



Arbitration CAS 98/213 Union Cycliste Internationale (UCI) / C. & Federazione Ciclistica Italiana (FCI), award of 24 February 1999

Panel: Mr. Stephan Netzle (Switzerland), President; Mr. Olivier Carrard (Switzerland); Mr. Luc Argand (Switzerland)

Cycling

Doping (testosterone)

Jurisdiction of CAS

Endogenous substance

- 1. By applying for a licence and by participating in races belonging to the international calendar of the UCI, athletes agree to comply with and to be bound by all provisions of the Regulations applying thereto, i.e. the UCI rules including the AER.**
- 2. For endogenous steroids, a sample is deemed positive if the T/E ratio is higher than 6, unless it can be proven that this ratio is due to physiological or pathological condition.**
- 3. Pursuant to the UCI Regulations, a sanction, in order to be effective, must be served during the period of normal activity. As a consequence, a suspension falling to a considerable extent within a “dead period”, which means a period where the athlete does usually not compete, cannot be regarded as an effective sanction.**

In April 1998, C. participated in the Tour of Trentino (“Giro del Trentino”), an international cycling event on the UCI's International Calendar for elite riders. After the stages of 29 and 30 April, C. was required to submit to a doping test pursuant to the rules of the Antidoping Examination Regulations (AER). Upon analysis of the A-sample, the “Laboratorio Antidoping” of the “Federazione Medico Sportiva Italiana” in Rome reported to the UCI Antidoping Commission in Lausanne on 22 May 1998, that besides a minor concentration of Noretiocholanolone and Norandrosterone, a Testosterone/Epitestosterone (T/E) ratio of 9.8 was identified in the urine specimen taken on 29 April 1998. The mentioned substances were also identified in the sample taken on 30 April 1998. However, considering the low concentrations identified the UCI decided not to consider the second sample positive.

On 26 May 1998, the UCI Antidoping Commission, acting in accordance with Article 59 AER, notified the FCI that C. tested positive.

In May 1998, C. participated in the Tour of Romandie (“Tour de Romandie”), another international cycling event on the UCI's International Calendar for elite riders. After the stages of 7, 8, 9 and 10

May, C. was required to submit to doping tests pursuant to the rules of the AER. The analysis of the A-samples was carried out by the “Laboratoire Suisse d'Analyse du Dopage” in Lausanne. Upon analysis, the mentioned institute reported to the UCI Antidoping Commission in Lausanne on 25 May, 1998, that three out of four samples were found to contain a T/E ratio higher than 6 and therefore needed to be regarded positive. In fact, the “Laboratoire Suisse d'Analyse du Dopage” identified T/E rates of 10.4, of 7.0 and of 8.1.

On 26 May 1998, the UCI Antidoping Commission reported the results to the Federazione Ciclistica Italiana (FCI) and pointed out that in the light of the excessive T/E ratio C. must be given the opportunity to undergo further endocrinological examination in order “to ascertain whether this high ratio is due to a physiological or pathological condition.” This procedure complies with the rules set down in the UCI's actual doping list (List Nr. 1/98; entry into effect: 1 April 1998). The UCI further stated:

“Should C. not wish to avail himself of this right, you will have to initiate the procedure provided for in the Articles 60 to 65 of the same Regulations. We would remind you that, under the said Articles, you have to keep us informed of all steps you take by sending us copies. Moreover, we draw your attention to the fact that - according to Article 82 para. 3 - if there is no final decision within the deadlines (see Article 82 para. 1), the defendant shall be automatically suspended until the date of the decision, unless an extension of the period is granted by the Antidoping Commission”.

The FCI received the above mentioned letter on 3 June 1998. On the same day, C.'s team reported to the UCI Antidoping Commission that C. had decided to submit to an endocrinological examination. The examination was carried out by the “Institut für Biochemie” at the “Deutsche Sportschule Köln” and took place between 29 June and 1 July 1998. The result of the examination was that C. did not have a naturally elevated T/E ratio. The report on the results stated:

“C. does not have a naturally elevated T/E ratio. All T/E ratios of the athlete during the endocrinological study are within the population based reference range of male athletes. The T/E ratios of the samples of the athlete, collected during the Tour de Romandie are both outside of his individual reference range and the population based reference range for male athletes”.

The report therefore recommended to consider the samples B-8098 and B-8126 from the “Tour de Romandie” positive for the application of steroids.

On 13 July 1998, the UCI Antidoping Commission informed the FCI about the results of the endocrinological examination and asked the FCI to proceed according to the Art. 62 ff. AER.

On 17 July 1998, C. requested a counter-analysis. On 28 July 1998, the UCI Antidoping Commission informed C. that the analysis of the B-samples would take place on 3 August 1998 at the “Laboratoire Suisse d'Analyse du Dopage” in Lausanne.

Two out of four samples have been subject to counter-analysis (sample A-8578 resp. sample B-8632; sample A-7815 resp. sample B-8159). One sample was originally tested negative (sample A-8503 resp. sample B-8098) another sample was sent to the “Deutsche Sportschule Köln” where it was used for the endocrinological examination (sample A-8716 resp. sample B-8126).

The results of the counter-analysis were positive. On 7 August 1998, the UCI Antidoping Commission notified the FCI the results and confirmed the violation of the AER. Moreover the UCI Antidoping Commission asked the FCI to implement proceedings according to Art. 69 ff. AER.

Subsequently, C.'s case was brought before the competent body of the FCI, the "Commissione Disciplinare" of the "Lega Ciclismo Professionistico" which rendered its verdict on 31 August 1998. On 3 September 1998, the FCI sent the verdict to the UCI. The "Commissione Disciplinare" sentenced C. to a suspension of six months and a fine of CHF 2'000.--. However, the "Commissione Disciplinare" did not specify the starting or ending date of the suspension. On 10 September 1998, the verdict was published in "Tutto Ciclismo", the official journal of the FCI.

In its Statement of Appeal dated 2 October 1998, the UCI pleaded that the sanction imposed upon C. was not adequate. Consequently, the UCI requested the CAS to impose a more decisive sanction both with regard to the suspension and to the fine.

On 12 October 1998, the UCI substantiated its Statement of Appeal. With regard to the contents the UCI challenged the fact that the decision of the "Commissione Disciplinare" did not impose a disqualification and requested the disqualification of C. from both the Giro del Trentino 1998 and the Tour de Romandie 1998. Besides, the UCI requested a suspension of C., starting from 9 September 1998, and lasting until 1 July 1999. Finally the UCI pleaded for an increase of the fine and required to hold C. liable for costs.

On 9 November 1998, C. submitted his Statement of Defence. At the same time, C. "cross-appealed" against the decision taken by the "Commissione Disciplinare" of the "Lega Ciclismo Professionistico" on 31 August 1998.

C. asked the CAS "to reform the decision" and "to absolve C. from any challenge". He requested to reduce the suspension and to grant him probation. Moreover, the CAS was asked to fix the starting date of the suspension on 16 August 1998. The costs, finally, were to be paid either by the UCI or the FCI.

On 4 December 1998, the UCI submitted its "answer to cross appeal". The UCI basically contested the admissibility of a "cross appeal" and denied the existence of any grounds for probation.

The hearing before the Panel took place in Lausanne on 7 January 1999. All parties were present with the exception of the FCI.

LAW

1. The competence of the CAS is provided for in Article 81 AER, which is part of the Cycling Regulations (CR). Moreover, the parties confirmed the competence of the CAS by signing the Order of Procedure.
2. According to Article 1 of the Preliminary Provisions of the CR, the UCI rules shall be applicable to all cycling races. National Federations may provide special Regulations applicable only to races of their National Calendar (Article 1 para. 2). Article 5 of the Preliminary Provisions further stipulates that participation in a cycling race implies acceptance of all provisions of the regulations applying thereto.
3. According to Article 1.1.001 of the CR, the licence shall be an identity document confirming the commitment of its holder to respecting the statutes and regulations that authorize him to participate in cycling events (likewise, Article 1.1.004 as well as Article 1.1.023). Part XIV of the CR provides for Antidoping Examination Regulations.
4. C. is a cyclist of the elite category licensed by the FCI in accordance with the CR. Consequently, by applying for a licence and by participating in races belonging to the International Calendar, C. agreed to comply with and to be bound by all provisions of the Regulations applying thereto, i.e. the UCI rules including the AER.
5. Moreover, the parties signed the Order of Procedure and thus confirmed the competence of the CAS. At the same time the parties agreed to the application of the Code.
6. The UCI's appeal has been lodged and registered within the time period and in conformity with the provisions of the UCI's AER (Articles 84 and 86 AER). It is therefore admissible with regard to the form.
7. Pursuant to Article 84 AER, both the UCI and C. have the right to enter an appeal against the decision of the National Federation by taking the matter to arbitration before the CAS.
8. According to Article 86 AER, the statement of appeal must be lodged with the CAS within one month from reception of the decision. The UCI received notice of the verdict on 3 September 1998. The UCI's statement of appeal dated 2 October 1998. Accordingly, the time limit set forth in Article 86 AER was kept.
9. The UCI's Appeal brief dated 12 October 1998, was received within the 10-day period set out in Rule R51 of the Code of Sports-Related Arbitration (hereinafter Code). C.'s response and cross appeal dated 9 November 1998, and was thus lodged within the time limit provided for in Rule R55 of the Code.
10. On 9 November 1998, C. submitted his Statement of Defence. At the same time C. "cross-appealed" against the verdict of the FCI. The UCI contested the admissibility of a cross

appeal. The Panel decided to hear the case in its entirety and not to render a separate decision on the issue of the admissibility.

The Panel emphasizes that the parties by signing the Order of Procedure agreed to the application of the Code, which provides in Rule R57 that the Panel shall have full power to review the facts and the law. Similarly, Article 88 AER states that the CAS has full power to review the case: “*the CAS shall take cognizance of the case in its entirety (...)*”.

Since the CAS has full power to review, the Panel may hear the case in its entirety, regardless whether the applicable rules do provide for a “cross appeal”. Thus the issue of the admissibility of a “cross appeal” – which is not provided neither in the UCI regulations nor in the Code – is redundant for the assessment of the present case.

11. Pursuant to Article 2 AER, the use of substances and methods stated in the UCI's doping list shall be prohibited. C. tested positive for the use of substances, which are enlisted in the UCI's actual List of Categories of Doping Substances and Methods (List Nr. 1/98; entry into effect: 1 April 1998).
12. Regarding the doping tests submitted during the Giro del Trentino, the Panel notices that the analysis of the A-sample taken on 29 April 1998 revealed besides a minor concentration of Noretiocholanolone and Norandrosterone, a T/E ratio of 9.8. However, the Panel has to take into consideration that the accuracy of these findings is questionable for procedural reasons. As a matter of fact, C. asked to counter-analyse the positive sample. The result of the B-sample was reported to the UCI only on 7 October 1998, and identified a T/E ratio of 8.2. Moreover, the analysis was carried out without informing – and consequently in absence of – C. Therefore the Panel decided not to take the Giro del Trentino-sample into consideration. Holding that the sample taken at the Giro del Trentino might, for procedural reasons not serve as a valid basis for any sanction, the Panel considers the disqualification of C. from the Giro del Trentino not to be justified.
13. Regarding the doping tests submitted during the Tour de Romandie, the Panel notes that the analysis of the A-sample taken on 7 May 1998 revealed a T/E ratio of 10.4. The analysis of the A-sample taken on 8 May 1998 revealed a T/E ratio of 7.0. The analysis of the A-sample taken on 10 May 1998, revealed a T/E ratio and of 8.1. C. asked to counter-analyse the mentioned A-samples. As stated before, two out of four samples have been subject to counter-analysis. The results of the testing of the B-samples were reported the UCI on 6 August 1998. The B-samples confirmed the results of the A-samples.
14. For endogenous steroids, a sample is deemed positive if the T/E ratio is higher than 6, unless it can be proven that this ratio is due to a physiological or pathological condition. In the case of C., at least two samples clearly identified a T/E ratio beyond 6. Moreover, the endocrinological examination confirmed that C. did not have a naturally elevated T/E ratio. Therefore, it is established that the T/E ratio was not due to a natural physiological or pathological condition. As a consequence the “Laboratoire Suisse d'Analyse du Dopage”

recommended the samples to be declared positive for the application of steroids. The Panel sees no grounds upon which the accuracy of these findings is subject to challenge.

15. The Panel – with the approval of the UCI – decided to consider the different positive results as one single offence. The Panel thus holds that the analysis of the A-samples, confirmed by the analysis of the B-samples, revealed the presence of prohibited substances, which as such constitutes an infringement of the AER.
16. With regard to the sanction, the Panel only partially agreed and therefore modifies the decision of the FCI.

The UCI – relying on Article 94 para. 2 AER – asked for an effective sanction. Article 94 para. 2 states:

“The suspension shall be effective in all matters sporting. It shall be served during the period of normal activity of the person concerned. For that purpose, the suspension may be spread over various periods of the year.”

The said Article thus explicitly states that a sanction, in order to be effective, must be served during the period of normal activity. As a consequence, a suspension falling to a considerable extent within a “dead period”, which means a period where the athlete does usually not compete, cannot be regarded as an effective sanction.

In the present case, C. denied the existence of a “dead period”, establishing that there were several races such as the Tour de Chine or the Asian Game taking place during the winter period. C. further asserted that he could also participate in cycle-cross races or indoor competitions. However, C. failed to convince the Panel that he has ever participated or intended to participate to races between mid November and mid February. Therefore the Panel decided that, considering the circumstances of the case, the mere possibility to participate in races did not hinder the assumption of the existence of a “dead period”. The Panel held that the suspension imposed by the FCI did therefore only partially fall within period of C.’s normal activity.

Considering the fact that C. was suspended by the FCI for the minimum duration of six months, and that the suspension – starting on 9 September 1998, and ending on 8 March 1999 – was falling to a considerable extent into the “dead period”, the sanction appears to be inadequate. The FCI further renounced to split the suspension, as provided for in the last sentence of Article 94 para. 2 AER.

Viewing the circumstances of the case, the Panel concludes that the suspension was effective only during three months, which is less than the minimum sanction provided by the AER. Bearing in mind the necessity of fighting effectively against doping, it is fundamental that the sanctions are effective. Consequently, a suspension falling to a considerable extent into a “dead period” cannot be considered to constitute an effective sanction. In order to assure that the suspension covers at least six months of C.’s normal activity, the Panel thus extended the duration of the suspension to nine months.

The Panel notices, however, that the discussion about the dead period is a consequence of the particular sanction system of the UCI, which provides for a minimal duration of suspension of less than one year. The discussion could be avoided if the UCI would harmonize its sanctions with other sport federations and provide for minimum suspension of at least twelve months.

17. With regard to the starting date of the suspension, C. brought forward that the suspension began – in accordance with Article 82 para. 1 and 3 AER – automatically on 16 August 1998.

The Panel does not agree. Article 82 AER establishes that the proceedings before the competent body of the National Federation of the rider or licence-holder shall have ended within one month of reception of the communication of the positive result. Furthermore, Article 82 para. 2 AER states:

“The deadlines shall be extended by the amount of time that elapses between the date on which the request for the counter-analysis is sent to the laboratory and the date on which the laboratory issues the results of the counter-analysis”.

Accordingly, it is necessary to determine both the exact duration of the proceedings and the amount of time that elapses between the date of the request and the issue of the results of the counter-analysis. The Panel further decided to construe the provision extensively: the provision is meant to extend the one-month period not only by the amount of time that elapses during the counter-analysis, but also by the amount of time that elapses during the endocrinological examination. The national Federation is not required to initiate proceedings before the final results of the examination are established. Therefore the one-month period shall be extended whenever further examination is provided for in the AER. Both the right to ask for a counter-analysis and the request for an endocrinological examination is provided by the AER.

On 26 May 1998, the UCI informed the FCI about the positive results of the testing. The FCI received the communication on 3 June 1998. The one-month period thus theoretically started on 3 June 1998. The same day, C. asked to submit an endocrinological examination. The result of this examination was communicated to the UCI on 10 July 1998. On 13 July 1998 the UCI informed the FCI about the result of the examination. On 17 August 1998, C. requested to counter-analyse the positive samples. The results of the counter-analysis were communicated to the UCI on 6 August 1998.

Consequently, the Panel decided to set the real starting date of the one-month period on 6 August 1998, which is the day when the results of the counter-analysis were communicated to the UCI. Further the Panel decided to accept – in favour of the athlete – the incurring of an automatic suspension on 6 September 1998.

However, the Panel considers it important to point to the fact that such understanding of Article 82 para. 3 AER could theoretically lead to a suspension even before the athlete was granted the right to be heard (see CAS 97/169, M. c/ FCI, in *Digest of CAS Awards 1986-1998*,

Staempfli Editions, Berne 1998, p. 539). As a consequence, the Panel recommends to review the wording of the provision.

18. For all these reasons the Panel holds that a disqualification from the Tour de Romandie, a suspension for nine months, from 6 September 1998 to 5 June 1999, and a fine of CHF 2'000.-- are adequate sanctions in this particular case.

The Court of Arbitration for Sport hereby rules:

1. The appeal by the UCI is partially upheld.
2. The decision of the Federazione Ciclistica Italiana (FCI) dated 31 August 1998 is partially modified:
 - a. The disqualification from the "Giro del Trentino" 1998 is cancelled.
 - b. The rider C. is sanctioned as follows:
 - disqualification from the "Tour de Romandie" 1998;
 - suspension for nine months from 6 September 1998 to 5 June 1999;
 - fine of CHF 2'000.-- (two thousand Swiss francs).

(...)