CAS 2004/A/777 ARcycling AG v/UCI

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Massimo **Coccia**, Attorney-at-law, Rome, Italy

Arbitrators: Mr Beat **Hodler,** Attorney-at-law, Bern, Switzerland
Mr Brd Racin **Meltvedt**, Attorney-at-Law, Oslo, Norway

Ad hoc Clerk: Mr Patrick **Grandjean**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

ARcycling AG, Hombrechtikon, Switzerland

Represented by Mr Lucien W. **Valloni** and Mr Alessandro L. **Celli**, Attorneys-at-law, Zurich, Switzerland

Appellant

and

Union Cycliste Internationale (UCI), Aigle, Switzerland

Represented by Mr Philippe **Verbiest**, Attorney-at-law, Leuven, Belgium

Respondent

* * *

I. THE PARTIES

1. ARcycling AG (the "Appellant") is a Swiss limited company, having its seat in Hombrechtikon, Switzerland, the purpose of which is to operate professional cycling teams. The Appellant's cycling team is sponsored by and named after the company Phonak Hearing Systems (the "Phonak team").

2. Union Cycliste Internationale ("UCI" or the "Respondent") is a non-governmental association of national cycling federations – with registered office in Aigle, Switzerland – recognized by the International Olympic Committee ("IOC") as the international federation governing the sport of cycling under all forms worldwide.

II. BACKGROUND FACTS

3. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts will be set out, where relevant, in connection with the description of the CAS proceedings (*infra*, section III) or with the legal discussion (*infra*, section IV).

II.1 THE LICENCE COMMISSION'S DECISION GRANTING THE APPELLANT A PROVISIONAL UCI PROTOUR LICENCE

4. In May 2004, the Respondent made public the information related to the application for a UCI ProTour licence. Among the documents made available, there were the "conditions for the grant of UCI ProTour Licences for teams", which read in parts:

> *«The UCI ProTour is a formula set up by the UCI Professional Cycling Council (PCC) under which a certain number of high-Ievel professional cycling teams holding a UCI ProTour licence take part in UCI ProTour road races.*
>
> *[…]*
>
> *UCI ProTour Licences shall be issued exclusively by the Licence Commission appointed by the PCC.*
>
> *[…]*
>
> *The quality criteria described below may be taken into account by the Licence Commission to, inter alia, refuse to issue a licence, reduce the validity of a licence to a period of less than 4 years or to decide between applicants:*
>
> *1. Quality and rapidity in the fulfilment of the criteria and conditions for the issuing of a licence. The applicant must enclose all documents and information in support of the candidature with the "Information" document, including:* […]
>
> *2. Quality of the riders, including without limitation their ranking and results;*
>
> *3. Compliance with the UCI Regulations, including the provisions of the standard contract between the rider and the team and in the Joint Agreements signed between the CPA and the AIGCP;*
>
> *4. Compliance with the legal obligations;*
>
> *5. Respect for sporting ethics, including matters of doping and health;*

6. Absence of other elements likely to damage the image of cycling.

Criteria 2 to 6 concern any element or fact arising before the application for a licence and may be applied to each person involved as part of the team».

5. The Appellant sent its application for a UCI ProTour licence by letter of 28 May 2004, which was received by the Respondent on 1 June 2004.

6. At the request of the representatives of the Respondent, the Appellant completed its application with various details and pieces of information by letters of 10 and 28 June 2004.

7. On 30 June 2004, the UCI Licence Commission – a newly established body composed of three eminent and independent personalities – held a meeting during which it decided to accept the application of the Appellant and to grant provisionally a UCI ProTour licence (hereinafter the "Provisional Licence"), in accordance with Article 2.15.018 of the UCI Cycling Regulations (hereinafter the "Regulations").

8. By letter dated 1 July 2004, the Respondent informed the Appellant of the decision of the Licence Commission in the following terms (as translated from French by the Respondent):

«The International Cycling Union is pleased to inform you that at the meeting of 30 June 2004, the UCI Licence Commission accepted your application for a UCI ProTour licence.

Consequently, provided your team meets the conditions laid down by the UCI (in particular the submission of all riders' contracts, the original of the bank guarantee and accounting documents), and also provided that, on 23 November 2004, the application still meets all the other conditions required to obtain a licence, as well as today, a four-year UCI ProTour licence will be granted to your team.

The UCI would further inform you that, for all applications, all files must be completed by 20 October 2004. The UCI Licence Commission will notify your team whether or not it is to be definitively granted a licence, and its duration, on 13 November 2004. If your team so wishes, it may be heard on 22 November 2004 by the Licence Commission, and the latter's final decision will be notified to it on 2 December 2004. An appeal may be lodged against this decision before the Court of Arbitration for Sport in accordance with the terms and procedure to be defined by the UCI.»

II.2 THE ANOMALIES OR ADVERSE ANALYTICAL FINDINGS IN ANTI-DOPING TESTS CONDUCTED ON THE APPELLANT'S RIDERS

9. In April 2004, at the stage race "Tour de Romandie", blood tests were carried out on the riders of the Phonak team and produced some values (haematocrit and reticulocytes) which, albeit below the threshold levels established by the Regulations for deeming the riders unfit for participation in cycling races, were on the average higher than the average values of the other teams.

10. In May 2004, the UCI physician and health manager, Dr Mario Zorzoli, contacted and met the Appellant and warned it to be vigilant on its riders. Then, on 14 June 2004, Dr Zorzoli made a presentation to the representatives of the Appellant in relation with the above mentioned tests and on how to detect and interpret suspicious blood values. During the remaining months of the 2004 cycling season, according to Dr Zorzoli's testimony before this Panel, the whole Phonak team was blood-tested again at the start and during the *Tour de France* and at the start and during the *Vuelta a España* ("Vuelta") and the average blood values were in line with those of the other teams (obviously leaving aside the findings concerning the riders Tyler Hamilton and Santiago Perez; see *infra* at 13 and 22).

11. On 22 July 2004, the rider Oscar Camenzind, who was under contract with the Appellant, was tested and found positive for EPO. Mr Camenzind readily admitted his guilt and the contract was terminated; shortly thereafter, the rider announced publicly his withdrawal from professional cycling.

12. In August 2004, at the Olympic Games in Athens, the rider Tyler Hamilton, who was also under contract with the Appellant, underwent an anti-doping control. The A blood sample, which was at first deemed negative, after a review by an expert panel was considered to indicate a homologous blood transfusion and thus to produce an "*adverse analytical finding*" (according to the definition set forth by the World Antidoping Code and accepted by UCI). As explained below (at 15), the adverse analytical finding was notified to the rider about one month later, on 18 September 2004.

13. On 11 September 2004, a blood sample was collected from Tyler Hamilton during the Vuelta. It was analysed by the IOC/WADA accredited laboratory "Laboratoire Suisse d'Analyse du Dopage" (the "Lausanne Laboratory"), which reported the presence of a mixed red blood cell population indicating in its opinion a case of homologous blood transfusion.

14. On 16 September 2004, Tyler Hamilton was notified of the adverse analytical finding produced by the anti-doping test conducted during the Vuelta. The rider claimed that it was "a false positive" and requested immediately a counter-analysis.

15. On 18 September 2004, a meeting was held in Geneva and attended by Dr Zorzoli, Mr Schattenberger (president of the UCI Antidoping Commission), Dr Schamasch (director of the IOC Medical Commission), Mr Freuler (team manager of the Appellant), Dr Klimatschka (physician of the Phonak team), Mr Hamilton and Mr Valloni (attorney representing both Mr Hamilton and the Appellant). The main object of the meeting was to discuss Mr Hamilton's adverse analytical finding. During the meeting, Dr Schamasch notified formally Mr Hamilton of the adverse analytical finding caused by the A sample collected at the 2004 Olympic Games. The Appellant requested, but did not obtain, complete access to Mr Hamilton's file as well as to all the documents related to Mr Hamilton's adverse analytical findings. Mr Hamilton requested, but did not obtain, to have the B sample analysed in another laboratory and to postpone for two days the B sample analysis, so as to enable him to be assisted by an expert of his choice from the United States.

16. On 21 and 22 September 2004 in the Lausanne Laboratory, Tyler Hamilton attended with an accompanying haematologist from Italy the analysis of the B sample of the blood test carried out during the Vuelta. The results of the A sample were confirmed.

17. On 23 September 2004, the Appellant suspended Tyler Hamilton from the team.

18. On 23 September 2004, the IOC communicated to Mr Hamilton that the case regarding the adverse analytical finding of the A blood sample collected during the Olympic Games was closed, since the result of the laboratory analysis of the B blood sample was "*considered as non conclusive because of lack of enough intact red blood cells*". Therefore, the IOC did not pursue sanctions against Mr Hamilton and his Olympic gold medal was confirmed.

19. As to the tests conducted during the Vuelta, while Tyler Hamilton claimed his innocence, the Appellant and his representatives formally contested the validity of the test method. First, on 20 September 2004 Mr Valloni sent a letter to the Respondent summarizing and restating in writing what was discussed at the meeting of 18 September 2004 in Geneva:

> «*[…] Valloni requested all available documents concerning the applied test method […]*
>
> *Based on this insufficient information Valloni contested that this testing method is in compliance with the International Standard. Thus, Valloni stated that the A-test is not valid under the IOC Anti-Doping-Rules. […]*
>
> *Fact is that there are a number of uncertainties with regard to (i) the test method itself, (ii) the interpretation of its results, (iii) the way that this case and file have been handled under, among other things, fair trial aspects*».

20. Then, on 23 September 2004, the following was published on the website of the Appellant:

> «*Since the new method is an effort based on probability and interpretation measurements uncertainties will remain in this examination and procedure in any case. Because neither UCI nor IOC have so far disclosed data and because legal procedures may last for a long time without a clear outcome, the team management has decided to establish a scientific board in order to achieve clarity as to the medical method and reliability of these new blood testing tools. This scientific board will consist of various scientists with outstanding reputation in this field. Those scientists will be teamed up from different sources and will look into the entire method and data and report as to whether the analysis conducted at the lab in Lausanne in connection with the B-testing is reliable. In order that the scientific board can commence its work the entire files have to be released from UCI and/or IOC. This is so far not the case although requested by Tyler Hamilton.*
>
> *Once the data is available the scientific board will come up with its results as soon as possible. For the time being the names of the scientists involved will not be disclosed in order to avoid that they are disturbed in their work or influenced in any way.*

Once the results are available the press will be informed. The team's goal is, and this is in the exact interest of Tyler Hamilton, that we have clarity in the end. Moreover, if there is a way to improve the new method in order to avoid future uncertainties this will also be a part of the mandate to the scientific board. With the foregoing the team management believes that it can form part of the campaign against blood doping and bring this matter up to a world-wide acceptable level.

Up to that point, i.e. the results which derive from said scientific board, communication as to the merits and procedure of the UCI and IOC cases will be reduced to a minimum. It is our all interest to contribute to reliable testing methods and not only to win the case because of legal deficiencies, if any, at the end of UCI and IOC.»

21. On several occasions thereafter, the Appellant requested detailed information on the test procedure and on the test validation, in order to build its own opinion on the reliability of the method applied, and has shown its dissatisfaction for the allegedly little information received. In this respect, the Respondent has submitted that: (i) the most relevant documents, i.e. the scientific publications, were immediately made available to the Appellant on 18 September 2004; (ii) it forwarded to the Appellant all documents received from the laboratory; (iii) it requested from the World Anti-doping Agency ("WADA") any documents concerning the validation of the method and would forward them as soon as they would be made available by WADA.

22. On 5 October 2004, an out-of-competition blood test was performed on the rider Santiago Perez, who was also under contract with the Appellant. The rider's A and B samples were considered as indicative of homologous blood transfusion and thus produced adverse analytical findings. Mr Perez was immediately suspended by the Appellant.

23. On 25 October 2004, the Respondent wrote a letter to the Appellant to express its concerns regarding the medical management of the latter and to encourage it to put in place a more effective internal control system. The Respondent also informed the Appellant that it would "*reassess the situation in six months' time*" and reserved the right to take the necessary decisions "*in light of the situation at that time*" (as translated from French by the Respondent). Following this letter, the Appellant invited representatives of the Respondent to meet its whole cycling team to present the features and aims of the health protection and anti-doping policy of the Respondent and the means the latter employs to achieve them. After some difficulties in finding a suitable date, eventually Dr Zorzoli made the requested presentation to the Phonak team on 8 December 2004.

24. On 27 October 2004, the Appellant completed the drafting of a "Medical Control Project of the Phonak Hearing Systems Team" (hereinafter the "Medical Concept"), intended to implement an effective internal control system and an improved medical support of its riders.

25. On 25 November 2004, the Appellant informed the President of the Licence Commission that the contracts with the riders Tyler Hamilton and Santiago Perez were being terminated.

II.3 THE APPELLANT'S IMAGE CONTRACTS WITH THE RIDERS

26. Art. 2.15.116 of the Regulations provides as follows:

> «*In addition to the employment contract, only an image contract may be concluded, subject to the following conditions: […] the remuneration payable under the image contract shall not exceed 15% of the total remuneration paid to the rider*»

27. On 1 September 2004, the above mentioned provision was discussed – *inter alia* – during a workshop with the candidate teams to ProTour licences, organised by the Respondent with its advisor on financial matters Ernst & Young SA (hereinafter "E&Y"). On that occasion, according to Mr Siegrist's testimony, the E&Y auditors mentioned to the representatives of the teams, including the Phonak team's representatives, that art. 2.15.116 would not be applied to already existing contracts due to the legal principle prohibiting retroactivity.

28. On 28 October 2004, E&Y sent a report to the Respondent, which as far as material reads as follows (as translated from French by the Respondent):

> «*[…] In accordance with the mission entrusted to us by Union Cycliste Internationale within the scope of the mandate to supervise the professional cyclist Teams for their registration in 2005, we have implemented the agreed procedures described in the mission letter and relating to the checking of the budget and financial documentation, contracts of employment, insurances and social security cover of the riders as well as the bank guarantee of the Teams.*
>
> *[…] The checks relating to the contracts of employment, insurances and social security cover of the riders have not revealed any significant anomalies, with the following reservations:*
>
> *[…]*
>
> *• 9 endorsement fee contracts do not respect the 15% limit imposed by article 2.15.042 of the UCI Rules. These contracts were all signed in 2004 for several years. The riders concerned are mentioned in the list of endorsement fee contracts, attached to the report; […]*
>
> *We inform you of the following remarks:*
>
> *• We have not received the contracts of the other people, Alain Lapendry, Holger Hüring and Alvaro Pino;*
>
> *• The second paragraph of the "declaration" clause laid down by the UCI rules (Article 11 of the standard contract – art. 2.15.057) is not used in 8 contracts of employment of riders. […]*
>
> *[…]*
>
> *• We are awaiting the proof of insurances for the pension of the rider Tadej Valjavec;*
>
> *• We are awaiting the proof of national insurance for the following riders: […];*
>
> *[…]*».

29. On 9 November 2004, E&Y submitted to the Respondent a supplementary report, which reads in part (as translated from French by the Respondent):

«[…] The checks relating to the contracts of employment insurances and social security cover of the riders have not revealed any significant anomalies, with the following reservations:

• 10 endorsement fee contracts do not respect the 15% limit imposed by article 2.15.042 of the UCI Rules. These contracts were all signed in 2004 for several years. However, for the riders Elmiger, Gonzalez, Grabsch, Gutierrez and Schnider, the contracts were to end as at 31.12.2004 and were extended between 20th September and 4th October 2004. The riders concerned are mentioned in the list of endorsement fee contracts, attached to the report; […]

We inform you of the following remarks:

[…]

• We have not received the contracts of the other people, Alain Lapendry and Alvaro Pino;

• The second paragraph of the "declaration" clause laid down by the UCI rules (Article 11 of the standard contract – art. 2.15.057) is not used in 8 contracts of employment of the riders […];

[…]

• We are awaiting the proof of insurances for the pension of the rider Tadej Valjavec;

• We are awaiting the proof of national insurance for the following riders: […];

[…]».

30. The UCI administration handed the two above E&Y reports to the Licence Commission. There is no evidence in the files that the reports were sent also to the Appellant prior to the Licence Commission meeting of 12 November 2004. Ms Zürcher declared in her testimony that, although she was not sure about it, perhaps the Appellant received the E&Y first report (of 28 October 2004) before 12 November 2004, but she was certain that it never received the second report (of 9 Novenber 2004). Indeed, according to Mr Rumpf's testimony, due to some misunderstandings between E&Y and UCI, both E&Y reports were delivered to the Appellant only a few days after 12 November 2004.

31. On 15 November 2004, following the Licence Commission's negative preliminary opinion of 12 November (see *infra* at 34), the Appellant informed the Licence Commission that it would take immediate measures to amend the image contracts which had been recently extended beyond their original expiry of 31 December 2004.

32. During the hearing of 22 November 2004 before the Licence Commission, the Appellant informed the Licence Commission that the contracts had been brought in compliance with the 15% requirement. According to Mr Rumpf's testimony, the amended contracts were handed to him, and thus to the Respondent, immediately after the hearing.

II.4 THE UCI LICENCE COMMISSION'S NEGATIVE PRELIMINARY OPINION OF 12 NOVEMBER 2004 AND FINAL DECISION OF 22 NOVEMBER 2004

33. On 12 November 2004, the Licence Commission held a meeting devoted to issuing its preliminary opinions on all the thirty-one applications received for the UCI ProTour

Licence. According to Mr Rumpf's testimony, during the first part of the meeting the Licence Commission was assisted in its examination of the applications by Mr Rumpf, Mr Verbiest, and the UCI President Mr Verbruggen; subsequently, the Licence Commission alone ruled *in camera* upon the thirty-one applications.

34. On 13 November 2004, the Respondent informed the Appellant that on the previous day the Licence Commission had issued its negative preliminary opinion on the definitive grant of a UCI ProTour Licence to the Appellant (hereinafter also referred to as the "Preliminary Opinion"). The Respondent's letter reads as follows (as translated from French by the Respondent):

> «*[…] On the basis of your dossier, the UCI Licence Commission has established that it should reconsider its previous notice delivered on 30 June 2004 and issue a negative initial evaluation for your application based on the following elements of your dossier:*
>
> *• A doping case is established in your team and two other cases are currently under examination.*
>
> *• A procedure to control the internal organisation of your team related to the fight against doping has been introduced by the UCI medical service, without any result being known as of today.*
>
> *• You did not respect art. 2.15.116 of the UCI Cycling Regulations regarding image contracts.*
>
> *The UCI Licence Commission will meet on 22 November 2004 and will take its final decision on the granting of a UCI ProTour Licence. If you wish you have the opportunity to be heard during this hearing. […]*».

35. Furthermore, the Respondent informed the Appellant that the final decision would be communicated on 2 December 2004 and that it could then be appealed before the CAS.

36. On 17 November 2004, the Appellant confirmed to the Respondent its attendance at the hearing and asked advice and instructions in view of the hearing. In particular, the Appellant wrote as follows:

> «*We ask you to provide us in advance with an agenda and a list of items that you presume to be necessary to provide to you and the commission from our side. […]*
>
> *If we do not have to provide documents, please let us also know.*
>
> *If you think that this issue of providing documents is up to us, please advise as well. If so, we will come up with the information that we assume you would want to expect*».

37. By letter dated 19 November 2004 and signed by Mr Alain Rumpf, UCI Professional Cycling Manager, the Respondent informed the Appellant of the following:

> «*We acknowledge receipt of your fax dated 17th November 2004 and thank you for it. […]*
>
> *In accordance with article 2.15.017.5 of UCI ProTour regulations, please send us a copy of all 2004 and 2005 image contracts signed with your riders.*
>
> *It is up to you to decide if you wish to provide the Licence commission with additional documentation, in accordance with article 2.15.026*».

38. At the hearing of 22 November 2004, the Licence Commission heard the representatives of the Appellant (Messrs. Rihs, Freuler and Celli) and of the Respondent (Messrs. Rumpf, Zorzoli and Verbiest). During the hearing the Appellant handed to Dr Zorzoli its recent Medical Concept (see *supra* at 24) and informed the Licence Commission that it had decided to terminate and not renew the contracts of the riders Hamilton and Perez. Then, the Appellant informed that it had amended the recently extended riders' contracts in order to comply with the image rights 15% rule and, immediately after the hearing, handed the amended contracts (see *supra* at 32).

39. In its final decision dated 22 November 2004, the Licence Commission rejected the Appellant's application for a UCI ProTour Licence giving the following reasons:

> «*Given that:*
>
> *1. Article 2.15.011 of section XV of the UCI Regulations (hereinafter: the Regulations) sets out the criteria which the Commission may take into account in allocating a UCI ProTour Licence to a team. Among these criteria are the respect for UCI regulations (article 2.15.011, number 4), the respect of sporting ethics, including ethics in relation to doping and health (article 2.15.011, number 7) and the absence of other aspects likely to be particularly damaging to the image of cycling as a sport (article 2.15.011, number 8).*
>
> *Under article 2.15.026 of the Regulations: "the Commission shall judge the request on the basis of the dossier in its possession at the moment when it formulates its initial evaluation. There may be no subsequent additions to this dossier. […]" It emerges from this last text that the Commission may not take account of documents produced or of facts arising after its initial evaluation, in this case 12 November 2004.*
>
> *2. Two objections have been put forward with regard to the Phonak team. Firstly there is the existence of several cases of doping or suspected doping which have emerged at close intervals since August 2004, and the reactions of the said team's members to these events. Then there is the failure to respect the UCI's rules regarding riders' contracts.*
>
> *2.1. In relation to the question of doping by members of the team, the following facts may be considered as established:*
>
> - *the rider Oscar Camenzind tested positive for EPO just before the Athens Olympic Games, has admitted his misconduct and has been dismissed by the Phonak team;*
> - *the rider Tyler Hamilton was suspected of doping during the Olympic Games in Athens following a test, but his guilt was not established and the case has been closed, the blood sample taken from this rider not having been kept under conditions allowing its use for the B sample analysis;*
> - *following a test during the Tour of Spain on 11 September 2004, this same rider has been accused of doping by blood transfusion;*
> - *the rider Santiago Perez, who finished second in this same Tour of Spain, has also been accused of doping by blood transfusion following a test carried out on 5 October 2004;*

- *these accusations are based on tests making it possible to detect doping by blood transfusion, developed by the Lausanne laboratory and reproduced in a similar fashion by that in Athens;*
- *these tests have been approved by the World Antidoping Agency (WADA) and the International Olympic Committee (IOC);*
- *the riders Tyler Hamilton and Santiago Perez contested the charge of doping;*
- *the Phonak team has not dismissed these riders;*
- *it has cast doubt on the reliability of tests developed by the laboratories in Lausanne and Athens;*
- *it has set up an experts committee to evaluate these tests.*

2.1.1. At the hearing of 22 November 2004, the management of the Phonak team indicated that the rider Hamilton's contract would expire on 31 December 2005, while Perez's contract would come to an end on 31 December 2004.

They explained that the work of the said experts had been delayed, the experts not yet having been able to obtain the data enabling them to validate the way in which blood tests were carried out. These delays were not disputed by the UCI's representatives who stressed that they were not responsible and, on the contrary, had done everything in their power to prevent them. Alessandro Celli, Phonak's lawyer, indicated that a provisional report from their experts did not enable them to reach significant conclusions, two of these experts considering that the Lausanne and Athens laboratory tests were invalid, a third having detected certain errors which, however, did not cast doubt upon their reliability, and two others having found nothing abnormal in these tests.

Having stated that, if the expert investigation established by his team was to confirm the suspicions of doping, the riders Perez and Hamilton would be dismissed immediately, Andy Rhis informed the Commission, during the same meeting, that he had decided to terminate Tyler Hamilton's contract before its expiry. It should be noted that after the hearing, but before the present decision was drafted, Alessandro Celli, on behalf of Phonak, has confirmed to the Commission that on 25 November 2004, it terminated the contract linking this team to Tyler Hamilton.

It emerges from the dossier and the explanations given by Mario Zorzoli during the hearing of 22 November 2004, that on several occasions during 2004 doubts had arisen about the abnormal readings observed in the blood of certain riders in the Phonak team. The team's managers had been summoned to clarify this matter. Following the recent cases mentioned above, the UCI decided to launch an enquiry to determine and improve the Phonak team's modus operandi in relation to the fight against doping and the protection of riders' health.

During the hearing of 22 November 2004, the applicants manager produced a draft protocol, dated 27 October 2004, intended to establish the terms of the Phonak team's antidoping policy.

2.1.2. Apart from the existence of the checks instituted by the UCI's doctor, the facts related above (paragraph 2.1.1) by the applicant do not appear in the dossier and were not known to the Commission when it issued its initial evaluation. Under the Regulation quoted above (article 2.15.026), the commission is not entitled to take these into account.

Nonetheless, the consideration of these facts and even the last minute announcement of the dismissal of the rider Tyler Hamilton, does not make it possible to overturn the negative initial evaluation issued on 12 November 2004.

More than the confirmation of the doping cases in which certain riders in the team are or have been suspected during these last months, it is the attitude of this team's management to these revelations which arouses serious reservations. Though it is not in itself contentious for a team to defend its riders when they are involved in a doping affair, at least while their guilt has not been established, the attitude of this team, which has tried to cast doubt on the validity of the tests which revealed the suspected doping in order to provide its defence, is quite another thing. The Commission can only observe that the validity of these tests has been accepted by both WADA and the IOC. Of course it cannot be excluded that this validity could be called into in question, or undermined in the future, but under current circumstances it should be admitted that the method of analysis is correct, that it has made it possible to observe the absence of doping in other sportsmen and women who have been tested, and that in consequence the results of the tests carried out on the riders Tyler Hamilton and Santiago Perez justify, despite their denials, the strong suspicion of doping. The attitude of the applicant, consisting of basing his defence on the challenging of proven methods, to which must be added the fact that abnormal blood levels had already been revealed in certain of the team's riders during 2004 by the UCI, certainly justify the announcement of more thorough checks by the medical officials at the UCI.

It has not been demonstrated that, since suspicions arose about the doping of its riders, the Phonak team has followed the example of other teams admitted to the UCI ProTour, and organised itself in such a way as to combat doping effectively.

As a result this team does not provide guarantees in respect of sporting ethics as they apply to doping, within the meaning of the Regulation cited above. Its admission to the UCI ProTour would at present be such as to harm the image of cycling as a sport.

There will be grounds for checking how far the Phonak team management respect the undertakings they say they wish to give in relation to the fight against doping. Such scrutiny may take place following the checks carried out by the UCI during these next months. In this respect, the draft protocol for internal controls submitted by the applicant to the Commission for the UCI's attention represents a step in the right direction.

2.2. Under article 2.15.116 of the Regulations, an image contract may be concluded with riders in addition to the employment contract. Remuneration under the image contract may not exceed 15% of the total remuneration paid

to the rider. The applicant does not dispute the fact that after learning of this regulatory provision, five image contracts were extended without respect for this 15% limit. The manager of the team, Urs Freuler, explained that at the workshop of 1 September 2004, an Ernst & Young consultant said that there was no need to worry about the 15% problem for existing contracts.

This explanation is not convincing, as the regulations, known and applicable at the time that these contracts were renewed, make no distinction between renewed and completely new contracts.

There has therefore been a violation of article 2.115.116 of the Regulations. It is also noted, furthermore, that Phonak declared itself ready to bring all its contracts into line with the Regulation»

40. The final negative decision of the Licence Commission was received by the Appellant on 30 November 2004. On 3 December 2004 and at the Appellant's request, the Respondent sent to the Appellant the complete file concerning the ProTour licence procedure, with the exception of the Appellant's documents which had been handed to the Respondent on the day of the hearing (the new medical concept and the amended image rights contracts).

III. PROCEEDINGS BEFORE THE CAS

III.1 THE APPEAL

41. The Appellant's appeal dated 15 December 2004 challenged the decision issued on 22 November 2004 by the UCI Licence Commission (hereinafter also referred to as the "Appealed Decision"). The Appellant submitted the following motions for relief:

«1. The decision of the Licence Commission of the International Cycling Union (UCI), of 22 November 2004, to reject the application of ARcycling AG for the grant of a UCI ProTour Licence for the Phonak Hearing System team, is to be overruled in its entirety.

2. The application of ARcycling AG for the grant of a UCI ProTour Licence for the Phonak Hearing System team is to be accepted and a UCI ProTour Licence is to be granted to ARcycling AG for the Phonak Hearing System team for a period of four years.

3. Eventualiter (to Motion 2): The application of ARcycling AG for the grant of a UCI ProTour Licence for the Phonak Hearing System team is to be accepted and a UCI ProTour Licence is to be granted to ARcycling AG for the Phonak Hearing System team for a period of two years.

4. Subeventualiter (to Motions 2 and 3): The application of ARcycling AG for the grant of a UCI ProTour Licence for the Phonak Hearing System team is to be accepted and a provisional UCI ProTour Licence is to be granted to ARcycling AG for the Phonak Hearing System team for a period of at least one year, potentially subject to conditions.

5. Subsubenventualiter (to Motions 2 to 4): The case is to be referred back to the Licence Commission of the International Cycling Union (UCI) for a new decision.

6. All costs and damages to be borne by the Defendant».

42. The Appellant's submissions may be summarized as follows:

– The accusations of doping cannot be linked to any proven organisational misbehaviour of the Appellant or of its team.

– The final decision rejecting the application for a UCI ProTour Licence was taken all of a sudden and without any warning. From 30 June 2004 up to 12 November 2004, the Respondent did not give any indication to the Appellant that there was any inadequacy or incompleteness in its application. Therefore, the latter's right to be heard was breached.

– All the mistakes allegedly made have been corrected and the application fully complies with the expected conditions at least at the moment the hearing took place or the final decision was taken by the Licence Commission.

– Once caught positive in a doping test, Oscar Camenzind rapidly admitted the facts and withdrew from professional cycling. In November 2004, he was not a member of the team of the Appellant, which had no knowledge of the forbidden practices of the said rider.

– The doping cases of Tyler Hamilton and Santiago Perez are different from Camenzind's in many ways:

- Both riders still claim their innocence; special credit must be given to Tyler Hamilton's word, who is a world-class rider, was active in the fight against doping and had a completely spotless image.
- The blood test is new and its reliability must be investigated. For example, Tyler Hamilton's blood A sample collected during the Olympic time trials of August 2004 was initially evaluated as negative, then it was labelled "suspicious", before it was called positive. Later, the case was closed and sanctions were not pursued.
- Moreover, the adverse analytical finding of the A blood sample collected during the 2004 Olympic Games was formally notified almost one month after the test was carried out, which is very unusual and led the Appellant to think legitimately that the test could be flawed.
- The behaviour of the Respondent also led the Appellant to think legitimately that the test could be flawed. As a matter of fact, the way in which Tyler Hamilton as well as the Appellant were notified of the doping control results did not give them the reasonable time to get organised; without previous announcement, they were notified of the results of the anti-doping tests carried out during the 2004 Olympic Games and during the Vuelta in a meeting held on 18 September 2004. Moreover, the Respondent refused a) that Tyler Hamilton's B sample be tested in another laboratory, b) a two-day postponement for the B sample test, in order for Tyler Hamilton to obtain the presence of the desired haematologist from the United States, c) to carry out a DNA analysis of the available blood samples. Finally and without success, the Appellant has repeatedly requested the Respondent, the WADA and the IOC to provide detailed information on the test procedure applied and its validation documents.

– Under those circumstances, it is legitimate and not unethical that someone who is confronted with an accusation of doping, questions the reliability of a new doping test and is at least shown within a reasonable time period how it works.

– Unlike the Appellant, which suspended Tyler Hamilton and Santiago Perez immediately after the notification of the test results, the Respondent did not take any measures against the riders (which also suggests that the latter is not convinced of the reliability of the test). Moreover and as formally reported to the Licence Commission on 25 November 2004, the Appellant terminated the contracts with the said riders.

– The Appellant did not know and was not informed by the Respondent before 12 November 2004 that a control investigation of its internal organisation would be carried out in connection with the fight against doping. With better and timely communication, the Appellant would have been in a position to offer immediate cooperation, which would have resulted in a positive report to be delivered to the Licence Commission.

– Article 2.15.116 of the Regulations (regarding the remuneration under the image contract) is questionable and constitutes a breach of the Appellant's right of personality. Moreover, the adviser of the Respondent, Alain Siegrist, confirmed to the Appellant that the "15% rule" pursuant to art. 2.15.116 of the Regulations only applies to contracts that are newly concluded.

– The provisional decision of 30 June 2004 created trust that a UCI ProTour Licence would be granted to the Appellant, which started planning the racing season and entered into several contracts with the firm belief of taking part in the UCI ProTour. This is even more true since the Respondent did not give the Appellant any hint that it might be otherwise. It is only on 12 November 2004, that the Appellant found out for the first time that its application for a UCI ProTour Licence was rejected.

– Unlike other applicants, the Appellant was not given the opportunities by the Respondent to amend its application in order to meet the expectations of the Licence Commission. Therefore, the principle of equal treatment has not been respected.

– The successful sporting performances of the team of the Appellant have not been taken into account by the Licence Commission.

– The effect of a refusal of the UCI ProTour Licence by the monopoly holding Respondent is an economic restriction on the free economic growth of the Appellant and its employees, which is incompatible with the right of personality protected by art. 28 of the Swiss Civil Code, and it is an exclusion from the market which violates competition law (in particular art. 7 of the Swiss Federal Act on Cartels and Other Restraints of Competition).

– The final decision of the Licence Commission is proven to be disproportionate, since the UCI Regulations provide that a ProTour Licence may also be granted for a shorter period of time than the normal four years.

III.2 THE ANSWER

43. On 10 January 2005, the Respondent filed its answer, requesting the Panel to confirm the contested decision and to condemn the Appellant to pay all costs, including a contribution towards the costs of the Respondent. The Respondent submitted the following motions:

«*1. The Appeal lodged by ARcycling AG is rejected.*

2. The decision of the International Cycling Union Licences Commission of 22 November 2004 to reject the application of ARcycling AG for a grant of a UCI ProTour licence for Phonak Hearing System team is confirmed.

3. All costs and damages to be borne by the Appellant».

44. The Respondent's submissions may be summarized as follows:

– The Respondent always provided the Appellant with all the documents in its possession.

– The Appellant could not be sure in advance of obtaining a ProTour Licence. It had to take into account the possibility of a refusal and prepare for an alternate position in professional cycling.

– There is no right for an applicant to obtain a UCI ProTour Licence. When the UCI Professional Cycling Council decided to reform road racing, its aim was to create a competition with a level of excellence, which was not reached by the Appellant.

– The Appellant immediately sided with Tyler Hamilton despite a confirmed adverse analytical finding and challenged a testing method that was validated and implemented by the WADA and the IOC and applied by highly qualified laboratories and scientists. In spite of the fact that it is common experience that most athletes cry out their innocence until they are found guilty, the Appellant immediately cast doubt in public on a validated testing method. By doing so, the Appellant had an unethical behaviour, which is contrary to the Regulations in application of the specific conditions for granting a Licence under article 2.15.011.

– The way in which the adverse analytical finding was announced to the Appellant and to Tyler Hamilton has nothing extraordinary and has nothing to do with the reliability of the test.

– The refusal of the requests to have the B sample analysed in another laboratory and to postpone the analysis of the B sample is based on the applicable regulations and cannot be invoked as a ground to challenge the testing method.

– The fact that UCI did not take any measures against the riders Hamilton and Perez cannot suggest that it has doubts on the reliability of the test method.

– Only the riders Perez and Hamilton tested positive with the method validated by WADA, implemented for the first time at the Athens Olympic Games and conducted by now almost 300 times. This is an indication that there might be something wrong in the team of the Appellant rather than with the test method.

– The Appellant has not demonstrated that it has organised itself in such a way as to combat doping effectively. Such a demonstration will need time.

– Article 2.15.116 of the Regulations (regarding the remuneration under the image contract) is in line with labour law and aims at introducing equal treatment of the teams of different countries and at protecting the riders against artificial image contracts.

– Pursuant to article 2.15.026, the documents handed by the Appellant after 12 November 2004 cannot be taken into account. At that date, several contracts entered into by the Appellant did not respect the 15% limit imposed by the Regulations.

– The letter dated 1 July 2004 is not a provisional decision creating trust that the Appellant would be granted a licence in November 2004. The wording of the letter as well as the wording of articles 2.15.018, 2.15.019, 2.15.020 and 2.15.028 of the Regulations are very clear as to the provisional nature of the said decision.

– It is not the role of the Respondent to warn the Appellant of problems which might be relevant for the final decision as the grant of a Licence is the exclusive jurisdiction of the Licence Commission which judges in total independence.

– The right to be heard of the Appellant has been respected, since an oral meeting was organized after the latter received a negative prior opinion.

– The Appellant has been treated equally with those applicants which were in the same situation as the Appellant.

– The Appealed Decision cannot be considered as out of proportion for the sole reason that intermediate solutions are available. As already stated, the Appellant did not reach the requested level of excellence and does not provide guarantees in respect of sporting ethics as they apply to doping. For these reasons, the said decision is proportionate.

III.3 THE HEARING OF 18 JANUARY 2005

45. The hearing was held on 18 January 2005 at the CAS headquarters in Lausanne. The Panel was present, assisted by the ad hoc clerk Mr Patrick Grandjean and by the CAS counsel Mr Jorge Ibarrola.

46. The following persons attended the hearing: for the Appellant, the president and owner Mr Andy Rihs with the attorneys Messrs Lucien Valloni and Alessandro Celli; for the Respondent, the manager of the legal services Ms Vanessa Ng with the attorney Mr Philippe Verbiest. At the outset of the hearing, both parties declared that they had no objection to raise with regard to the composition of the Panel.

47. The Panel heard evidence from the following witnesses: Mr Urs Freuler, former Appellant's team manager; Mr Ernst Vogelsang, member of the Appellant's management team; Ms Monika Zürcher, commercial manager of the Appellant; Mr Tyler Hamilton, former Phonak rider; Mr Alain Siegrist, former E&Y auditor; Mr Alain Rumpf, UCI Professional Cycling Manager; Dr Mario Zorzoli, UCI physician and health manager. Each witness was invited by the President of the Panel to tell the truth subject to the consequences provided by the law; each witness was examined and cross-examined by the parties and questioned by the Panel.

48. The Panel heard the detailed submissions of the parties, the Respondent having the floor last. After the parties' final arguments, the Panel closed the hearing and reserved its final award. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV DISCUSSION

IV.1 CAS JURISDICTION

49. The jurisdiction of the CAS, which is not disputed, derives from arts. 2.15.226 to 2.15.242 of the Regulations and art. R47 of the Code of Sport-related Arbitration (the "Code").

50. It follows that the CAS has jurisdiction to decide the present dispute.

IV.2 APPLICABLE LAW

51. Art. 2.15.242 of the Regulations provides as follows: «*Unless otherwise specified in the present section, the Code of Sports-related Arbitration shall apply*».

52. Art. R58 of the Code specifies that the Panel «*shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled*».

53. It follows that the UCI Regulations and Swiss law are applicable to the present case.

IV.3 PROCEDURAL MOTIONS

54. The Appellant filed several procedural motions.

55. In particular, the Appellant requested that the Respondent produce the whole file of the Licence Commission related to the Appellant's case. As announced at the hearing of 18 January 2005, the Panel rejects the motion because the Appellant has in fact received the entire file, with the justified exception of a few documents (see *supra* at 40) which were already in possession of the Appellant.

56. Then, the Appellant requested that the Respondent produce all files of the Licence Commission concerning all the other applicants for a UCI ProTour Licence. At the hearing of 18 January 2005, the Appellant explained that the motion was justified in order to demonstrate that before the date when the Licence Commission gave its Preliminary Opinion, the Respondent informed other applicants of the inadequacy or incompleteness of their applications, thus giving them a chance to complete their files and correct their mistakes before the Licence Commission's preliminary opinion. To support its motion, the Appellant exhibited the decisions of 22 November 2004 of the Licence Commission regarding the applications of Van der Schueren H.-Sportpromotie ASBL and EUSRL France Cyclisme. In the Panel's view, the two Licence Commission's decisions were enough evidence to confirm that, as a matter of fact, other applicants were advised of the inadequacy or incompleteness of their applications. As announced at the hearing, the Panel does not need further evidence as far as this point is concerned and, therefore, it rejects the motion.

57. The Panel dismisses the other procedural motions insofar as they are in connection with the above rejected motions or with rights reserved but thus far not exercised by the Appellant, or do not require any action from the Panel and are thus of no object.

IV.4 SCOPE OF REVIEW OF THE CAS

58. The UCI Regulations provide some special rules with regard to the appeal before the CAS against a Licence Commission's final decision concerning a ProTour Licence. With respect to the scope of review of the CAS, art. 2.15.239 of the Regulations provides as follows:

> «*For the licence application procedures, including those for the transfer of a licence, the Panel will only examine the compliance of the challenged decision with the provisions of the present section. The Panel shall be bound by, and cannot review such points, considerations or decisions which are at the discretion of the Licence Commission, unless such points, considerations or decisions are materially ungrounded or are evidently unjustified*».

59. The Panel notes, therefore, that art. 2.15.239 allows the review of the decisions issued by the Licence Commission on 22 November 2004 if it finds that it was adopted without proper regard for the applicable articles of section XV of the Regulations.

60. Furthermore, art. 2.15.239 obliges the Panel to defer to the discretionary appreciation of the Licence Commission but, at the same time, it allows the Panel to review the Appealed Decision if such appreciation is "*materially ungrounded*" or "*evidently unjustified*" and thus, *a fortiori*, if it is arbitrary. According to the Swiss Federal Court, a decision is arbitrary if it severely fails to consider established rules, a clear and undisputed legal principle or breaches a fundamental principle (ATF 124 IV 86; ATF 106 Ia 7). A decision is arbitrary if it harms in an inadmissible way the sense of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued. Not only the decision must be arbitrary in itself to be overruled, but its result must be arbitrary too (ATF 125 I 166 consid. 2a p. 168; 125 II 10 consid. 3a p. 15, 129 consid. 5b p. 134; 124 V 137 consid. 2b p. 139; 124 IV 86 consid. 2a p. 88).

61. In view of that, the Panel is of the opinion that it must review the Appealed Decision if it is "materially ungrounded or evidently unjustified", including any case of breach of the fundamental rights of the applicants. Indeed, it would not be logical to consider that by applying for a UCI ProTour Licence an applicant would waive its fundamental rights.

62. Besides, it can be pointed out that the Respondent does not object to the above point of view. In its answer, the Respondent commented and disputed every alleged breach of fundamental rights put forward by the Appellant on the basis of Swiss law, without shielding itself behind art. 2.15.239 of the Regulations.

63. The Panel notes also that art. 2.15.240 of the Regulations provides as follows:

> «*The appeal is judged on basis of the documentation in the possession of the Licence Commission at the date when the Licence Commission gave its preliminary opinion. No additional documentation can be added. The documents,*

statements and written evidence which the appellant intends to raise before the CAS can only refer to the same elements as found in the Licence Commission's file».

64. A parallel must be drawn between art. 2.15.240 and art. 2.15.026 of the Regulations, which provides as follows:

«The Commission shall judge the request on the basis of the documentation in its possession at the date when it gives its preliminary opinion. There may be no subsequent additions to this documentation».

65. The Panel thus notes that the Regulations set forth an obligation for the Licence Commission to take into account in its final decision only the documents which were in its file at the date of the Preliminary Opinion (12 November 2004) and, conversely, not to consider documents disclosed after such date. This Panel is allowed to consider the same documents as the Licence Commission; besides, the Panel is allowed to consider the "*documents, statements or written evidence*" put before the CAS which make reference to the elements "*found in the Licence Commission's file*" (art. 2.15.240). In addition, given that art. 2.15.232 of the Regulations allows the Appellant to "*indicate in his appeal document which witnesses and experts he wishes to appear at the hearing*", the Panel is obviously allowed to take into account the oral evidence heard at the hearing of 18 January 2005 (see *supra* at 47).

IV.5 THE UCI PROTOUR LICENSING PROCEDURE

66. The Panel notes that the Regulations set out a particular three-stage procedure for the granting of a UCI ProTour licence. The first stage involves the examination of the teams' applications by the Licence Commission in order to "*grant [or deny] the licence provisionally*" (art. 2.15.018 of the Regulations). At the second stage, after the teams have completed their applications with all further documentation required, the Licence Commission examines the applicants' submissions as well as the report from the UCI-appointed auditors and issues "*a preliminary opinion on the definitive grant of licence*" (art. 2.15.019). In case of a negative preliminary opinion, there is a third stage whereat, upon request from the rejected team, the Licence Commission holds a hearing after which the final decision is issued (arts. 2.15.020-2.15.025). However, as already mentioned, at the third stage the applicant is restricted to the previously submitted evidence, as the Licence Commission may only take into account the documentation already in its possession at the time of the preliminary opinion (art. 2.15.026).

67. It seems to the Panel that, given the above stringent restriction on the applicant's right to submit evidence, the case is truly decided at the second stage, when the Licence Commission issues its preliminary opinion. The subsequent hearing, in front of the same body which has already issued a negative decision, and with no additional evidence permitted, can hardly be of any avail.

68. Therefore, given that the crucial moment is the second stage of the licensing procedure, the Panel is of the opinion that the process leading to the issuance of the preliminary opinion must be fair and transparent towards the applicants. In particular, the applicants should be allowed to present their case at such stage in an adversarial proceeding, i.e.

having the right to know the allegations of the UCI representatives and of the UCI consultants, to examine in advance all the evidence submitted by the UCI to the Licence Commission and to question it or refute it with its own counter-evidence. Otherwise, the right to be heard and the right to a fair proceeding would be breached. It is undisputable that the said rights are fundamental and that the CAS has always endeavoured to protect them (see e.g. Watt/ACF, CAS 96/153, in *Digest of CAS Awards*, I, 341; AEK Athens-Slavia Prague/UEFA, CAS 98/200, in *Digest of CAS Awards*, II, 66; AOC, CAS 2000/C/267, in *Digest of CAS Awards*, II, 741; SKU/WKF, TAS 2003/A/443).

69. The Panel notes that when the Licence Commission adopted the Preliminary Opinion, on 12 November 2004, the Appellant did not know all the allegations of the UCI representatives and of the UCI-appointed consultants. In particular, at least two important documents included in the file concerning the Appellant's licence procedure were not communicated to the Appellant before the date of the Preliminary Opinion (12 November 2004): (i) the letter from the UCI physicians (Dr Schattemberg and Dr Zorzoli) to the Licence Commission of 2 November 2004 commenting the medical situation of the Appellant's team and attaching their letter to the Appellant of 25 October 2004; (ii) the E&Y report dated 9 November 2004; it is also unclear, as there is no conclusive evidence in the file, whether the E&Y report of 28 October was sent to the Appellant before or after 12 November 2004 (see *supra* at 30).

70. As a consequence of the above circumstances, the Appellant could not examine beforehand the said evidence and could not refute it by providing some counter-evidence or supplementing and correcting its application. In addition, after receiving the Provisional Licence, the Appellant never received from the Respondent any hint that there was a risk that its application could be eventually rejected. When the Respondent was informed of the rejection, it was too late under the Regulations to provide more evidence or to supplement its application with the appropriate documents.

71. The Panel remarks that there is no provision in the Regulations preventing the Respondent from postponing for some days the adoption of the Licence Commission's preliminary opinion if, after the examination of the documentation, it appears that some applications are going to be rejected. It seems to the Panel that any potentially dismissed applicant should be informed of its exact situation and, before the issuance of a negative preliminary opinion, should be granted the opportunity to rebut or redress, if at all possible, the negative elements of its application. Arts. 2.15.017-2.15.019 of the Regulations would be perfectly compatible with a procedural framework such as the one just suggested.

72. Indeed, the Panel notes that the above-described fair and transparent procedural setting corresponds exactly to what the Licence Commission did carry out in the licence procedures concerning the applicants "Van der Schueren H.-Sportpromotie ASBL" (for the team "Mr Bookmaker-Palmans") and "EUSRL France Cyclism" (for the team "AG2R Prévoyance"). It is undisputed that in both cases the Licence Commission, after having examined the applications at a first meeting (on 8 September 2004), notified to the applicants that it could not accept their files as submitted and announced that it would re-examine them at a subsequent meeting (on 6 October 2004), allowing the applicants to supplement their applications and submit new evidence. It is true, as the

Respondent asserted in its written and oral pleadings, that this occurred with regard to applicants which were being denied the provisional license rather than the definitive licence. However, the Panel finds it illogical that, while the applicants are granted a fair and transparent procedure in connection with the provisional licence, they are denied such a procedure in respect of the more important and consequential definitive licence.

73. The Panel notes also that in situations when – as is the case of the Appellant – a team first obtains a provisional licence and then a negative preliminary opinion, it could even be argued that the latter negative determination might be considered tantamount to a withdrawal of an (albeit provisional) licence, thus causing the possible resort, by way of analogy, to art. 2.15.042 of the Regulations, which provides as follows: "*Before effectively withdrawing the licence, the Commission may, if it deems useful and appropriate, impose an additional deadline to the UCI ProTour Team in order to sort out its situation*".

74. In conclusion, the Panel finds that the Regulations granted the possibility to conduct a fair and transparent procedure vis-à-vis the Appellant before the adoption of the Preliminary Opinion, but the Respondent did not avail itself of this opportunity. Accordingly, the Panel finds, and so holds, that the Appellant's fundamental due process rights were breached.

IV.6 THE MERITS OF THE APPEALED DECISION

75. Art. 2.15.012 of the Regulations provides that in order "*to refuse the award of a licence or to reduce its duration to less than 4 years*" the judging body should apply the criteria listed in art. 2.15.011.

76. Art. 2.15.011 of the Regulations sets out the following criteria:

> «*1. Quality and rapidity in the fulfilment of the conditions for the granting of a licence;*
>
> *2. Assurances of financial soundness and stability for the four coming years;*
>
> *3. Quality of the riders, inter alia as regards their placing and results;*
>
> *4. Compliance with UCI regulations;*
>
> *5. Compliance with contractual obligations, including the provisions of the standard contract between the rider and the team under Article 2.15.139 and those of the Joint Agreement signed by the Associated Professional Cyclists (Cyclistes Professionnels Associés – CPA) and the International Association of Professional Cycling Teams (Association International des Groupes Cyclistes Professionels, AIGCP).*
>
> *6. Compliance with legal obligations;*
>
> *7. Compliance with sporting ethics, including matters of doping and health;*
>
> *8. Absence of other elements likely to bring the sport of cycling into disrepute*».

77. In the Appealed Decision, the Licence Commission mentioned as particularly relevant for its ruling the above criteria nos. 4, 7 and 8 of art. 2.15.011, and then rejected the Appellant's application making reference to three main issues, namely:

- the anomalies or positive results of anti-doping tests concerning some of the riders of the Appellant;
- the unethical attitude of the Appellant;
- the failure to respect the Regulations with respect to the riders' image contracts.

IV.6.1 ***The anomalies or positive results of anti-doping tests concerning some of the Appellant's riders***

78. In the Appealed Decision, one of the objections put forward with regard to the Phonak team is "*the existence of several cases of doping or suspected doping which have emerged at close intervals since August 2004*". In this respect, the major events occurred during the year 2004 have already been summarized (*supra* at section II.2, nos. 9-25).

79. It is a fact that three Appellant's riders had adverse analytical findings and were thus involved in anti-doping procedures between July and October 2004. One of them (Camenzind) admitted his guilt, while the disciplinary procedures regarding the other two riders (Hamilton and Perez) are still pending at the time of this arbitration.

80. Such cases are certainly regrettable and apt to raise suspicions. Indeed, the Panel wishes to make clear that it has considerable sympathy with the UCI's anti-doping stance and efforts. However, the Panel is of the opinion that, unless there is evidence of an intentional or negligent implication of a team representative, the team as such cannot be held liable for the individual actions of its riders. The Respondent did not point out any provision in its Regulations which might be construed as establishing a strict liability of the teams for wrongful behaviours of some of their riders. In the Panel's view, a strict liability regime must be expressly set out by the applicable rules and cannot be presumed (cf. CAS 2002/A/423, PSV Eindhoven v/UEFA, in *Digest of CAS Awards*, III, 522; CAS 2004/A/593 FA Wales v/UEFA, in [2004] *I.S.L.R.*, SLR-62).

81. In the submitted documentation, the Panel could not find any evidence of the Appellant's direct implication in its riders adverse analytical findings. On the contrary, there is evidence that the Appellant reacted in the right direction to its riders' anomalous values and adverse analytical findings.

82. First of all, after Dr Zorzoli's warning to the Appellant in May 2004 for its riders' high blood values, during the rest of the season the average blood values of the Appellant's team were in line with those of the other professional teams, with the exception of the riders Hamilton and Perez (see *supra* at 10). Then, once Oscar Camenzind admitted his guilt and retired, the Appellant could not be expected to do anything more. Third, the Appellant suspended Tyler Hamilton and Santiago Perez immediately from all competitions, although they are still claiming their innocence and no disciplinary measure has yet been taken against them by any anti-doping organization (in fact, this Panel cannot take any position on this issue because the CAS might have to deal with those cases in the future). Fourth, even the UCI physicians in charge with doping and health matters – Dr Schattemberg and Dr Zorzoli – have been fairly hopeful in their letter of 2 November 2004 to the President of the Licence Commission, stating that they were hoping for good results with the Appellant, which had "*already made an*

important first step" in inviting Dr Zorzoli to make a presentation to the whole team. Fifth, in his oral evidence Dr Zorzoli has expressed the view that the Medical Concept submitted by the Appellant (see *supra* at 24) is comparable to the endeavours of other teams admitted to the ProTour and that he is not even sure whether all the teams have adopted internal policies of that kind.

83. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision's reference to the cases of doping or of suspected doping in the Appellant's team as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

IV.6.2 ***The ethical attitude of the Appellant***

84. It is apparent to the Panel that the core rationale of the Appealed Decision is the negative evaluation of the Appellant's ethical attitude and, in particular, its reactions once the Hamilton's and Perez's adverse analytical findings emerged. The Licence Commission makes it very clear: "*More than the confirmation of the doping cases in which certain riders in the team are or have been suspected during these last months, it is the attitude of this team's management to these revelations which arouses serious reservations. Though it is not in itself contentious for a team to defend its riders when they are involved in a doping affair, at least while their guilt has not been established, the attitude of this team, which has tried to cast doubt on the validity of the tests which revealed the suspected doping in order to provide its defence, is quite another thing*".

85. In its pleadings before this Panel, the Respondent has restated the Licence Commission's view that the Appellant, by casting doubts in public on a testing method which has been accepted by the WADA and the IOC, had an unethical behaviour.

86. The Panel observes that in the crucial Preliminary Opinion there is no reference at all to the Appellant's reaction to the Hamilton and Perez cases and no reference at all to any "unethical behaviour" of the Appellant. Furthermore, the Panel notes that in the file concerning the Appellant's licence procedure – produced by the Respondent with the assurance that it was "*a copy of the complete file*" (UCI letter of 3 December 2005) – there is not one single document, on or before 12 November 2004, mentioning in any manner whatsoever the Appellant's reactions and attitude after the Hamilton and Perez cases. The only reference in the licence file to the Appellant's doubts about the validity of the new anti-doping test is to be found in the minutes of the hearing of 22 November 2004.

87. As art. 2.15.026 of the Regulations requires the Licence Commission to judge the applications only "*on the basis of the documentation in its possession at the date when it gives its preliminary opinion*" (i.e. 12 November 2004), the Panel wonders how the Licence Commission was informed, and what kind of evidence it received, with regard to the Appellant's allegedly unethical behaviour. Perhaps, the Licence Commission took into account the information and documents provided by the parties at the hearing of 22 November 2004. In the Panel's view, this would amount to a violation of art. 2.15.026 of the Regulations.

88. Apart from the foregoing observations, the Panel notes that the homologous blood transfusion testing method was absolutely new. Under such circumstances, the Panel finds it legitimate that someone might cast doubts on the validity and reliability of the homologous blood transfusion test. Indeed, even in the recent past there have been CAS cases where the validity and reliability of anti-doping methods adopted by the IOC have been challenged, and nobody has contested the right of the athletes or of their organizations to bring forward such challenges (see, e.g., CAS 2002/A/370, L. v/ IOC, in *Digest of CAS Awards*, III, 273, in reference to the methodology of testing for darbepoetin; CAS 2002/A/374, M. v/IOC, in *Digest of CAS Awards*, III, 286, in reference to the tests used to detect Aranesp and r-EPO). There might well be a CAS proceeding in the future where the validity and reliability of the homologous blood transfusion test is questioned. The Panel is mindful of the fact that the fight against doping requires a tough stance against anybody who might try to undermine such fight. However, until a decision is rendered on the above matter by the CAS or another independent court, the Panel is of the view that under the given circumstances it is clearly not unethical to voice doubts.

89. Furthermore, the Licence Commission pointed out in the Appealed Decision that it "*has not been demonstrated that, since suspicions arose about the doping of its riders, the Phonak team has followed the example of other teams admitted to the UCI ProTour, and organised itself in such a way as to combat doping effectively. As a result this team does not provide guarantees in respect of sporting ethics as they apply to doping*".

90. In this respect, it is undisputed that during the hearing of 22 November 2004 before the Licence Commission the Appellant's representatives exhibited and handed to Dr Zorzoli a document dated 27 October 2004 and entitled "*Medical Control Project of the Phonak Hearing Systems Team*" (the so-called Medical Concept). In his testimony, Dr Zorzoli declared that the Medical Concept is an acceptable way of treating the medical issues and of organizing the team in order to prevent doping; Dr Zorzoli specified also this is comparable to what has been done by other ProTour teams.

91. It seems to the Panel that this circumstance demonstrates that, had the Respondent respected the Appellant's rights to be heard and to obtain a fair proceeding before the adoption of the negative Preliminary Opinion (see *supra* at 74), the Appellant could have proven that it had organised its team in such a way as to combat doping effectively, thus avoiding the negative judgment on this issue.

92. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision's reference to the allegedly unethical behaviour of the Appellant as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

IV.6.3 *The failure to comply with the Regulations with respect to the riders' image contracts*

93. Art. 2.15.116 of the Regulations sets out a rule (see *supra* at 26) forbidding ProTour teams and riders to sign contracts for image rights whereby the remuneration exceeds 15% of the total remuneration paid to the rider (the "15% rule").

94. The 15% rule has been inserted for the first time in the Regulations in view of the granting of the ProTour licences. At the workshop held by E&Y in September 2004 with all the applicants, the E&Y auditors explained that, because of the non-retroactivity principle, only the new contracts were expected to comply with the 15% rule (see *supra* at 27).

95. In the Appellant's application, there were a few contracts whose expiry date had been recently extended beyond 31 December 2004, which did not respect the 15% rule. The Appellant's own interpretation was that such an extension did not render those contracts "new" and, hence, they would not be caught by the 15% rule. As the Appellant received at least one of the E&Y reports (and perhaps both) only after the 12 November 2004, the Appellant did not and could not know that his interpretation would have been prejudicial to the attainment of the ProTour License. In addition, Mr Rumpf testified that, between 28 October and 12 November 2004, nobody from the UCI administration contacted the Appellant in order to draw the Appellant's attention to the problems outlined in the E&Y Reports.

96. In particular, the Appellant was not knowledgeable about the distinction made by E&Y auditors (and not to be found in the Regulations) between "reservations" and "remarks", i.e. between more serious and less serious shortcomings relating to the contracts of employment, the insurances and the social security cover (see *supra* at 28-29). Indeed, it would seem to the Panel that some of the shortcomings listed by E&Y under the heading "remarks" could well be inserted under the heading "reservations", due to their apparent relevance (e.g. the lack in some employment contracts of a "declaration" clause expressly required by the Regulations, the lack of some insurances, the absence of some contracts). However, according to Mr Rumpf's testimony, several teams obtained a ProTour licence even though they were not fulfilling all the requirements of the Regulations, provided that such flaws were classified among the "remarks" in the pertinent E&Y reports. Therefore, the distinction between flaws which yielded a "reservation" and flaws which yielded a "remark", to be found in the E&Y reports, was a crucial piece of information for any applicant, but it was not delivered to the Appellant before the Preliminary Opinion (see *supra* at 30). In any event, even if the Appellant had received the E&Y reports beforehand, they were not drafted in such way as to clearly indicate that the Appellant's ProTour licence could be at risk, inasmuch as they comfortingly stated that the riders' contracts "*have not revealed any significant anomalies*" (see *supra* at 28-29), without any hint that the ensuing "reservations" would prevent the release of the licence.

97. Indeed, the Appellant quickly reacted when it could see the relevance of the image rights issue in the Preliminary Opinion; in his testimony, Mr Rumpf declared that the Appellant handed to him the correctly amended contracts immediately after the hearing of 22 November 2004 in front of the Licence Commission (see *supra* at 32). This circumstance demonstrates that, if the Respondent had respected the Appellant's rights to be heard and to obtain a fair proceeding (see *supra* at 74), the Appellant could have easily corrected his mistaken interpretation of the 15% rule and avoided the negative judgment on this issue.

98. Furthermore, the Panel considers that the Respondent's unclear behaviour could lead the Appellant to believe that it could legitimately present the amended contracts even after the deadline of art. 2.15.026 of the Regulations.

99. Indeed, on 1 July 2004, the Respondent wrote to the Appellant and strangely mentioned 23 November 2004 as the deadline to meet the conditions required to obtain a licence: "*[...] provided that, on 23 November 2004, the application still meets all the other conditions required to obtain a licence, as well as today, a four-year UCI ProTour licence will be granted to your team [...]*" (see the letter's complete text *supra* at 8). As was mentioned, the amended contracts were delivered on 22 November 2004, thus before the said date of 23 November 2004.

100. More significantly, on 19 November 2004, the Respondent wrote to the Appellant – with a copy to the Licence Commission – asking to provide "*a copy of all 2004 and 2005 image contracts signed with your riders. It is up to you to decide if you wish to provide the Licence Commission with additional documentation[...]*" (see the letter's complete text *supra* at 37). Obviously, the Respondent was asking the Appellant to provide the Licence Commission with the *amended* image contracts, as on that date the faulty contracts were already in the hands of the Licence Commission and the negative judgment related to the breach of the 15% rule was already known to the Appellant.

101. The Panel agrees with the Respondent that stringent financial and contractual requirements are needed for the orderly management and development of professional sports. Moreover, the Panel concurs with the Respondent's position that, in order to take part in top professional cycling, teams must be well-organized and scrupulously comply with all the administrative deadlines. However, the Panel finds that the Respondent's behaviour, and in particular the express request (after the set deadline) of providing to the Licence Commission the amended image contracts, could lead the Appellant to believe that the Licence Commission would take into consideration the documents filed by the Appellant after 12 November 2004, and that the express request of documentation would prevail over art. 2.15.026. If this was not the case, the Respondent's letter of 19 November 2004 was illogical, and it should have been clearly declared before or during the hearing of 22 November 2004 that any new production of documents was useless.

102. Therefore, the contradictory attitude of the Respondent was such that the Appellant was legitimately entitled to believe that it had the right to provide the amended contracts even after the 12 November 2004. Arguably, to claim otherwise could be deemed as a breach of fundamental rights such as the principles of good faith and the prohibition of *venire contra factum proprium* (cf. CAS OG 02/006, New Zealand Olympic Committee v/FIS-IOC-SLOC, in *Digest of CAS Awards*, III, 609).

103. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision's reference to the 15% rule as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

IV.6.4 *Conclusion on the merits of the Appealed Decision*

104. The Panel has found that the Appellant's fundamental rights to be heard and to obtain a fair procedure were breached (*supra* at 74). However, according to the constant jurisprudence of the CAS, a procedural violation is not enough in and by itself to set aside an appealed decision (see CAS 2001/A/345, M. v/ Swiss Cycling, in *Digest of CAS Awards*, III, 240 and the references quoted therein); it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body could be cured through the due process accorded by the CAS, and the appealed decision's ruling on the merits was the correct one, CAS panels had no hesitation in confirming the appealed decision.

105. In the Panel's view, the above analysis on the merits of the Appealed Decision has shown that the procedural defects of the licensing procedure had a critical bearing on the outcome of the same procedure (see supra at 91 and 97). As a consequence, the Panel holds that the violations of the Appellant's fundamental procedural rights, in addition to the other questionable aspects of the Appealed Decision (see *supra* at 83, 88 and 102), have yielded a ruling that, as a whole, is materially ungrounded and evidently unjustified.

106. For all the above reasons, the Panel finds, and so holds, that the Appellant's appeal must be allowed and the Appealed Decision must be set aside.

IV.7 OTHER GROUNDS OF APPEAL

107. The Appellant submitted other grounds of appeal – concerning, in particular, the right of personality, competition law, and the principle of proportionality – which, in its opinion, would also render the Appealed Decision unlawful (see *supra* at 42). Since the Panel has already held that the Appealed Decision is to be set aside, it is not necessary to rule on the other grounds of appeal.

IV.8 NEW DECISION ON THE APPELLANT'S APPLICATION ISSUED BY THE CAS

108. According to art. 2.15.241 of the Regulations, the Panel "*will deliver a new decision replacing the challenged decision. This decision will definitively decide the dispute.*" Therefore, the Panel must issue a decision *ab novo* with regard to the Appellant's application.

109. For the reasons already expounded, the Panel considers that the Appellant did not have an unethical behaviour and that its application met all the required conditions to obtain a licence. However, it is undisputable that, for the Phonak team, the year 2004 was marked by blood tests with average high values, a confirmed doping case and two cases of adverse analytical findings. This sequence of events, undoubtedly, is a circumstance which might have contributed to bringing the sport of cycling into disrepute.

110. Nevertheless, the high average blood values were observed in April 2004 and did not prevent the issuance of the Provisional Licence a couple of months later. After Dr Zorzoli's presentation in June 2004, the Phonak team's average blood values were in line with the average blood values of the other teams (with the obvious exception of the

two riders with adverse analytical findings). In any event, according to Dr Zorzoli's testimony, during the season no rider from the Phonak team had to be stopped because of blood values above the thresholds set by the Regulations.

111. As far as the riders Camenzind, Hamilton and Perez are concerned, the Appellant took immediately the correct measures. According to Dr Zorzoli's testimony, the Appellant established an acceptable Medical Concept, comparable to that of other teams.

112. Relying on Dr Zorzoli's testimony, the Panel finds that the Appellant might not have been irreproachable in its internal organisation during the 2004 season. Nevertheless, since the doping suspicions were raised, the Appellant took several measures and dismissed some staff members and hired others so as to prevent further problems. With regard to the next seasons, the Appellant does not appear as being less prepared than the other UCI ProTour Licence holders as far as the anti-doping requirements and health security measures are concerned. In addition, more pressure will be on the Appellant, for it cannot ignore that it will be under constant scrutiny by the general public opinion as well as by the sporting authorities, in order to check whether it will rigorously act in accordance with sporting ethics, including matters of doping and health.

113. Based of the foregoing, the Panel is of the opinion that the granting of a UCI ProTour Licence for a period of two years is proportionate. Such measure will give the opportunity to the Appellant to demonstrate, as far as required, that there was in fact no connection between its riders' high blood values and adverse analytical findings and its internal organisation, and to confirm that the team can reach the level of excellence necessary for the UCI ProTour. In any event, the Regulations allow the Licence Commission to withdraw the ProTour licence at any moment should the team no longer comply with the conditions set out by art. 2.15.040.

114. For those reasons, the Panel accepts the Appellant's application and, considering in particular some events of the year 2004 in light of the criterion no. 8 of art. 2.15.011 of the Regulations (see *supra* at 109), holds that the granting of a UCI ProTour licence for two years is appropriate.

115. (…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by ARcycling AG on 15 December 2004 is upheld.

2. The appealed decision issued on 22 November 2004 by the Licence Commission of the Union Cycliste Internationale is set aside.

3. The application of ARcycling AG for the obtainment of a UCI ProTour Licence for the Phonak Hearing System team is accepted, and a UCI ProTour Licence is granted to it for a period of two years, namely for the cycling seasons 2005 and 2006.

4. All other motions or prayers for relief are dismissed.

5. (…)

Done in Lausanne, on 31 January 2005

THE COURT OF ARBITRATION FOR SPORT

Massimo **Coccia**
President of the Panel

Beat **Hodler**
Arbitrator

Bård Racin **Meltvedt**
Arbitrator