CAS 2007/A/1290 Roland Diethart v/ IOC

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr Luc **Argand**, Attorney-at-law, Geneva, Switzerland

Arbitrators: Mr Peter **Leaver** QC, Barrister, London, England
Mr Christian **Krähe**, Attorney-at-law, Konstanz, Germany

Ad hoc Clerk: Mr Sylvain **Bogensberger**, Attorney-at-law, Geneva, Switzerland

between

Mr Roland Diethart, Trofaiach, Austria,
Represented by Dr Hans-Moritz Pott, Attorney-at-law in Schladming, Austria

Appellant

and

International Olympic Commitee, Lausanne, Switzerland,
Represented by Mr Jan Paulson, Mark Mangan and Guiseppe Curto, all three Attorney-at-law in Paris, France, from Freshfields Bruckhaus Deringer, Paris, France

Respondent

FACTUAL BACKGROUND

A. THE PARTIES:

1. Mr Roland Diethart ("Mr Diethart") is an Austrian cross-country skier born on 3 August 1973.

2. The International Olympic Committee ("the IOC") is an international non-governmental non-profit organisation and the creator of the Olympic Movement. The IOC exists to serve as an umbrella organisation of the Olympic Movement. Its primary responsibility is to supervise the organisation of the summer and winter Olympic Games.

B. STATEMENT OF FACTS:

3. On 15 February 2006, Mr Diethart was nominated to participate in the cross-country team relay to take place on 19 February 2006 in Pragelato.

4. Mr Diethart arrived in Pragelato early in the morning on 17 February 2006.

5. On the night of 18 February 2006, the Italian police searched the premises (via del Plan 5 in Pragelato) in which Mr. Diethart was accommodated pursuant to a house search and confiscation warrant. This house also accommodated the other members of the Austrian cross country ski team, namely, Mr Martin Tauber ("Mr Tauber"), Mr Johannes Eder ("Mr Eder") and Mr Jurgen Pinter ("Mr Pinter"), and part of their support staff.

6. The Italian police found a number of items within the accommodation of the Austrian cross-country team, including numerous syringes (some used), blood bags (some used), butterfly valves for intravenous fusion, injection needles, bottles of saline and a device for measuring a person's haemoglobin levels as well as a device for determining the blood group of a blood sample.

7. In relation to Mr Diethart, the Italian police found various items in a beauty case contained in his travel bag and one box labelled "Anabol Loges" in an undisclosed location. At the hearing, however, there was some disagreement, on the exact items found.

8. On 19 February 2006, Mr Diethart competed, alongside Mr Eder, Mr Tauber and Mr Pinter, in the Men's 4 x 10 km relay.

9. Following the house search, the Austrian Olympic Committee ("AOC") set up an Inquiry Commission to investigate the conduct of the Austrian cross-country and biathlon teams at the Torino Olympic Games.

10. The Austrian Ski Federation ("ASF") Disciplinary Board also conducted a general investigation into the conduct of the Austrian cross-country and biathlon teams at the Torino Olympic Games.

11. The IOC informed Mr Diethart by letter dated 1 March 2007 that it was establishing a Disciplinary Commission ("the IOC Disciplinary Commission") to investigate the appropriateness of sanctions in connection with the seizure of evidence from his accommodation which appeared to demonstrate the possession, administration and use of prohibited substances and prohibited methods, or complicity in violations of the IOC Anti-Doping Rules applicable to the XX Olympic Winter Games in Turin ("IOC ADR").

12. The IOC Disciplinary Commission met on 4 and 5 April 2007 and unanimously concluded in its 24 April 2007 recommendation, that Mr Diethart had violated Articles 2.6.1 and 2.8 of the IOC ADR in that he possessed, aided and abetted other athletes to use or possess prohibited substances and methods. It recommended that the IOC Executive Board should impose a number of sanctions on Mr Diethart. The IOC Disciplinary Commission also investigated the appropriateness of sanctions in respect of Mr Tauber, Mr Eder and Mr Pinter.

13. On 25 April 2007, the IOC Executive Board decided to impose the following sanctions:

"*I.* [Mr Diethart]*:*

(i) is disqualified from the Men's 4x10 km Relay and

(ii) is permanently ineligible for all future Olympic Games in any capacity.

II. The Austrian Men's 4x10 km Relay team is disqualified;

III. The Fédération Internationale de Ski is requested to modify the results of the above-mentioned event accordingly;

IV. The file is referred to the Fédération Internationale de Ski to consider any further action within its own competence;

V. The decision shall enter into force immediately."

C. PROCEEDINGS BEFORE CAS:

14. On 14 May 2007, Mr Diethart filed his Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the decision rendered on 25 April 2007 by the IOC Executive Board. The three other members of the Austrian cross-country relay team, Mr Eder, Mr Tauber and Mr Pinter, also appealed against the IOC Executive Board decisions in their respective cases. Their appeals were consolidated and considered by a different CAS Panel.

15. On 25 May 2007, Mr Diethart filed his Appeal Brief with CAS. He asserted that the proceedings that resulted in the IOC Executive Board decision were null and void since the lifelong suspension was imposed against him after a hearing at which he was *"neither seen nor heard"* and that the decision was taken by the wrong body. He also requested the production of various documents by the IOC ("the Discovery Request").

Further, he made the following applications:

"*The (…)* [CAS] *is asked to accept this appeal resp. statement of claim and to modify the decision of the (…)* [IOC] *Executive board dated 25 April 2007 and to find the accused Roland Diethart not guilty resp. to terminate proceedings against him.*

In eventu, the (…) [CAS] *is asked to accept the appeal resp. statement of claim and to modify the decision of the (…)* [IOC] *Executive board dated 25 April 2007 in a way that the imposed lifelong suspension is transformed into a one year suspension."*

16. On 25 June 2007, CAS ruled that the language of the present arbitration was English and invited the Appellant to lodge with the CAS Court office translations of all documents filed in a language other than English.

17. On 20 July 2007, Mr Diethart filed a second submission and introduced three new documents into the record.

18. On 20 August 2007, the IOC filed its Answer to the Appeal Brief, together with exhibits in 4 bundles (namely, two volumes of factual exhibits, one volume of legal authorities and one expert report of Professor Don H. Catlin). The IOC requested that:

"1. the appeal of Roland Diethart be dismissed; and

2. Roland Diethart be ordered to pay the IOC's cost and expenses arising out of this arbitration."

19. On 6 September 2007, Mr Diethart filed a third submission and introduced five new documents into the record.

20. On 15 October 2007, the IOC filed a second submission and introduced five new documents into the record.

21. A hearing was held in Lausanne on 5 November 2007. The members of the Panel, the ad hoc Clerk as well as Ms Andrea Zimmermann, Counsel to the CAS, were present.

    Mr Diethart; Mr Hans-Moritz Pott, Counsel for the Appellant; Mr Mark Mangan and Mr Ryan McWhinnie, both from Freshfields Bruckhaus Deringer, Counsel for the IOC; M. Christian Thill, from the IOC and M. Kilian Seeber, interpreter, attended the hearing.

    Mr Pott for Mr Diethart and Mr Mangan for the IOC made full oral presentations (introductory remarks and conclusions).

    Professor Don H. Catlin, expert called by the IOC, was questioned by both Mr Pott and Mr Mangan.

    Mr Diethart made a full oral presentation and was questioned by both Mr Pott and Mr Mangan.

22. Neither party raised any objection at any stage either to the constitution of the Panel or the procedure, and each party confirmed its satisfaction with regard to its right to be heard; that it had been treated equally with the other party in these arbitral proceedings; and that it had had a fair chance to present its position.

D. POSITION OF THE PARTIES:

23. In his written submission **Mr Diethart** submitted that the proceedings before the IOC Executive Board were null and void since the lifelong suspension was imposed after a hearing at which he was *"neither seen nor heard"* and that the IOC decision was taken by the wrong body. He also questioned the competence of CAS on the basis, as he alleged, the Olympic Games entry form was not signed by him. However, having

advanced that submission, Mr Diethart drew no conclusion from it, and did not formally ask the Panel to declare itself incompetent.

He drew to the Panel's attention that all doping control (blood and urine) performed on him, particularly the primary medical test on 17 February 2007 and the doping test taken in Sestriere on the night of the house search proved to be negative. He did not take any prohibited preparation of any kind nor did he see any colleague doing so in any manner.

Mr Diethart admitted lying to the Disciplinary Board of the Austrian Ski Federation on 10 March 2006: he did so (as he submits) because he had been advised to do so by his previous Counsel, and did not realise the gravity of the charges against him. However, apart from that lie, he has told the truth to every body which he has attended in respect of the events at Pragelato.

Mr Diethart asserted that the Italian Police Report ("the Police Report") made after the house search was inaccurate. Of the items mentioned in the Police Report only the following items were his: one 250 ml saline solution; one unopened needle-pack; 3 (and not 13) unopened syringes; 2 (and not 1) butterfly needle; 2 (and not 5) unopened packs of infusion devices, all packed in his red beauty case. All of them were unused. He also stated that the box labelled Anabol Lodges was his, but that it was not found in his beauty case.

Mr. Diethart explained that he did not possess any microperfuser or a box containing four jars with haemoglobin testing equipment. He found out about those items during the house search. He contended that they were found on the upper shelf of the cupboard in his room, and that they must have been put there before he arrived in Pragelato. Indeed, according to the room list, other Austrian athletes had stayed in the room prior to his arrival. He gave a demonstration during the hearing of why he contended that the box could not have fitted into his red beauty case.

Mr Diethart submitted that he had committed no violation of Article 2.6.1 of the IOC ADR since he was not in possession of any items essential for the use of a prohibited method: it would have been impossible to carry out blood doping with the items in his possession, and he had a justification for the materials he did possess. Indeed, the 250 ml saline solution bottle (a quantity which by itself was insufficient to manipulate haemoglobin values) was needed as a treatment for sinusitis. It was used for a different

purpose to "Rinomer", a medication which he did possess, but which was not listed in the Police Report. The needle found was carried solely for the purpose of removing the saline solution from the bottle with a syringe, which, Mr Diethart asserted, was the only way to extract the saline solution: Mr Diethart also gave a demonstration during the hearing of how to extract the solution by the use of a syringe.The solution was injected into the nose once the needle removed. For *"hygienic reasons"*, more than one syringe was brought by him to Pragelato. The 2 butterfly needles and the infusion device packs (intravenous tubes) were carried purely as a precaution against an emergency and as a result of his unpleasant experience in Obersdorf; these items were not meant for *"self treatment"* since he has no medical knowledge and the intravenous tube did not contain an adequate filter. The Anabol Loge Pills were needed for treatment and were not a prohibited substance. Also, the connection of Mr Diethart with the other items found in the house was pure speculation.

Until 2003, he only participated in amateur races and had only been a member of the Austrian National Ski Team since 2005 as a member of the Austrian Sprint Team, and not of the Austrian Relay Team. He never trained with the latter and only met its members on a few occasions before the Olympics. He never thought that he would participate in the Olympics since he was the second replacement for the Austrian Relay Team and was only notified about his nomination on 15 February 2006 when both Christian Hoffmann and Michael Botvinov, whom he replaced, fell ill. He only arrived in Pragelato at around 00:45 on the morning of 17 February 2006. Also, he never had anything to do with the biathletes accommodated 40 km away.

He committed no violation of Article 2.8 of the IOC ADR since he had no knowledge of any alleged doping *"manoeuvring"*. He cannot be charged with complicity and particularly of membership of a criminal organisation since he had never trained with the Relay Team and only met them on rare occasions.

The penalties have to be in proportion with each other. Article 6 of the European Convention on Human Rights ("the ECHR") had been violated because the penalty was disproportionate when compared with the penalties of the other athletes and the life long ban is disproportionate when compared with the 2 year suspension in case of a first breach of the WADA Code. Furthermore, the IOC violated the principle of *"certainty"* as the penalties were not clearly laid down, the principle of *"fault"* as no evidence have

been shown that a doping offence has been committed by Mr Diethart, and of Article 6 of the ECHR, as he was found to be in breach by way of collective fault, the IOC wanting to make *"an example*".

*

24. The **IOC** submitted that the proceedings were valid and that Mr Diethart's right to be heard had not been violated: Mr Diethart had been given the opportunity to present his defence before the IOC Disciplinary Commission. Further, the IOC decision was taken by the competent authority, namely, the IOC Executive Board.

The IOC pointed out during the hearing that the Panel must declare itself incompetent if Mr Diethart does not recognize the competence of CAS as a consequence of a lack of signature on the entry form to the Olympic Games.

The IOC submitted that the Police Report was accurate and pointed out that during the hearing before the Panel Mr Diethart expressly admitted lying on 10 March 2006 before the Disciplinary Board of the Austrian Ski Federation on the possession of micro-cuvettes, an issue crucial to this case, so his words should be considered with the utmost caution since he might well be lying once again before this Panel. Furthermore, the IOC noted that the accuracy of the Police Report had not been challenged by any other Relay Team member.

According to the Police Report, the following materials were found in a beauty case contained in Mr Diethart's travel bag: 250 ml saline solution Braun 0.9%; 4 jars with 50 devices for haemoglobin testing (i.e. microcuvettes); 13 unopened packs of syringes; 5 unopened infusion device packs (i.e. intravenous tubes); 1 pack of butterfly needles; 1 sterile-packed microperfuser (i.e. butterfly needle with intravenous tube attached); 1 unopened single-use needle pack. In addition, 1 box labelled Anabol Loges, containing approximately 15 black pills, had been found. Mr Diethart accepted that they were his pills.

Mr Diethart violated Article 2.6.1 IOC ADR as he was found in possession or in constructive possession of Prohibited Methods that were not exempted by a Therapeutic Use Exemption (TUE) and no other *"acceptable justification"* for being in possession of those items was advanced by Mr Diethart. Indeed, Mr Diethart does not contend that he ever sought a TUE, despite supposedly suffering from sinusitis since October 2005,

and his assertions are internally inconsistent and demonstrably false. In particular, he did not offer any convincing explanation as to why he needed 13 syringes to inject saline solution into his nose, nor why he was in possession of 50 devices for haemoglobin testing. Also, it was suspicious that he asserted for the first time during the hearing possessing a bottle of "Rinomer", a medication which precisely serves the purpose of nose irrigation.

The fact that he was only nominated on 15 February 2006 and arrived in Pragelato on 17 February 2006 is no excuse for bringing along the above-mentioned items. Also, since he is charged with possession of Prohibited Methods, it is not an issue whether or not he actually used the methods.

Mr Diethart violated Article 2.8 of the IOC ADR, a breach considered particularly serious under the WADA Code, which prohibits complicity or attempt to commit an anti-doping rule violation. Very little within the houses of the Austrian Cross-country team, mostly accommodation with shared space, - could go unnoticed from the other occupants and the blood doping or the possession of equipment for use in blood doping was facilitated by the team support staff (Mr Hoch and Mr Gandler), who collected their used infusion equipment. Other athletes have acknowledged the coordinated nature of the medical activities. Further, if indeed Mr Diethart was pressured to lie, it may well be because he was asked to cover for somebody else, which would suffice to charge him of violation of Article 2.8 of the IOC ADR.

The IOC decision does not violate the principle of proportionality. The relevant anti-doping rules as well as the IOC decision are proportionate as the principle of proportionality is *"built into"* both the WADA Code and the IOC ADR, its objective being to protect the fairness and equality of competition and protecting the athlete's health.

Further, the IOC decision does not rest on *"collective fault"*. Mr Diethart's possession of Prohibited Methods and his active participation in a blood doping network was clear. Also, the IOC did not violate the principle of certainty, the Olympic Charter and WADA Code expressly provides for the possibility of life-time bans.

II. IN LAW

A. JURISDICTION AND SCOPE OF THE PANEL'S REVIEW:

25. Mr Diethart pointed out that the Olympic Games Entry Form was never signed by him, and that this may have a consequence on the applicability of the Olympic Charter and the IOC ADR to his case, and as such, on the competence of CAS deriving from those rules. Accordingly, he openly raised the issue of the Panel's jurisdiction, without formally asking that it declares itself to have no jurisdiction.

26. Rule 9 of the Entry Form Eligibility Conditions provides the following: *"The NOC* [National Olympic Committee, i.e. Austria in the present case] *hereby certifies and guarantees that all the relevant rules including all those referred to above, have been brought to notice of the participant and that the NOC has been authorized by the National Sports Federation concerned to sign this entry form on the latter's behalf, with the approval of the relevant International Federation."*

27. In the present case, the Entry Form was duly signed by the Austrian Ski Federation ("ASF") on 30 January 2007, as permitted by Rule 9. The signature of the Austrian NOC was on behalf of all Austrian athletes, including Mr Diethart.

28. Accordingly, the IOC ADR and the Olympic Charter are applicable to Mr Diethart (Rule 2 of the Entry Form) and the jurisdiction of CAS derives from Article R47 of the Code, Article 12 of the IOC ADR and Article 59 of the Olympic Charter.

29. Furthermore, the CAS jurisdiction is explicitly recognized by the parties in their respective briefs: Mr Diethart did not formally challenge the competence of CAS. It is further confirmed in the Order of Procedure which was duly signed by both parties. It follows that CAS has jurisdiction to decide on the present dispute.

30. With respect to its power of examination, the Panel observes that the present appeal proceeding is governed by the provisions of Articles R47ff of the Code. In particular, Article R57 of the Code grants a wide power of examination as well as a full power to review the facts and the law. CAS may thus render a new decision in substitution for the challenged decision, either annulling the latter or sending the case back to the previous authority.

B. APPLICABLE LAW:

31. Article R58 of the Code provides the following:

> "*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 or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

32. By the Austrian NOC's signature of the Entry Form, Mr Diethart specifically agreed to comply with the provisions of the Olympic Charter, of the World Anti-Doping Code in force at the time of the Olympics ("WADA Code"), the IOC ADR and with the IOC Code of Ethics (Article 2 of the Entry form).

    Furthermore, Article 15.1 of the IOC ADR provides the following: "*These Rules* [IOC ADR] *are governed by the Olympic Charter, by the Code* [WADA Code] *and by Swiss law*".

33. Accordingly, the Panel must decide the dispute according to the Olympic Charter, the IOC ADR, the World Anti-Doping Code and Swiss law.

C. ADMISSIBILITY OF THE APPEAL:

34. Mr Diethart's Statement of Appeal was filed within the deadline provided by Article 12.5 ADR IOC, that is, within 21 days after notification of said decision. It furthermore complies with all the other requirement of Article R48 Code. Accordingly, it is admissible.

D. ADMISSIBILITY OF M. DIETHART'S SECOND (ON 20 JULY 2007) AND THIRD (ON 7 SEPTEMBER 2007) SUBMISSIONS:

35. On 20 July 2007, M. Diethart produced a second submission and exhibits without either seeking or obtaining the prior consent of the IOC or the CAS. The IOC raised this irregularity in its 20 August 2007 submission.

36. Again, on 7 September 2007, M. Diethart submitted a third written submission to the Panel without either seeking or obtaining the prior consent of the IOC or CAS.

37. On 25 September 2007, the IOC requested from CAS to confirm that it could submit a short response to M. Diethart's reply dated 6 September 2007. The IOC was allowed to do so by the Panel, and submitted a second submission on 15 October 2007.

38. Article R56 of the Code provides the following:

> "*Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer.*"

39. Twice, M. Diethart supplemented his arguments and produced further evidence without either seeking or obtaining the prior consent of the IOC or CAS. Of and by itself, this lack of respect for the CAS Rules is unacceptable and in many cases would justify the exclusion of any further submission or evidence produced.

40. However, the Panel has a discretion as to whether or not to allow such submissions. The Panel notes that the IOC requested and obtained the right to submit a second submission on 15 October 2007, which gave it the ability to voice its position on the new arguments developed by Mr Diethart, and never formally asked for the exclusion of these submissions. The Panel also notes that all arguments developed in Mr Diethart's second and third submissions could also have been presented during the hearing, and indeed Mr Diethart did so.

41. It follows that the Panel sees no reasons to disregard the second and third submissions of Mr Diethart and decides to exercise its discretion to accept them in accordance with the provisions of Article R56 of the Code.

E. ADMISSIBILITY OF DOCUMENTS PRODUCED IN GERMAN:

42. Article R29.3 of the CAS Code provides the following: "*The Panel may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure.*"

43. On 25 June 2007, the Deputy President of the Appeals Arbitration Division of CAS ruled that the language of arbitration was English and invited Mr Diethart to lodge with the CAS Court Office within 15 days of the notification of the order English translations of all documents filed in a language other than English. On 16 July 2007, with the consent of the IOC, the President of the Panel later extended that deadline to 25 July 2007.

44. In the event, the Panel has disregarded all documents filed in a language other than English and which were not translated into English by 25 July 2007 at the latest (Article R29 of the CAS Code).

F. REQUEST FOR DOCUMENTS:

45. In his 25 May 2007 submission Mr Diethart requested the production of documents on which the IOC Executive Board apparently relied in coming to its decision. However, Mr Diethart did not suggest that any sanctions should flow from a failure to produce those documents.

46. The conduct of evidentiary proceedings ordered by the Panel is governed by Article R44 of the CAS Code (applicable to Appeal Arbitration Procedure by Article R57 of the CAS Code).

47. In respect specifically to the production of documents requested by one of the party, Article R44.3 of the CAS Code provides the following: "*A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant*".

48. The IOC produced several bundles of exhibits as enclosures to its submissions.

49. The Panel notes that the request for documents was neither repeated by Mr Diethart after the IOC submissions nor at the hearing and that Mr Diethart expressly confirmed, at the end of the hearing, (a) his satisfaction with regard to his right to be heard, (b) that he had been treated equally in this arbitral proceeding and (c) that he had had a fair chance to present his position.

50. In any case, if Mr Diethart still did not feel satisfied with the documents produced by the IOC, a point which he did not mention at the hearing, the Panel also notes that he did not expressly demonstrate how specific documents, if they existed, would be likely to be relevant in accordance with Article R44.3 of the CAS Code.

51. The Panel is, therefore, of the opinion that the request for the production of documents was abandoned, and is no longer of any relevance.

G VALIDITY OF THE IOC EXECUTIVE BOARD DECISION & PROCEDURAL OBJECTIONS RAISED BY M. DIETHART:

52. Mr Diethart raises a number of procedural objections regarding the validity of the IOC Executive Board Decision.

(i) **The IOC Executive Board decision was taken by the wrong authority, that is by Disciplinary Commission rather than the IOC Executive Board:**

The IOC submits that it is clear that the IOC Executive Board considered the recommendation of the IOC Disciplinary Commission, but insists that the decision was made by the IOC Executive Board when it met in Beijing on 25 April 2007. The decision itself was signed by the IOC President and the IOC Director General. Further, it reminds the Panel that the power of the IOC Executive Board to delegate the investigation of suspected doping matter to a Disciplinary Commission is expressly provided for in the Olympic Charter under Rule 19.4 ("Delegation of powers"). Mr Diethart made no counter-submission. Therefore, the Panel accepts and holds that the IOC decision was taken by the right authority and that the decision is valid.

(ii) **Mr Diethart was denied his right to be heard:**

Mr Diethart was given the opportunity by the IOC Disciplinary Commission either to present a written defence or to appear at the hearing of the Disciplinary Commission in person. M. Diethart chose to make a written submission: that was made by his former Attorney, Dr Adolph Platzgummer, by letter dated 19 March 2007. The Panel also observes that by letter dated 28 March 2007, the IOC

Disciplinary Commission reminded Mr Diethart that his attendance at the hearing would give him an opportunity to provide any explanations he might have in relation to the seized materials. The Panel concludes that Mr Diethart was given ample opportunity to be heard by the IOC Disciplinary Commission.

If it was a technical defect in the procedure not to offer Mr Diethart an opportunity to state his position before the IOC Executive Board (an issue upon which the Panel makes no finding), the Panel nonetheless takes the view that any such defect was cured at the hearing before it. That hearing was *de novo.*

Mr Diethart had a fair chance to state his position before CAS and confirmed at the end of the hearing his satisfaction with regard to his right to be heard.

Accordingly, the Panel believes that the right to be heard of Mr Diethart before the IOC Executive board does not violate his right to be heard.

(iii) **The IOC Executive Board decision violates the principle of fault:**

The IOC's decision does not rest on collective fault. It is based on Mr Diethart's possession of Prohibited Methods and his alleged participation in a blood doping network.

(iv) **The IOC Executive Board decision violates the ECHR:**

As a matter of Swiss law, which is applicable to the present case, the ECHR is not applicable to sports law matters.[1]

In any event, as is stated above, the IOC Executive Board decision does not reside on collective fault.

53. Also, the Panel holds that further objections raised by Mr Diethart (violation of the principles of certainty and proportionality) are directly connected with the sanction imposed and will therefore be discussed thereafter accordingly.

54. Overall, the Panel is not aware of any procedural defect concerning the IOC Executive Board decision and is of the opinion that it is perfectly regular. Accordingly, the Panel believes that the objections raised by Mr Diethart are irrelevant and must be set aside.

[1] ATF 127 III 429

H. MERITS:

H.1 POLICE REPORT

55. Mr Diethart asserted in his submissions and at the hearing that the Police Report written after the house search is inaccurate and that only some of the items listed as being "in his possession" were actually in his possession.

56. The Panel cannot accept Mr Diethart's contentions in respect of the accuracy of the Police Report. Its reasons can be shortly stated.

57. During the hearing before the Panel Mr Diethart admitted that he had lied to the ASF Disciplinary Board on the items possessed. It follows that his attack on the accuracy of the Police Report starts from a difficult position. The difficulty of Mr Diethart's attack becomes even clearer when it is observed that his explanation have always been inconsistent. Also, the Panel notes that he is the only person accommodated in this house who has questioned the accuracy of the Police Report.

58. Therefore, the Panel finds that the Italian Police Report is accurate and that the items mentioned in the Report were indeed found in the house accommodating the 4 Austrian skiers at via del Plan 5 in Pragelato, and that the items listed as being in Mr Diethart's beauty case were in that case.

59. Accordingly, the Panel will proceed to discuss whether the possession or constructive possession by Mr Diethart of those items identified in the Italian Police Report do indeed constitute a violation of article 2.6.1 of the IOC ADR ("Possession of Prohibited Substances and Methods").

H.2 ESTABLISHMENT OF THE VIOLATION OF ANTIDOPING RULES

60. The IOC Executive Board concluded that Mr Diethart had committed a violation of Articles 2.6.1 and 2.8 of the IOC ADR Rule. The Panel will now specifically discuss each alleged violation in light of its conclusions on the submissions and evidence of the parties.

(A) VIOLATION OF ARTICLE 2.6.1 IOC ADR (POSSESSION OF PROHIBITED SUBSTANCES OR METHODS):

61. Article 2.6.1 of the IOC ADR provides as follows:

> "*The following constitute anti-doping rule violations:*
>
> *(…)*
>
> *2.6 Possession of Prohibited Substances and Methods;*
> *2.6.1 Possession by an Athlete at any time or place of any prohibited substance or prohibited method, referred to in Article 2.6.3 below, unless the Athlete establishes that the Possession is pursuant to a TUE granted in accordance with Article 4.3 (Therapeutic Use) or other acceptable justification."*

62. Article 2.6.3 of the IOC ADR and Appendix 1 to the IOC ADR provides that any method described on the *Prohibited List* published and revised by WADA pursuant to the WADA Code (Article 4.1 of the IOC ADR) is considered to be a Prohibited Method.

According to the *WADA 2006 Prohibited List* valid 1 January 2006, are considered as Prohibited Methods:

> "*M1. Enhancement of Oxygen Transfer*
>
> *The following are prohibited:*
>
> *a. Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin.*
>
> *b. Artificially enhancing the uptake, transport or delivery of oxygen, including but not limited to perfluorochemicals, efaproxiral (RSR13) and modified haemoglobin products (e.g. haemoglobin-based blood substitutes, microencapsuled haemoglobin products).*
>
> *M2. Chemical and physical manipulation*
>
> *a. Tampering or attempting to tamper, in order to alter the integrity and validity of Samples collected during Doping Controls is prohibited. These include but are not limited to catheterisation, urine substitution and/or alteration.*
>
> *b. Intravenous infusions are prohibited, except as a legitimate acute medical treatment.*
>
> *(…)"*

The definition of blood doping is non-exhaustive and is defined as *"including"* transfusions. Modern doping practices dictate that the concept of blood doping encompasses not only blood transfusions, but also the steps taken after a blood transfusion, including the subsequent monitoring and/or reduction of haemoglobin values in order to avoid a *"protective ban"*.

63. The concept of possession under the IOC ADR comprises more than just actual physical possession and includes "constructive possession":

> *"The actual, physical possession, or the constructive possession (which shall be found only if the Person has exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists); provided, however, that if the Person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the Person knew about the presence of the Prohibited Substance/Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous Possession." (*Appendix 1 to the IOC ADR*).*

Constructive possession is defined as existing either where a person has exclusive control over a Prohibited Substance or Method, or over the premises in which the Prohibited Substance or Method is located, or where an athlete knows about the presence of a Prohibited Substance or Method and intends to exercise control over it. Exclusive control of the Prohibited Substance or Method, or the premises, in which it is found, is therefore not necessary to establish constructive possession.

64. Thus, a person will be found to be in possession of a Prohibited Substance or Method if he or she:

- had it in his or her physical possession; or
- had constructive possession over it, which means that he or she either:
  - (i) had exclusive control over the Prohibited Substance or Method or over the premises in which it was found; or
  - (ii) knew about the presence of the Prohibited Substance or Method and intended to exercise control over it.

65. According to the Italian Police Report, the following items were found in the physical possession of M. Diethart:

"(…)

- *4 (four) jars with 50 devices for haemoglobin testing (found in a beauty case contained in his travel bag);*

- *1 (one) box labelled Anabol Loges, containing approximately 15 black pills;*
- *1 (one) solution Kochsalz Braun 0.9% containing a transparent liquid with instructions (found in a beauty case contained in his travel bag);*
- *21 medical devices including 13 (thirteen) unopened packs of syringes, 5 (five) unopened packs of infusion devices, 1 pack of epicranial needles, 1 sterile packed microperfuser, 1 unopened pack of single-use needle (found in a beauty case contained in his travel bag). (…)"*

The Panel starts by noting that, unless an athlete establishes that the possession is pursuant to a TUE granted or *"other acceptable justification"*, the possession of these items, i.e. materials which can be used to monitor and artificially reduce haemoglobin values, constitutes in itself an anti-doping rules violation since these devices can be used for blood doping

In the present case, it is not contended that Mr Diethart ever sought a TUE for the materials in his possession, despite the fact that he told the Panel that he had been suffering from sinusitis since October 2005.

Further, even taking the most benign view of the evidence, the Panel only considers that part of the explanation put forward by Mr Diethart for the possession of the items found in his direct possession could amount to *"acceptable justification"*.

For the purpose of this Award, the Panel is prepared to accept the explanation given (and demonstration made) by Mr Diethart at the hearing concerning the use of the 250 ml saline solution and the necessity to have a needle syringe to extract the saline solution from the 250 ml bottle in order to irrigate the upper cavity of his nose as a treatment for sinusitis after having taken out the needle from the syringe.

However, the Panel was unable to accept the other explanations given by Mr Diethart in his submissions and during the hearing concerning the other items found in his possession:

i. Mr Diethart did not give any plausible justification as to why he possessed 13 standard syringes to irrigate his nose as only one syringe, which could be reused on a number of occasions would have sufficed. The explanation given by Mr Diethart that he took so many syringes for *"hygienic reason"*, namely, the use of a new

syringe each time he needed to extract saline solution from the 250 ml bottle is unconvincing and inconsistent with the fact that he only possessed one needle. Also, as demonstrated by Professor Don H. Catlin, in evidence which the Panel accepts, bulb syringes and not standard syringes are usually used for nose irrigation.

ii. Mr Diethart contended that the intravenous tubes and butterfly needles found in his possession were brought in case of *"emergency"*, which he described as *"the risk of a doctor attending him during the Olympic Games without the necessary infusion equipment"*, assuming an infusion was required, and so as to avoid *"medical care problems"* similar to those that allegedly occurred during the 2005 World Championships in Oberstdorf. This explanation is unconvincing. Indeed, as explained by Professor Catlin, again in evidence which the Panel accepts, the possibility of a doctor attending an elite athlete at a major sporting event without infusion equipment is extremely remote. In any event, the Austrian Olympic delegation included eight doctors, any of whom could have been contacted in an emergency. Also, there was a public surgery a short distance away.

iii. Mr Diethart offered no explanation for his possession of 4 (four) jars with 50 devices for haemoglobin testing (microcuvettes). While he now asserts that the 4 (four) jars were already in his room (on the upper shelf of the cupboard) when he arrived and that he only found out about the presence of said items during the police search, the Panel note that he previously asserted the contrary before the Disciplinary Board of the ASF when stating the following: "*It is correct that I had a box with cuvettes for controlling haemoglobin values. It was in my travelling bag. I check haemoglobin every day. (…)*"[2]. Even though Mr Diethart now states that this declaration was a lie, the Panel finds this change of evidence highly suspicious: this is particularly the case when it is remembered that Mr Tauber, who occupied a room which Mr Diethart needed to cross to access his room, possessed a haemoglobinmeter, kept on his bedside table. The Panel has concluded that it cannot accept Mr Diethart's change of evidence. It finds that those items were in his possession as described in the Police Report. It follows that the Panel is satisfied that

[2] Testimony before the Disciplinary Board of the Austrian Ski Federation p. 6 of the English translation, Exhibit 60 produced by the Respondent.

Mr Diethart brought the microcuvettes with him to Pragelato so that he could check his haemoglobin values on M. Tauber's haemoglobinometer.

iv. M. Diethart also denied possessing a microperfuser on the basis that *"he did not know what a microperfuser was"*. This statement is strange since a microperfuser is simply a butterfly needle attached to an intravenous tube. Also, Dr Platzgummer, who was, as has been described above, Mr Diethart's attorney, explained in a letter addressed 19 March 2007 to the IOC Disciplinary Commission that the microperfuser "*had only been taken as a precaution, in case of an absolute emergency.*"[3] It would, therefore, seem that Mr Diethart then knew what a microperfuser is. During the hearing Mr Diethart told the Panel that he had been persuaded to accept that certain items were in his possession by Dr Platzgummer. The Panel is unable to accept that a legal representative acted in such a way. The Panel is, therefore, satisfied that Mr Diethart was in possession of a microperfuser, and knew what it was.

Accordingly, the Panel concludes that the explanation provided by Mr Diethart do not constitute an acceptable justification and finds that Mr Diethart was in possession of the items identified in the Police Report.

66. According to the Police Report, the following items were also found in the accommodation (via del Plan 5) of all four cross-country skier and their support staff:

- In possession of Mr Tauber: 1 (one) biotest device for haemoglobin testing (on the bedside table); 2 (two) jars with 18 and 11 medical devices for haemoglobin testing or microcuvettes (found in his travel bag); 14 medical devices including an open pack with used single use needles with traces of blood; ten closed boxes of single-use needles; two unopened packs of needles for "infusion or transfusion" (butterfly needles) and one unopened "infusion device pack" (one intravenous tube);

- In the possession of Mr Pinter and Mr Eder (who shared a room on the ground floor[4]): four used single-use syringes with traces of blood; five unopened boxes of single-use 20 ml and 10 ml syringes; one intravenous drip needle containing a small quantity of transparent liquid in possession of Mr Eder.

[3] Letter addressed by Dr Platzgummer to the IOC Disciplinary Commission on 19 March 2007, Exhibit 74 produced by the Respondent.
[4] Floor plans of the villa at Via del Plan 5 in Pragelato, Exhibit 105 produced by the Respondent

None of these Athletes contended that the Police Report was inaccurate.

67. Mr Diethart denies that he ever was aware that his fellow members of the Austrian cross-country relay team were monitoring and manipulating their haemoglobin values. Yet Mr Tauber has acknowledged that he kept his haemoglobinmeter on his bedside table[5] and Mr Diethart has not denied that he could only access his room through M. Tauber's room.

68. The Panel has concluded that Mr Diethart must at least have known that Mr Tauber's haemoglobinmeter was in the room. Indeed, if Mr Diethart did not know that a haemoglobinmeter was going to be available in the house, there is no conceivable explanation for him having, as the Panel has found that he did have, four jars of microcuvettes which were found in his room.

Accordingly, the Panel concludes that Mr Diethart was in constructive possession of the items found in Mr Tauber's room.

69. For these reasons, the Panel will hold that M. Diethart was in breach of Article 2.6.1 of the IOC ADR.

(B) VIOLATION OF ARTICLE 2.8 IOC ADR:

70. Article 2.8 of the IOC ADR provides as follows:

> "*The following constitute anti-doping rule violations:*
>
> *(…)*
>
> *2.8 Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation*."

71. The Panel is aware that Mr Diethart was not present in Salt Lake City in 2002 as he only participated in amateur races until 2003. The Panel also knows that Mr Diethart has only been a member of the Austrian National Ski Team since 2005 as a member of the Austrian Sprint Team - and not of the Austrian Relay Team, and that he never trained with the latter and only met its members on a few occasions before the Olympics.

[5] Appeal Brief of M. Tauber p. 11, Exhibit 110 produced by the Respondent

Further, the Panel believes that M. Diethart never really thought that he would indeed participate in the Olympic Games as he was *"the replacement of the replacement"* and was notified on very short notice about his nomination when both of the originally nominated athletes (Christian Hoffmann and Michael Botvinov) fell ill.

72. Notwithstanding those facts, the Panel finds it to be an extraordinary coincidence that Mr Diethart nonetheless managed, at such short notice, to bring along, like the other athletes accommodated in the same house, items which constitute by and of themselves a violation of Article 2.6.1 of the IOC ADR.

73. That coincidence becomes even more extraordinary and Mr Diethart's explanation even less acceptable when it is remembered that Mr Diethart expressly admitted to this Panel lying before the ASF Disciplinary Board on 10 March 2006 about the items in his possession, particularly in respect of the possession of the four jars of microcuvettes because, as he explained further to a question by the IOC, *"he had been asked to do so by his former attorney Dr Adolph Platzgummer"* who told him that the question of the possession of microcuvettes *"was not about doping"* and that he could, therefore, freely declare that they had been *"in his possession"*.

The Panel finds that statement bizarre.

If microcuvettes *"were not about doping"*, as Mr Diethart now asserts that he was told, then why was he pressured to lie about them? And why then did it take almost a year for the Athlete to change his point of view?

The Panel can not accept this account by Mr Diethart. Either he knew what the items were for and was assisting, encouraging, aiding or abetting an anti-doping violation, or he was covering up or otherwise complicit in such a violation. The best evidence for that conclusion is to be found in the lies that he has told to the various bodies investigating the events. If he was as innocent as he protests that he is, there has never been any reason to tell such lies.

74. For these reasons, the Panel will hold that M. Diethart also violated Article 2.8 of the IOC ADR.

H.3 PENALTY

75. Article 23.2.1 of the Olympic Charter provides that "*In the context of the Olympic Games, in the case of any violation of the World Anti-Doping Code, (…)"* measures and sanctions to be taken by the IOC Executive board against individual competitors and teams are as follows:

> *"temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the relevant infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit or any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; if such case the medals and diplomas won by him or it shall be returned to the IOC Executive Board."*

76. Similarly, Article 8 of the IOC ADR provides as follows:

> *"1. A violation of these Rules [IOC ADR] in connection with Doping Control automatically leads to Disqualification of the individual result obtained in that Competition (-i.e. with respect to which the Doping Control was carried out) with all resulting consequences, including forfeiture of any medals, points and prizes.*
>
> *2. (…). In addition, the IOC may declare the Athlete, as well as other Persons concerned, ineligible for editions of the Games of the Olympiad and the Olympic Winter Games subsequent to the Olympic Games."*

77. Specifically regarding the violation of Article 2.6.1 of the IOC ADR and WADA Code, Article 10.1 of the WADA Code provides as follows:

> *"Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Articles 2.1 (…), 2.2 (…) and 2.6 (Possession of Prohibited Substances and Methods) shall be:*
>
> *First violation: two (2) years ineligibility;*
>
> *Second violation: lifetime ineligibility.*
>
> *(…)"*

The establishment of a violation of Article 2.6.1 IOC ADR leads to an ineligibility of two (2) years for first violation. Article 10.5 of the WADA Code regarding the elimination or reduction of period of ineligibility based on exceptional circumstances is not applicable to Article 2.6.1 IOC ADR violations as "fault or negligence" is already required to establish such anti-doping rule.[6]

[6] See WADA Code foot note to article 10.5.1

78. Specifically regarding the violation of Article 2.8 of the IOC ADR and WADA Code, article 10.4.2 of the WADA Code provides as follows:

> *"For violation of (…) [Article] 2.8 (administration of Prohibited Substance or Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to a lifetime ineligibility. (…)"*

Indeed violations of Article 2.8 of the IOC ADR are considered particularly serious under the WADA Code.

The establishment of a violation of Article 2.8 of the IOC ADR leads to a period of ineligibility of four (4) years at least. However, in accordance with Article 10.5.2 applicable to violations of Article 2.8 of the IOC ADR, the period of ineligibility may be reduced to no less than one-half of the minimum period of ineligibility otherwise applicable if the athlete establishes in an individual case involving such violations that he bears no *"Significant Fault or Negligence"*[7].

79. The Panel notes that the WADA Code expressly provides for the possibility of life-time bans. Therefore, contrary to the allegation of Mr Diethart, the IOC Executive Board decision did not violate the principle of certainty.

80. Further, regarding the principle of proportionality, the WADA Code (and by extension the IOC ADR) has been drafted to reflect that principle, thereby relieving the need for an appellate body to apply this principle. In other words, the principle of proportionality is "built into" the WADA Code and the IOC ADR. Therefore, the Panel notes that the IOC Executive Board decision did not, of and by itself, violate the principle of proportionality.

81. The Panel must determine the appropriate sanction in application of Article 2.8 IOC ADR. To this end, the WADA Code may be used as a reference in order to establish the sanctions applicable to the different violations of antidoping regulations.

According to the WADA Code, possession of Prohibited Methods leads to a period of ineligibility of 2 years for first violation. Violation of Article 2.8 IOC ADR leads to a period of ineligibility of 4 years at the minimum and up to a life-time, but can be reduced to no less than one half if the athlete bears No Significant Fault or Negligence.

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[7] No Significant Fault or Negligence: The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence was not significant in relationship to the anti-doping rule violation.

82. The Panel is of the opinion that the penalty imposed upon Mr Diethart should reflect the fact that he clearly possessed Prohibited Methods without proper justification and clearly tried to cover up other athlete's behaviour, but should also reflect the fact that the endemic culture in the Austrian cross-country ski team appears to have been one in which such conduct was encouraged. Indeed, it may well be that the "entry fee" payable by an athlete wishing to be selected in that team was a willingness to participate and assist in such behaviour.

83. The Panel also takes into account that Mr Diethart was a late replacement in the team, had never trained with the Austrian Relay Team and was clearly pressured by higher "means". Having observed Mr Diethart during the hearing the Panel is satisfied that he knew what he was doing, but was equally satisfied that he was an assister and not a prime mover.

84. The majority of the Panel is of the view that a life ban for the Appellant to participate in any future Olympic Games in any capacity would be disproportionate considering the fault committed. However, the majority of the Panel considers that the Appellant, who was born in 1973, should not be given a chance to appear again in the Olympic Games as an active athlete and shall be prevented to participate in all Olympic Games up to and including the 2010 Olympic Games.

85. In light of the foregoing and in accordance with Article R57 of the Code, the period of ineligibility of the Appellant to participate in future Olympic Games shall be reduced to a 4 (four) years period starting on 25 April 2007 and the decision of the Executive Board of the IOC shall be modified accordingly.

I. COSTS

86. […]

ON THESE GROUNDS

The Court of Arbitration for Sport pronounces:

1. The appeal filed by Mr Diethart against the decision rendered on 25 April 2007 by the Executive Board of the IOC is partially upheld;

2. The decision rendered on 25 April 2007 by the Executive Board of the IOC is set aside as far as the period of ineligibility is concerned;

3. M. Diethart shall be ineligible to participate in any capacity in all Olympic Games up to and including the 2010 Olympic Games;

4. […]

Lausanne, 4 January 2008

THE COURT OF ARBITRATION FOR SPORT

Luc **Argand**

President of the Panel