earned between [redacted]. The Rider has no other assets, earning or immovable property and is supported by his wife. Furthermore, he has two children.

122. Only very few decisions of CAS have dealt so far with the fixation of a fine under the UCI rules. CAS itself noted in the decision 2016/A/4686 (para. 162) that the jurisprudence in this respect is not clearly established. It appears however, that the CAS gives particular weight to the present financial situation of a rider (as opposed to the financial situation when the ADRV occurred) when assessing the amount of the fine. This is particularly true in a case where – because of retesting – the ADRV has been committed a long time ago and the amounts earned at that time are not indicative of a rider's present financial situation. The CAS in the above decision has found as follows:

> *"This is, as already noted, one of the first retesting cases, and the jurisprudence regarding the fixation of a fine under these circumstances is not clearly established. In light of the sharp decline in the Rider's annual income from 2012 to 2016, the Panel is of the opinion that a fine which is closer to 80 per cent of the Rider's annual income in 2016 appears to be too harsh and disproportionate. Therefore, given the Rider's present financial situation, the Panel holds that the fine should reflect the Rider's reasonable financial capacity today …."*.

123. In light of the above, the Single Judge sets the financial fine at [redacted].

124. In relation to the costs of the testing and the results management process, the Single Judge takes note of Article 10.10.2 ADR 2015. The provision reads as follows:

> "10.10.2 Liability for Costs of the Procedures
>
> If the *Rider* or other *Person* is found to have committed an anti-doping rule violation, he or she shall bear, unless the *UCI Anti-Doping Tribunal* determines otherwise:
>
> 1. The cost of the proceedings as determined by the *UCI Anti-Doping Tribunal*, if any.
> 2. The cost of the result management by the *UCI*; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the *UCI* and determined by the *UCI Anti-Doping Tribunal*.
> 3. The cost of the B *Sample* analysis, where applicable.
> 4. The costs incurred for *Out-of-Competition Testing;* the amount of this cost shall be CHF 1'500, unless a higher amount is claimed by the *UCI* and determined by the *UCI Anti-Doping Tribunal*.
> 5. The cost for the A and/or B *Sample* laboratory documentation package where requested by the *Rider*.
> 6. The cost for the documentation package of *Samples* analyzed for the *Biological Passport*, where applicable.
>
> The *National Federation* of the *Rider* or other *Person* shall be jointly and severally liable for its payment to the *UCI*."

125. The Single Judge notes that Article 275 ADR 2012 is practically identical to Article 10.10.2 ADR 2015.

126. In application of the above provisions, the Single Judge holds that the Rider shall reimburse to the UCI the following amounts:
    - CHF 5,000 for costs of the results management for both cases (Article 10.10.2 (2)); and
    - CHF 1,500 for costs of the out-of-competition testing (Article 10.10.2 (4)); and
    - EUR 2,100 for costs of the B-sample analysis (UCI Exhibit 49); and
    - EUR 1,900 for costs of the two documentation packages (UCI Exhibit 50.1 and 50.2).

VIII. COSTS OF THE PROCEEDINGS

127. Article 28 ADT-Rules provide as follows:

> *1. The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2 para. 1 ADR.*
>
> *2. As a matter of principle the Judgment is rendered without costs.*
>
> *3. Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution toward the costs of the Tribunal. Whenever the hearing is held by videoconference, the maximum participation is CHF 7'500.*
>
> *4. The Tribunal may also order the unsuccessful Party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.*

128. In application of Article 28.2 ADT-Rules, the Tribunal decides that the present Judgment is rendered without costs.

129. Notwithstanding the above, the Tribunal may also order the unsuccessful party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts (Article 28.4 ADT-Rules). Furthermore, the provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs. The First Case was handled by UCI's internal counsel. The Second Case on the contrary involved external counsel. The UCI in the Second Case succeeded with its Tampering charge. Only in respect of the proper Period of Ineligibility did the Single Judge deviate from the UCI's request. Nevertheless, the Single Judge finds it proper and just that the Rider pay a contribution to the UCI's legal costs in the amount of CHF 5'000.

IX. RULING

130. In the light of the above, the Tribunal decides as follows:

1. **Mr. Jure Kocjan has committed a first Anti-Doping Rule Violation according to Article 21.1 ADR 2012 and a second Anti-Doping-Rule Violation according to Article 2.5 ADR 2015.**

2. **Mr. Jure Kocjan is suspended for a period of ineligibility of 4 years commencing on 28 January 2016.**

3. **The results obtained by Mr. Jure Kocjan from 8 March 2012 until and including 8 March 2014 are disqualified.**

4. **Mr. Jure Kocjan is ordered to pay to the UCI the amount of [redacted] as monetary fine.**

5. **Mr. Jure Kocjan is ordered to pay to the UCI:**

   a) the amount of CHF 5'000 for the costs of results management;
   b) the amount of CHF 1'500 for costs of the Out-of-Competition Testing;
   c) the amount of EUR 2'100 for the costs of the Second Bottle analysis; and
   d) the amount of EUR 1'900 for the costs of the two documentation packages.

6. **Mr. Jure Kocjan is ordered to pay a contribution in the amount of CHF 5'000 towards UCI's legal costs in connection with these proceedings.**

7. **All other and / or further reaching requests are dismissed.**

8. **This judgment is final and will be notified to:**

   a) **Mr. Jure Kocjan;**
   b) **the Slovenian National Anti-Doping Agency ;**
   c) **UCI ; and**
   d) **WADA**

131. This Judgment may be appealed before the CAS pursuant Article 30.2 ADT-Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 ADR 2015.

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Ulrich HAAS
Single Judge