UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 01.2018

UCI v. Mr. André Cardoso

Single Judge:

Mr. Andreas Zagklis (Greece)

Aigle, 15 November 2018

INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (hereinafter "the Tribunal" or "UCI ADT") in application of the UCI Anti-Doping Tribunal Procedural Rules (hereinafter "the ADT Procedural Rules") and in relation to an alleged anti-doping rule violation committed by Mr. André Cardoso (hereinafter "the Rider").

I. FACTUAL BACKGROUND

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

3. The Rider is a 34-year-old Portuguese professional cyclist who is affiliated with the Andorran Cycling Federation (Federació Andorrana De Ciclisme - "FAC"). He turned professional in 2006. In 2017 he was under contract with the Trek-Segafredo Team and was a License-Holder within the meaning of the UCI Anti-Doping Rules (hereinafter referred to as "the UCI ADR"), which is relevant for these proceedings.

4. On 18 June 2017 in Gondomar, Portugal, the Rider was tested out-of-competition. The doping control was carried out by a Doping Control Officer on behalf of the UCI. The Rider confirmed on the Doping Control Form that the urine, blood and Athlete Biological Passport (ABP) samples had been taken in accordance with the applicable regulations and indicated that he had used "multivitamins" over the seven days preceding the control.

5. The urine sample provided by the Rider was then analyzed in the WADA-accredited Laboratory in Lausanne, Switzerland (hereinafter the "Laboratory"). On 27 June 2017, the Laboratory reported the presence of rhEPO (Recombinant Erythropoietin) in the Rider's A-sample (the Adverse Analytical Finding - "AAF"). Erythropoietins (EPO) and agents affecting erythropoiesis are prohibited substances under Section S2 "Peptide Hormones, Growth Factors, Related Substances and Mimetics" of the 2017 (and 2018) Prohibited List which is maintained by the World Anti-Doping Agency (hereinafter "the WADA") and adopted by the UCI. Recombinant Erythropoietin is not a threshold substance and is prohibited both in- and out-of-competition.

6. By letter dated 27 June 2017, UCI informed the Rider of the analysis results. In the same communication, UCI informed the Rider of his right to request the opening and analysis of the B-sample, as well as to attend such procedure. By the same letter, UCI informed the Rider that under article 7.9.1 of the UCI ADR, the presence of rhEPO, which is not a Specified Substance, requires the UCI to impose a provisional suspension on him from the date of that notification. However, UCI pointed out that the Rider had the right to request the lifting of the provisional suspension under article 7.9.5 of the UCI ADR, providing the reasons justifying his request.

7. On 27 June 2017, the Rider requested by email the A-sample documentation package from UCI as well as the opening and analysis of his B-sample. The Rider also asked UCI whether his blood sample was tested for EPO.

8. On 28 June 2017, UCI confirmed receipt of the Rider's requests and informed him that no analysis for erythropoietin stimulating agents (incl. recombinant EPOs and analogues) was performed on his blood sample.

9. On 28 June 2017, Mr. Joao M. Correia, the Rider's Agent (hereinafter "the Agent") informed UCI by email that he would be present with the Rider at the opening of the B-sample and requested whether the Rider's blood sample can be tested for EPO, as well as an estimate on the costs to be incurred with respect to the B-sample analysis.

10. On 29 June 2017, UCI wrote to the Rider and his Agent informing them of two possible dates for the B-sample analysis, namely on 3 or 4 July 2017, and requesting them to confirm which one they preferred and whether they would attend only the B-sample opening or the full 3-day analysis process. UCI also stated that the B-sample analysis will be conducted on the Rider's urine B-sample only, which is the only sample which can confirm the presence of the prohibited substance found in the Rider's urine A-sample, as required to establish the anti-doping rule violation of article 2.1 of the UCI ADR. Lastly, UCI informed the Rider and his Agent of the laboratory costs for the B-sample analysis and for the copies of the documentation packages.

11. On 29 June 2017, the Agent asked UCI on the exact 3-day analysis process schedule and enquired on the possibility of providing later dates due to the short notice for the dates proposed by the Laboratory, stating at the same time the Rider's wish to proceed with the B-sample analysis as soon as possible.

12. On 29 June 2017, UCI informed the Agent that the next available dates for the Laboratory would be after 25 July 2017. By a second email on the same day, UCI informed the Agent of the Laboratory schedule for the 3-day analysis of the B-sample.

13. On 29 June 2017, the Agent informed UCI by email that the Rider's medical experts were not available on the proposed analysis dates and, therefore, requested that the analysis of the B-sample be conducted on 25 July 2017 or as soon as possible after that.

14. On 30 June 2017, UCI informed the Agent that the next available date for the B-sample analysis was on 25 July 2017 and, on the same day, the Rider confirmed his and the Agent's availability for said date.

15. On 18 July 2017, the Agent informed UCI that Dr. Douwe de Boer, Rider's medical expert, would also attend the B-sample analysis.

16. On 25 July 2017, the opening and analysis of the B-sample took place at the Laboratory in the presence of the Rider, his Agent and his medical expert, Dr. de Boer.

17. On 8 August 2017, the Laboratory informed UCI of the Rider's B-sample analysis test report, which stated that *"The result of the analysis of the urine sample coded B2017-08064 (B4121328) is doubtful but inconclusive regarding the presence of recombinant EPO"*.

18. On 8 August 2017, the Laboratory also issued a report captioned *"Internal assessment of the A- and B-analyses of sample 4121328"*, aiming to *"summarize the stages and conclusions of the internal assessment which was initiated to target any internal or external factor(s) which could have contributed to the observed differences between A- and B-sample analyses"* (hereinafter "Internal Assessment Report"). The report, having analysed the materials and methods used for analysis and the staff involved concluded, *inter alia*, that

"It is highly unlikely that the deviation between the results of A- and B-sample 4121328 is connected to the selection of methodology or general performance of the method P07-03-01.

(…)

It is unlikely that the deviation between the results of A- and B-sample 4121328 is connected to the training, experience or differences in performance between individual technical staff members involved in the confirmation procedure.

(…)

Regarding materials and regents, immunopurification can be identified as the highest risk for the repeatability of the method. Incomplete yield could theoretically result into lower sensitivity of the purification and to the partial loss of EPO-isoforms in the sample.

(…)

It is highly unlikely that the deviation between the results of A- and B-sample 4121328 is due to a swap of the sample bottles or aliquots within the laboratory processes.

(…)

It is unlikely that the deviation between the results of A- and B-sample 4121328 is due to differences in the performance of the analytical batches.

(…)

Theoretically, the consistence of urine in A- and B-sample containers may differ, in case if the primary sample is not mixed well before division to containers. According to our observations, there was no visual difference between the A- and B-sample 4121328. For urine, -20 °C is a eutectic temperature i.e., urine is not entirely frozen but contains liquid regions with high concentration of urea and other solutes[3]. In aqueous solutions urea decomposes leading to formation of cyanate ions[4], which readily react with various functional groups on proteins leading to carbamyl derivatives[5-6]. This can cause irreversible alterations in the tertiary structure of the protein[7-8]. In anti-doping domain this has been described by Lempiäinen et al. who have proposed either +4°C or -80 °C storage as better alternative to -20 °C for the protection of hCG in urine samples. This result has been taken into account also in the WADA guideline for the reporting and management of hCG-findings[9].

Basic pH measured in the sample may refer to bacterial contamination in the Sample 4121328. Bacteria can contain neuraminidase (or sialidase) activity[10]. Sialidases are able to hydrolyse sialic acid on glycoproteins, and rEPO is distinguished from endogenous EPO based on the sialic acid content[11]. Indeed, potential contamination by bacterial sialidase could result to the disappearance of specific "smear" to recombinant EPO. In addition to these enzymes, presence of slow-acting enzymes is not excluded in the sample, as no further experiments are carried out to discover presence of proteases in the sample.

Conclusion: In this assessment we are not in a position to verify the appropriate homogenization of the urine sample, which has taken place outside the laboratory. Upon reception, no remarks were made about differences in colour or turbidity between A- and B-sample 4121328, so we should assume that the total urine fraction was well homogenized prior to distribution between the A- and B-containers. Taking into account the SG- and pH-properties of the A- and B-sample 4121328, they are at the higher limit of the reference ranges, high SG value indicating an excess of salts, and alkaline pH being a potential indicator of microbial activity. The time difference between the confirmation procedures of A- and B-sample 4121328 is 28 days, during which the B-sample has been stored in -20 °C. The contribution of time difference is only speculative, but according to scientific publications, even in frozen conditions, a possibility of protein (e.g. EPO) degradation cannot be completely excluded. The degradation may result from the enzyme activity or physical properties (e.g. high salt content) of the sample and could lead to minor differences between samples. Taking into account these various potential confounding factors to the sample integrity and degradation of EPO seems highly likely phenomenon as a source of the inconsistence in analytical result between A- and B-sample 4121328.

(…)

It is highly unlike that the deviation between the results of A- and B-sample 4121328 is due to differing opinions between individual experts.

(…)"

19. As a general conclusion, the Internal Assessment Report determined that *"It is our current opinion that immunopurification and/or degradation of EPO are highly likely phenomena as a source of the inconsistence in analytical result between A- and B-sample 4121328"*.

20. On 9 August 2017, UCI informed the Rider by registered letter that the results of the B-sample analysis were reported by the Laboratory as an Atypical Finding. The UCI also enclosed for the Rider's information the B-sample Analysis Report, the Documentation Package of the A- and the B-sample analysis, as well as the Internal Assessment Report. In the same correspondence, UCI asserted that the Rider had committed an Anti-Doping Rule Violation of Article 2.2 of the UCI ADR (Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method) and invited the latter to provide his explanation about the asserted violation within the next 14 days. The Rider was also reminded of his right to request the lifting of his provisional suspension before the UCI Disciplinary Commission in accordance with article 7.9.5.4 of the UCI ADR.

21. On 23 August 2017, the Rider's counsel wrote a letter to the UCI stating that a scientific opinion by Dr. de Boer dated 15 August 2017 had shown that the AAF "could well be of endogenous origin". Dr. de Boer's expert opinion (part 2), enclosed therein, indicated that metabolism disorders, such as a mild congenital or a transient CDG syndrome, could explain the atypical result of the B-sample analysis, particularly when combined with the Rider's chronic alcohol consumption and the method of sample analysis used by the Laboratory. In this respect, the Rider requested the UCI to provide him with: (i) an overview of all urine and blood tests ever performed on him; (ii) all the raw data for EPOETINS of all the urine samples of his ever analysed; (iii) all testing results for ethylglucuronide of the of his urine samples; (iv) all concentration results for endogenous steroids of all the urine samples of his ever analysed; (v) the information contained in the Rider's biological blood passport. The Rider also requested an extension of 14 days to explain the asserted violation of the UCI ADR.

22. On 23 August 2017, the Rider also filed with the UCI Disciplinary Commission a Request to lift the provisional suspension pursuant to Article 7.9.5.3 of the UCI ADR and submitted parts 1 and 2 of the opinion by Dr. de Boer dated 17 and 15 August 2017 respectively (hereinafter "the First de Boer Opinion"). In addition to what has been stated above with respect to its part 2, part 1 of the First de Boer Opinion indicated that no guarantee can be given by persons independent from WADA and the Laboratory that the processing of aliquots of the A-sample had been performed adequately, as opposed to the B-sample processing which was conducted in the presence of the Rider, his Agent and his medical expert. In light of the above, the Rider's expert suggested that "only the results of the B-sample analysis seem to be adequate and the urine should be labelled to be atypical". The Rider further asserts that proving an AAF through the analysis of urine samples is conclusively regulated under Article 2.1 of the UCI ADR and that, on the basis of CAS jurisprudence, it is not possible to base an AAF on the result of the analysis of an A-sample only.

23. On 8 September 2017, UCI submitted its written observations opposing the Rider's Request to lift his provisional suspension. UCI stated in particular that for the asserted ADRV under Article 2.2 of the UCI ADR (and not Article 2.1) it has not relied on the A-sample analysis alone, as suggested by the Rider, but has sought scientific confirmation both that the A-sample reliably identified EPO and that there was a satisfactory explanation for the lack of confirmation in the B-sample. Moreover, it asserted that CAS jurisprudence does not always annul the A-sample analysis result, even in cases where only procedural matters invalidate the B-sample analysis. In addition, UCI filed a joint expert opinion by Dr. Günter Gmeiner and Dr. Christian Reichel of the WADA accredited laboratory in Seibersdorf, Austria (hereinafter "the First Seibersdorf

Opinion"), which reviewed the A- and B-sample analysis as well as the Laboratory's Internal Assessment Report and concluded that

> *"From the documentation provided the quality of the analytical data is excellent, indicating well trained staff and suitable equipment, no deviations from accepted standards are visible, the analytical method complies with the WADA requirements, internal chain of custody is traceable and results interpretation of the A-sample is in agreement of accepted scientific experience.*
> *Consequently the conclusion of the laboratory is shared by the experts of this report. Especially the elevated pH as a consequence of possible microbial degradation is regarded as the main contributor to analyte lability in the sample.*
> *As already indicated above, this assumption is strengthened by the decrease in band intensity from A- to B-sample confirmation analysis."*

24. On 22 September 2017, the Rider filed his comments on the UCI observations repeating his requests for disclosure of several data from his past testing results; stating that UCI cannot argue that sample degradation is the cause of the B-sample inconclusive finding as the Rider was available for its analysis on the third date proposed by the Laboratory; and arguing that CAS jurisprudence confirms the necessity of the B-sample analysis and anything else violates the Rider's right to be heard.

25. On 27 September 2017, UCI sent an email to the Rider confirming that his time limit to explain the asserted violation had been extended until 11 October 2017 and also noted in relation to his disclosure request that the relevant WADA Technical Documents do not provide for the disclosure of the requested information. In fact, WADA Technical Document TD2017LDOC (on Laboratory Documentation Packages) expressly states that "Laboratories are not required to produce a Laboratory Documentation Package for a Sample in which no Prohibited Substance or Prohibited Method or their Metabolite(s) or Marker(s) was detected in the test menu". In addition, UCI requested the Rider to substantiate his request in further detail, by stating in particular, for each of the requested items, the precise fact that the Rider is seeking to prove and whether such fact cannot reasonably be established by any other means.

26. On 2 October 2017, UCI filed a submission with the Disciplinary Commission in response to the Rider's comments of 22 September 2017.

27. On 10 October 2017, the Rider requested an additional extension of his time limit to explain the asserted violation due to his counsel's extremely busy schedule.

28. On 12 October 2017, the UCI Disciplinary Commission rejected the Rider's Request to lift his provisional suspension.

29. On 16 October 2017, the Rider provided further substantiation of his disclosure request as solicited by UCI.

30. On 23 October 2017, the Rider requested an additional extension of 14 days to explain the asserted violation as the information requested by him through his disclosure request was not yet made available to him. UCI agreed to extend said time limit until 8 November 2017.

31. On 1 November 2017, the Rider requested another extension of 14 additional days after receipt of the UCI's decision on providing the requested deadline and, in the alternative, an extension of 14 days until 22 November 2017, due to the lack of the required information.

32. On 6 November 2017, UCI replied to the Rider's disclosure request as follows:

"(…) we wish to note that all of your requests for information are grounded on your client's alleged fundamental need to "evaluate [and prove the] theory" that "one of the many reasons why the A Sample was considered as an adverse analytical finding is the possibility of [Mr. Cardoso's] chronic alcohol consumption. Such alcohol consumption may have caused endogenously the adverse analytical finding. This needs to be excluded by evaluating whether my client has a mild congenital or transient disorder of glycosylation (CDG) which could have caused the endogenous EPOETINS".

In view of this fundamental premise, in considering your requests for information the UCI has made enquiries on the possibility that chronic alcohol abuse and/or CDG could have impacted on the glycosylation or transformation of endogenous EPO to exogenous synthetic EPO. In this respect the UCI understands that even if chronic alcohol abuse or CDG were to be established, this could not have had the effect that Dr. de Boer is alleging. i.e. it could not have caused the adverse analytical finding (see, for example Kristiansson, B., Stibler, H. and Wide, L. (1995), Gonadal function and glycoprotein hormones in the carbohydrate-deficient glycoprotein (CDG) syndrome. Acta Pædiatrica, 84: 655–659.)

Accordingly, the UCI responds to your requests for information as follows:

- *With respect to the request for an overview of all urine and blood tests ever performed on Mr. Cardoso, the UCI undertook enquiries and responds to this request in good faith and in the interests of transparency. With that said, to the best of the UCI's knowledge the information contained in ADAMS is complete, aside from one blood test which the UCI understands was carried out by Autoridade Antidopagem de Portugal (ADoP) on 20 September 2012 and not entered into ADAMS. The UCI confirms that it has made enquiries with the Portuguese Anti-Doping Organization in this respect and has not identified any other missing data from Mr. Cardoso's ADAMS. Nothing in the UCI's approach should be interpreted as an acknowledgment of the relevance of this information to the case at hand.*
- *The remainder of your requests are all grounded on the fundamental assumption that chronic alcohol use or CDG could have caused Mr. Cardoso's Adverse Analytical Finding (AAF). As the UCI understands that this assumption is incorrect, the UCI does not see any basis to disclose the information and, in particular, no legitimate, let alone overriding, interest of your client to have access to the requested information.*

As such, the UCI hereby invites your client to provide his explanations for the AAF by no later than 20 November 2017 following which the UCI will consider the explanations and whether an acceptance of consequences should be proposed. From there, the case can move forward expeditiously, as requested by the UCI Disciplinary Commission in its decision on maintaining Mr. Cardoso's provisional suspension."

33. On 20 November 2017, the Rider filed his Explanations, in which he disputed the ADRV alleged by UCI and argued that
    (i) according to Article 8 UCI ADR, the case should have been referred directly to the UCI ADT as soon as UCI had asserted an ADRV;
    (ii) the establishment of an AAF through the analysis of urine samples is conclusively regulated in Article 2.1 UCI ADR;
    (iii) there is a number of possibilities that could have led to the rhEPO finding in the A-sample and the two parts of the First de Boer Opinion support the accidental swap scenario (urine samples analysed together with the Rider's alleged A-sample were accidentally swapped) or the endogenous production scenario;
    (iv) the study submitted by UCI to disprove the effects of chronic alcohol abuse or CDG as to the AAF in the Rider's sample is not conclusive as it does not cover all CDG cases, which is supported by a second opinion by Dr. de Boer ("the Second de Boer Opinion")'

(v) the AAF could also be explained through microbial activity, particularly in view of the extremely warm weather in Portugal during the time of the samples' collection and transportation;
(vi) UCI is responsible for the Rider's B-sample degradation, as the dates for the B-sample opening were provided to UCI by the Laboratory;
(vii) the Internal Assessment Report cannot be trusted as the Laboratory is in conflict of interest;
(viii) an AAF in the B-sample analysis too is required by CAS jurisprudence; and
(ix) in view of the above, the Rider repeated his disclosure request and argued that he is entitled to compensation for all the damages suffered.

34. On 4 December 2017, UCI responded to the Rider's allegation that the case should have been referred directly to the UCI ADT and sent him a letter which stated *inter alia* that "*Contrary to the above, the UCI has adopted exactly the same process to deal with Mr. Cardoso's case as it does in every case. Specifically, and according to Article 2 of the UCI Anti-Doping Tribunal (ADT) procedural rules, a Petition can only be filed with the ADT once a rider has been offered (and has rejected) an Acceptance of Consequences (AoC)*" and indicated that the Rider had filed for the first time with his explanations a number of documents, which were being reviewed by experts engaged by the UCI. However, UCI offered to the Rider to waive this stage of the results management (*i.e.* the AoC process) and proceed directly to the UCI ADT for a decision.

35. On 7 December 2017, the Rider confirmed that he agreed that his explanations were reviewed first by UCI.

36. On 15 December 2017, the Rider sent a letter to UCI protesting unequal treatment to Chris Froome who was not provisionally suspended even though his A-sample analysis was fully confirmed by his B-sample analysis and requesting that the provisional suspension imposed on the Rider be lifted.

37. On 19 December 2017, UCI replied to the Rider stating that there is no mandatory provisional suspension for cases concerning Specified Substances (as was the AAF of the above-mentioned athlete), which is obviously not the case for Prohibited non-Specified Substances such as EPO. UCI also reminded the Rider of its offer to proceed directly to the UCI ADT and invited him to file any request to lift the provisional suspension with the UCI Disciplinary Commission.

38. On 21 December 2017, UCI informed the Rider that there is a reference at paragraph 35 of the Rider's explanations to an Annex which was not provided to the UCI.

39. On 8 January 2018, the Rider provided to UCI an updated version of the Second de Boer Opinion which contained the missing Annex.

40. On 9 January 2018, the Rider confirmed that he does not wish to have his case directly transferred to the UCI ADT.

41. On 16 January 2018, UCI sent to the Rider an Acceptance of Consequences ("AoC") proposal according to Article 8.4 of the UCI ADR. UCI enclosed three further scientific reports supporting the terms of the proposed AoC, in order for the Rider to make an informed decision: a report by Dr. Tila Kuuranne rejecting the Rider's accidental swap scenario ("the Second Laboratory Report"), a second report by Dr. Gmeiner and Dr. Reichel addressing the Rider's allegation that microbial degradation could have caused his AAF, the reasons behind the lack of confirmation of the presence of rhEPO in the Rider's B-sample and why his blood serum sample had not tested positive for rhEPO ("the Second Seibersdorf Opinion") and a report by Prof. Hugues

Henry and Dr. Martial Saugy which comprehensively addressed Dr. de Boer's developments on possible metabolism disorders of the Rider and ruled them out as a possible cause for his positive A-sample ("the Henry/Saugy Report").

42. On 30 January 2018, the Rider rejected the AoC.

II. PROCEDURE BEFORE THE TRIBUNAL

43. On 15 March 2018, UCI initiated these proceedings by filing a petition together with exhibits (hereinafter "the Petition") before the Tribunal. In its Petition, UCI requests the Tribunal to issue a judgment:

- *Declaring that Mr. Cardoso has committed an Anti-Doping Rule Violation.*
- *Imposing on Mr. Cardoso a period of ineligibility of four years.*
- *Disqualifying all the results obtained by Mr. Cardoso from 18 June 2017 until the commencement of his provisional suspension.*
- *Condemning Mr. Cardoso to pay a fine of* [redacted].
- *Condemning Mr. Cardoso to pay: the costs of the results management by the UCI (CHF 2,500); the costs of the B Sample Analysis (CHF 510); the costs of the A/B Sample Laboratory Documentation Package (CHF 900); and the costs of the out-of-competition testing (CHF 1,500).*

44. On 19 March 2018, the Secretariat of the Tribunal (hereinafter referred to as "the ADT Secretariat") informed the Rider that UCI had filed the Petition, that Mr. Andreas Zagklis had been appointed to act as Single Judge (hereinafter referred to as "the Single Judge" or "the Tribunal") in the present proceedings in application of article 14 of the ADT Procedural Rules and that the Single Judge had confirmed his independence and impartiality in relation to the matter at hand. In the same communication, *inter alia*, the Parties were informed that:

a. a deadline until 6 April 2018 had been granted to the Rider to submit his answer to the Petition in conformity with article 16 and 18 of the ADT Procedural Rules; and

b. any challenge to the appointment of the Single Judge should be filed with the ADT Secretariat within 7 days of receipt of that letter.

45. On 19 March 2018, UCI informed the ADT Secretariat that it wished to amend its request for relief with respect to the costs of the A/B Sample Laboratory Documentation Package, as only CHF 600 were charged by the Laboratory (instead of CHF 900).

46. On 26 March 2018, the Rider inquired with the ADT Secretariat if it was possible to request financial legal aid. By a second letter of the same date, the Rider challenged the appointment of Mr. Andreas Zagklis as Single Judge on the grounds of doubts as to his independence and impartiality as *"Mr. Andreas Zagklis' law firm is well known to represent sports federations. In particular, his past position at the Court of Arbitration for Sport also jeopardizes the independence and impartiality of the future legal proceedings"*. The Rider further addressed several questions to the UCI ADT Secretariat with respect to any cases of the UCI having been handled by lawyers of Mr. Zagklis' law firm or any particular ties between the UCI or any of its officials or Mr. Antonio Rigozzi or his law firm with Mr. Zagklis and also concerning the way Mr. Zagklis became a member of the UCI ADT and how he was chosen for the present case.

47. On 27 March 2018, the ADT Secretariat acknowledged receipt of both the Rider's letters and informed him that his challenge of the Single Judge's appointment was to be referred to the other members of the UCI ADT for consideration and a decision in accordance with the ADT Procedural Rules. The ADT Secretariat also informed the Rider that neither the UCI ADR nor the ADT Procedural Rules provide for legal aid, but at the same time indicated to him that the Court of Arbitration for Sport provides for the possibility of being granted legal aid.

48. On 4 April 2018, the Rider requested an extension for his time limit to submit his answer to the Petition until 15 July 2018.

49. On 6 April 2018, UCI stated in writing that it did not oppose the Rider's request and the Single Judge granted the Rider's request.

50. On 13 July 2018, the Rider informed the ADT Secretariat that, due to lack of the necessary funds, he is unable to engage the necessary expert witnesses and legal representation and is therefore forced to refer the UCI ADT to the arguments and submissions already filed with the UCI Disciplinary Commission.

51. On 23 July 2018, the ADT Secretariat acknowledged receipt of the Rider's letter and requested the UCI, on behalf of the Tribunal, to provide by no later than 2 August 2018 a copy of all submissions and exhibits filed by the Rider before the UCI Disciplinary Commission. By the same letter, the ADT Secretariat informed the Rider that his challenge of the Single Judge, filed on 26 March 2018, had been rejected by the other members of the Tribunal in accordance with article 15 paragraph 4 of the ADT Procedural Rules

52. On 2 August 2018, the UCI Disciplinary Commission provided the ADT Secretariat with a copy of all submissions and exhibits filed by the Rider before the UCI Disciplinary Commission.

53. On 3 August 2018, the ADT Secretariat acknowledged receipt of the case file.

54. On 27 September 2018, the ADT Secretariat informed the Parties that the Single Judge decided not to hold a hearing in this matter in accordance with Article 22 paragraph 1 of the ADT Procedural Rules.

55. On 8 October 2018, the Rider protested in writing against the decision of the Single Judge not to hold a hearing in the present matter, stating that such decision constituted a violation of the Rider's right to be heard according to Article 29 paragraph 2 of the Swiss Federal Constitution.

56. On 17 October 2018, the ADT Secretariat acknowledged receipt of the Rider's letter of 8 October 2018 and informed the Parties that the case were to proceed as previously announced in the Tribunal's letter of 27 September 2018, while any reasons for the decision of the Single Judge not to hold a hearing would be provided in the Judgment.

III. JURISDICTION

57. Article 25 of the UCI ADR (2015 version) provides the following:

> *"25.1 These Anti-Doping Rules shall apply in full as of 1 January 2015 (the "Effective Date")" (emphasis added).*

58. Considering that the Rider's sample was collected on 18 June 2017, *i.e.* after the Effective Date, this case shall be governed by the procedural and substantive rules of the UCI ADR (2015 version).

59. Regarding jurisdiction, Articles 2, 7 and 8 of the UCI ADR provide in relevant part as follows:

> *"2. Settlement of Disputes*
> *Before referring a case to the Tribunal, the UCI shall offer the Defendant an acceptance of Consequences in accordance with Article 8.4 ADR.*
>
> *[…]*
>
> *7.1 Responsibility for Results Management and Investigations*
> *Except as provided for in Articles 7.1.1 and 7.1.2 below, for violation of these rules, results management and hearing shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection (and if no Sample collection is involved, the Anti-Doping Organization which first provides notice to the Rider or other Person of an asserted anti-doping rule violation and then diligently pursues that anti-doing rule violation).*
>
> *[…]*
>
> *8.1 UCI Anti-Doping Tribunal*
> *The UCI shall establish an UCI Anti-Doping Tribunal to hear anti-doping rule violations asserted after 1st January 2015 under these Anti-Doping Rules.*
>
> *[…]*
>
> *8.2 Jurisdiction of the UCI Anti-Doping Tribunal* [1]
> *The UCI Anti-Doping Tribunal shall have jurisdiction over all matters in which*
> *• An anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 […]" (emphasis added)*

60. As evidenced on the Doping Control Form, the out-of-competition doping control of 18 June 2017 was authorized by the UCI and carried out by a Doping Control Officer on its behalf. UCI, either directly or through the Cycling Anti-Doping Foundation (CADF), has been the sole results management authority in this case. Also, UCI asserted the alleged ADRV on 9 August 2017.

61. Furthermore, before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an "Acceptance of Consequences" form within the meaning of Article 8.4 of the UCI ADR and Article 2 of the ADT Procedural Rules. UCI's offer was not accepted by the Rider.

62. Therefore, the requirements for the Tribunal's jurisdiction, as set out in the UCI ADR, are met in the present case.

IV. APPLICABLE RULES

63. Article 25 of the ADT Procedural Rules provides that *"the Single Judge shall apply the ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law"*.

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1 Article 3.1 of the ADT Procedural Rules replicates the wording of Article 8.2 of the UCI ADR 2015.

64. As previously noted (see section III supra), these proceedings are subject to the UCI ADR (2015 version) because the Rider's sample was collected on 18 June 2017, *i.e.* after the Effective Date. The application of the UCI ADR (2015 version) has remained undisputed by the Parties.

65. Article 2 UCI ADR defines the relevant anti-doping rule violation as follows:

> *"2.2 Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method*
>
> *2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*
>
> *2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.*
>
> *[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]" (emphasis added)*

66. As for the standard period of ineligibility, article 10.2 UCI ADR provides as follows:

> *"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:*
>
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional.*
>
> *10.2.1.2 The anti-doping rule violation involves a Specified Substance and the UCI can establish that the anti-doping rule violation was intentional.*
>
> *10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years."*

67. As for the Disqualification of results, article 9 UCI ADR provides as follows:

> *"An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes."*

68. Also with respect to Disqualification, article 10.8 UCI ADR provides as follows:

> *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.*
>
> *[Comment to Article 10.8: Nothing in these Anti-Doping Rules precludes clean Riders or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]"*

69. In relation to the commencement of the period of ineligibility, article 10.11 UCI ADR provides (in relevant part) as follows:

> *"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed."*

V. THE FINDINGS OF THE TRIBUNAL

70. As a preliminary matter, the Single Judge points out that the Rider was given ample opportunity to express his views on all relevant facts, to submit written observations, to present his own evidence and to comment on the evidence and expert opinions relied upon by the UCI. The Rider was allowed to actively and proactively participate in the present procedure and, as a result, was able to effectively exercise his right to be heard. This notwithstanding, the Rider decided to waive his right to submit an answer to the UCI Petition before the UCI ADT and referred the Single Judge to his submissions and supportive documents already filed with the UCI Disciplinary Commission. According to Article 16 paragraph 2 of the ADT Procedural Rules, *"[i]f the Defendant fails to submit its answer within the set deadline, the Single Judge may nevertheless proceed with the case and render his Judgment"*. As a result, the Single Judge is perfectly able to proceed with the case and render a Judgment, even if the Rider did not submit his answer, which, in the present matter, it was the Rider's request; the Single Judge will therefore rely on the Rider's two requests to lift his provisional suspension and the Rider's explanations of 20 November 2017 filed with the UCI Disciplinary Commission, along with the accompanying evidence and documents submitted by the Rider.

71. As a further preliminary matter, the Single Judge wishes to address the Rider's letter dated 8 October 2018, by means of which the Rider protested against the decision of the Single Judge not to hold a hearing in the present matter, stating that such decision constituted a violation of his right to be heard under Article 29 paragraph 2 of the Swiss Federal Constitution. In this respect, the Single Judge notes the content of the Rider's letter of 13 July 2018, by means of which the latter informed the ADT Secretariat that he had not sufficient financial resources to file a proper answer and was "*happy to be available to the UCI ADT in person to explain the entire matter and answer all questions which the UCI ADT might have. Also Dr. Douwe de Boer is willing to be available for any questions the UCI ADT might have"*. The Single Judge also points out that the ADT Procedural Rules do not provide for a right to a hearing of either of the Parties, whereas the Rider did not request the holding of a hearing *in persona* in accordance with Article 22 paragraph 4 of the ADT Procedural Rules at any point of the present proceeding, but limited himself to confirm his availability in case of questions by the UCI ADT. In view of the above, considering the circumstances of the case and the arguments and

evidence produced by the Parties, the Single Judge did not consider a hearing to be necessary in the present case. Lastly, and quite importantly, UCI has communicated to the Rider all of the evidence, documents and expert opinions upon which it relied to submit its written observations opposing the Rider's Request to lift his provisional suspension, the AoC proposal and its Petition before the ADT and the Rider was provided with ample opportunity to address the matters raised by UCI, counter its arguments and submit his evidence, expert findings and documents supporting his case throughout this proceeding, both before the UCI Disciplinary Commission and this Tribunal. In this regard, reference shall also be made to jurisprudence of the Swiss Federal Court which has confirmed that Article 29 paragraph 2 of the Swiss Federal Constitution does not compel the decision-making body to provide for an oral hearing (cf. 2C_58/2010, paragraph 4.4) On account of all of the above, there has been no violation of the Rider's right to be heard in the present proceedings.

72. Turning to the substance of the present case, the Single Judge notes that he must determine whether, in the circumstances: (a) the Rider committed an ADRV pursuant to Article 2.2 of the UCI ADR; and (b) if so, what are the consequences of such ADRV.

The position of the Parties

(a) The position of the Rider

73. In the absence of an answer on the part of the Rider before the UCI ADT and in view of the Rider's wish to refer the UCI ADT to the arguments and submissions already filed with the UCI Disciplinary Commission, as expressed in his letter of 13 July 2018, the Rider's case is laid out in his two requests to lift his provisional suspension filed with the UCI Disciplinary Commission and his explanations of 20 November 2017 and can be summarized as follows: there is no ADRV under article 2.1 UCI ADR since the A-sample analysis was not confirmed by the B-sample analysis and thus cannot establish the use of a prohibited substance as per the UCI ADR provisions. In any case, the A-sample analysis is not reliable enough according to the First and the Second de Boer Opinions as there are many causes that can explain the presence of rhEPO in the Rider's A-sample in the present case. To support his case, the Rider submits in essence the following:

- The proof of an ADRV through the analysis of urine samples is conclusively regulated in article 2.1 UCI ADR, which determines that there needs to be positive A- and B-sample results.
- It is not possible to argue that the result of the A-sample analysis alone qualifies as an ADRV under article 2.2 UCI ADR, as it is obvious that the reference to results from the A-sample analysis in the comment to article 2.2.2 UCI ADR should be understood as applying only to cases in which the B-sample was not analysed at all.
- In addition, the AAF in the Rider's A-sample cannot be held against the Rider under the applicable rules and regulations, as it violates the Rider's right to be heard considering that he had no possibility to be present at the opening and analysis of the A-sample.
- The expert opinions submitted by Dr. de Boer allegedly provide sufficient data to support the Rider's position that the analysis of the Rider's A-sample is not reliable enough. In this respect, the Rider claims that:
  (a) Besides EPO abuse, other scenarios which could explain both the AAF in the A-sample and the atypical result in the B-sample are a mild congenital as well as a transient CDG syndrome / in combination with Rider's chronic alcohol consumption (said conditions make it impossible to distinguish between endogenous EPO and rhEPO). In order to check such scenarios, UCI has to supply

the Rider with the raw data of all his urine samples analysed in the past, which was the subject of a disclosure request by the Rider, later rejected by the UCI;

(b) As no guarantee can be provided by independent persons that the processing of aliquots of the Rider's A-sample has been performed adequately, the scenario of a possible exchange of aliquots during the A-sample testing, even though of small probability, cannot be disregarded. In order for it to be excluded though, the UCI should supply the Rider with the results of the other athletes' A-samples tested during the Rider's A-sample analysis;

(c) No indications of manipulation were reported for which the athlete could be responsible;

(d) The Rider's blood sample analysis did not give rise to an AAF;

(e) In view of the above, only the results of the B-sample analysis seem to be adequate and the result of the test of the Rider's samples should be deemed to be atypical.

- The Laboratory's Internal Assessment Report cannot be taken into consideration as the Laboratory is in conflict of interest.
- Furthermore, the AAF could allegedly be explained also as an effect of warm environment temperatures in Portugal or during the samples' excessively long transport time. The Rider submits in this respect a "scientific article" in German, dated 23 August 2017 and extracted from the website of a private company – water inspection body.
- The UCI should also be held responsible for any alleged degradation of the Rider's urine sample as the procedure and the dates for the B-sample analysis were in the hands of the UCI.
- Lastly, the Rider asserts that constant CAS jurisprudence dictates that it is absolutely necessary that the B-sample analysis confirm the A-sample analysis and that the B-sample analysis always overrules the A-sample analysis in case of different findings: in CAS 2002/A/385, Tachina v. FIG, the Panel ordered that the B-sample analysis results were to be disregarded because of the failure to provide the athlete with an opportunity to be present at the opening and analysis of her B-sample; in CAS 2010/A/2161, Weng Tong V. IJF, the Panel referred to established CAS jurisprudence according to which in cases when the athlete's right to attend the opening and analysis of the B-sample is not respected, the AAF of the A-sample must be disregarded; in CAS 2015/A/3977, WADA v. BFA & Vadim Devyatovskiy, considering that IAAF had provided the athlete with a very short time limit to attend the B-sample opening and analysis, the Panel found that the AAF could not be based on the A-sample analysis only; in CAS 2008/A/1607, Varis v. IBU, the Panel sided with the opinion that the athlete's wish to examine the A-sample documentation package before the opening and analysis of the B-sample should have been accommodated by the IF and, therefore, in the absence of any B-sample testing, there was no ADRV establishment, meaning that there was no way to base the ADRV on the A-sample result only. Consequently, the Rider's argument is that to base the AAF on the A-sample analysis only would be inadmissible and, additionally, would amount to a violation of the Rider's right to be heard according to article 29 par. 2 of the Swiss constitution and article 6 par. 1 ECHR.

(b) The position of UCI

74. UCI submits in essence the following:

- The ADRV has been established in accordance with the relevant burdens and standards of proof in the UCI ADR as well as CAS jurisprudence. In particular, UCI asserted an ADRV under Article 2.2 of the UCI ADR, which may be established "by any

reliable means", even if such means do not otherwise satisfy all the requirements to establish an ADRV under Article 2.1 (provision of the Comment to Article 2.2). In fact, the Rider's B-sample atypical finding does not rule out an ADRV for use of a prohibited substance or method; it simply means that the UCI cannot benefit from the favourable regime set out at Article 2.1.2 of the UCI ADR. Instead, UCI must address and satisfy the above factors relating to Use within the meaning of Article 2.2 of the UCI ADR, *i.e.* that there is reliable analytical data from the analysis of an A-sample and a satisfactory explanation for the lack of confirmation in the B-sample. Moreover, CAS jurisprudence does not support the Rider's position as to the applicability of Article 2.2 and its relation to Article 2.1 (a "Use ADRV" vs. a "Presence ADRV") as all the cases referenced by him concern a Presence ADRV, except for one which deals with a Use ADRV, but is eventually decided on the basis of a fundamental breach of the WADA International Standard for Laboratories (ISL) and, as such, does not discuss the meaning of the provision of the Comment to Article 2.2 and its relation to Article 2.1 of the UCI ADR.

- The ADRV has been established on the basis of reliable evidence and none of the explanations offered by the Rider can explain the presence of rhEPO in his system, in particular considering that the Rider has not responded to or addressed the latest scientific evidence provided to him by the UCI, namely the Second Laboratory Report rejecting the Rider's accidental swap scenario, the Second Seibersdorf Opinion addressing the Rider's allegation that microbial degradation could have caused his AAF, the reasons behind the lack of confirmation of the presence of rhEPO in the Rider's B-sample and why his blood serum sample had not tested positive for rhEPO and the Henry/Saugy Report which ruled out possible metabolism disorders of the Rider as a possible cause for his positive A-sample.
- Therefore, the Rider must be sanctioned in accordance with the UCI ADR for the Use ADRV. rhEPO being a Prohibited, non-Specified Substance, the applicable period of ineligibility is four years, unless the Rider can establish that the ADRV was not intentional, which is not the case here since the source of rhEPO has not been established by the Rider.

Burden and standard of proof

75. Article 3 of the UCI ADR stipulates the following:

> *"3.1 Burdens and Standards of Proof*
>
> *The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*
>
> *[Comment to Article 3.1: This standard of proof required to be met by the UCI is comparable to the standard which is applied in most countries to cases involving professional misconduct.]*
>
> *3.2 Methods of Establishing Facts and Presumptions*
>
> *Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport.]

[…]

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

[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the antidoping rule violation.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrefutable evidence against the Rider or other Person to whom the decision pertained of those facts unless the Rider or other Person establishes that the decision violated principles of natural justice.

3.2.5 The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Rider or other Person who is asserted to have committed an anti-doping rule violation based on the Rider's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in Person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the UCI."

The position of the Single Judge

76. The starting point for the Single Judge's analysis is the interpretation of the notion of a Use ADRV under Article 2.2 of the UCI ADR and the definition of the means to establish it. In accordance with the definition of "Use" in the World Anti-Doping Code, the violation of Article 2.2 of the UCI ADR consists in the utilization, application, ingestion, injection or consumption

by any means whatsoever of any Prohibited Substance or Prohibited Method. In addition, the Single Judge points out that the discretion to admit evidence under Article 3.2 of the UCI ADR is fairly wide as it determines that facts related to anti-doping rule violations may be established *"by any reliable means"*.

77. In this respect, the Comment to Article 3.2 lays down the manner in which the aforementioned provision is to be understood, namely with a broad scope as to the kind of evidence that may be used to establish a Use ADRV, as it explains that *"For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport."* (emphasis added)

78. The Single Judge also notes the contents of the Comment to Article 2.2 of the UCI ADR, which further provides that *"It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample."* (emphasis added)

79. In light of the above, the Single Judge finds that, in order to establish a Use ADRV, UCI needs to prove the violation (namely that the Rider has utilized, applied, ingested, injected or consumed by any means whatsoever any Prohibited Substance or Prohibited Method) to the comfortable satisfaction of the ADT by any reliable means. In the absence of an exhaustive list of "means", the Single Judge is required to examine any and all evidence provided by UCI as the prosecuting authority, within the broad scope of Article 3.2 of the UCI ADR and the guidance provided by the Comments to Article 2.2 and 3.2 and, to the extent he is comfortably satisfied they are "reliable" within the meaning of the aforementioned provisions and the Rider is not able to successfully oppose them, to find that a violation of Article 2.2 of the UCI ADR has been established.

80. At the same time, the Single Judge acknowledges that when the means of proof submitted to establish a Use ADRV are reliable analytical data from either an A- or B-sample that is however not sufficient to establish a Presence ADRV, said data is naturally not to be regarded *per se* as sufficient proof of a Use ADRV, as is the case under Article 2.1.2. In Use ADRV cases, the prosecuting authority that relies on analytical data from an A- or B-sample bears the burden of proving to the comfortable satisfaction of the Tribunal that an anti-doping rule violation has occurred and the defending party may rebut such presumptions.

81. In particular, the issue of analytical data is dealt with in the provisions of the Comment to Article 2.2 of the UCI ADR, which stipulate that *"Use may also be established by (…) other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation*

from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample". This provision expressly allows the use of analytical data from either an A- or B-sample to establish an ADRV under Article 2.2 of the UCI ADR, but in no way implies that any A- or B-sample analytical data enjoy special status in Use ADRV doping proceedings. They are to be treated just like any other means of proof under Article 3.2 of the UCI ADR, *i.e.* the prosecuting authority still has to prove therewith to the comfortable satisfaction of the Tribunal that such analytical data constitute "reliable means" to prove that the Rider in question has utilized, applied, ingested, injected or consumed the Prohibited Substance, whereas the Rider may freely oppose such analytical data and related considerations.

82. In this context, it follows that the Rider's argument according to which in the absence of the AAF confirmation in his B-sample, no ADRV can be possibly established as the analysis of urine samples is conclusively regulated at Article 2.1 of the UCI ADR, shall be dismissed. Whereas it is true that, in principle, under Article 2.1 of the UCI ADR the analysis of the B-sample is required to confirm the presence of the Prohibited Substance found in the athlete's A-sample, the Single Judge cannot help but note that UCI in the present case asserted an ADRV under Article 2.2 of the UCI ADR and not under Article 2.1. In this respect, the provisions of UCI ADR expressly allow the establishment of an ADRV under Article 2.2 on the basis of, *inter alia*, reliable analytical data from one sample alone, without confirmation from the second sample. For the sake of completeness, the Rider's argument regarding the exclusive application of Article 2.1 in cases of urine samples is unfounded. It is for the same reason that the CAS case-law referenced by the Rider is not relevant to the present matter, as all but one of the mentioned CAS cases deal with a Presence ADRV and the only case dealing with a Use ADRV (CAS 2015/A/3977) is not relevant either. Indeed, as noted also by the Rider, the CAS Panel in said case *"found that the athlete was not granted a reasonable opportunity to be present himself or to appoint an expert of his choice to represent him. The IAAF had been too strict and had therefore violated the applicable rules. Also in this case the Panel found that the Adverse Analytical Finding could not be based on the A Sample analysis only"*. The Single Judge points out that the findings of the CAS Panel do not address - let alone put into question – the application of Article 2.2 or the Comment to it in the present matter (which allows the establishment of an ADRV on the basis of reliable analytical data from one sample alone), but rather condemn the departure from applicable anti-doping rules such as the WADA International Standard for Laboratories with respect to the athlete's procedural rights when it comes to the opening and analysis of the B-sample. However, the opening and analysis of the B-sample are not challenged by the Rider in this matter and, therefore, the Single Judge is unable to identify the relevance of the CAS 2015/A/3977 award to the case at hand.

83. With the above analysis in mind regarding the burden and standards of proof, the Single Judge shall now examine the main issues of the present case:

(a) Did the UCI establish that the Rider committed a Use ADRV pursuant to Article 2.2 of the UCI ADR?

84. In its attempt to establish the ADRV of the Rider pursuant to Article 2.2 of the UCI ADR, UCI relies on the presence of rhEPO (Recombinant Erythropoietin) in the Rider's A-sample. UCI claims that the fact that the Rider's B-sample analysis did not confirm the presence of rhEPO does not rule out an ADRV; it simply means that UCI cannot benefit from the favourable regime set out at Article 2.1.2 of the UCI ADR.

85. In addition, UCI claims that the conditions of the provision of the Comment to Article 2.2 of the UCI ADR which allows Use to be established based upon (a) reliable analytical data from the analysis of an A-sample alone (without confirmation from an analysis of a B-sample) where (b) the prosecuting authority provides a satisfactory explanation for the lack of confirmation in the other sample, are satisfied in the matter at hand.

86. In this respect, the Single Judge notes that according to the Laboratory test report the analysis of the urine A-sample provided by the Rider showed the presence of rhEPO which is a Prohibited Substance under Section S2 "Peptide Hormones, Growth Factors, Related Substances and Mimetics" of the 2017 (and 2018) Prohibited List maintained by WADA and adopted by the UCI.

87. Moreover, the analysis results were confirmed by the First Seibersdorf Opinion submitted by UCI, which concluded with respect to the A-sample that *"[d]ue to the clearly visible faint area above the endogenous band of the sample concerned in the initial testing as well as in the confirmation analysis the sample meets the criteria of the WADA Technical Document TD2014EPO for the presence of rec. EPO. Consequently the A-sample has to be reported as adverse analytical finding".*

88. Further confirmation is provided by the Second Seibersdorf Opinion, which concurs that the Rider's A-sample was correctly reported as an AAF.

89. In addition, as far as the reasons for the lack of confirmation of the adverse finding in the Rider's B-sample are concerned, the Internal Assessment Report relied on by UCI includes the following assessment:

> *"Observed difference between the results obtained from confirmation procedure of the erythropoiesis stimulating agents (ESAs) in A- and B-sample 4121328 can be focused on the observed presence (A-sample) and absence (B-sample) of the characteristic smear, which is expected from rEPO. A single band is clearly visible with a migration slightly above the endogenous EPO band in A- and B-sample 4121328, but as the B-sample 4121328 is missing the characteristic smear expected from recombinant EPO, this evidence has been lost in this B analysis that can only be interpreted as doubtful but not conclusive.*
> *Consequently, the aim of this assessment was to discover and evaluate all the potential factors influencing the analytical process and the stability, abundance or behavior of EPO-isoforms in the sample. Critical points for the overall performance were defined as 1) selection and function of the analytical method, 2) competence of the laboratory staff, 3) materials and reagents applied to the method, 4) chain-of-custody, 5) performance of the specific analytical batches, 6) integrity of the urine sample, and 7) result interpretation.*
> *Based on the description and careful evaluation of each point we can conclude that an appropriate and up-to-date SAR-PAGE method has been applied to the analysis of A- and B-sample 4121328. The laboratory staff involved in the analysis is competent, the described procedures have been followed, and correct samples have been analyzed. The overall acceptable performance is verified by the evaluation of the quality control samples (positive and negative) of each analytical batch, and there is no reason to assume that the difference between analysis results could result from technical mistakes, sample mismatch, or non-conformities in analytical process.*
> *Regarding performance of the specific analytical batch, immunopurification was identified as the highest risk for the repeatability of the method. Incomplete yield could theoretically result into to the partial loss of EPO-isoforms in the purification and consequently, to lower amount of EPO in the gel (i.e. decreased sensitivity of the method). Enzyme activity and/or physical properties (e.g. high salt content) of the sample were also targeted as potential factors which could result in the degradation of the EPO-isoforms, and lead to minor differences between samples. Taking into account the SG- and pH-properties of the A- and B-sample 4121328, high SG value may refer to an excess of salts, and alkaline pH to potential microbial activity."*

and eventually reached the following conclusion:

> *"It is our current opinion that immunopurification and/or degradation of EPO are highly likely phenomena as a source of the inconsistence in analytical result between A- and B-sample 4121328."*

90. The above findings were confirmed by the First Seibersdorf Opinion which concludes in its relevant part that:

> *"From the documentation provided the quality of the analytical data is excellent, indicating well trained staff and suitable equipment, no deviations from accepted standards are visible, the analytical method complies with the WADA requirements, internal chain of custody is traceable and results interpretation of the A-sample is in agreement of accepted scientific experience.*
> *Consequently the conclusion of the laboratory is shared by the experts of this report. Especially the elevated pH as a consequence of possible microbial degradation is regarded as the main contributor to analyte lability in the sample.*
> *As already indicated above, this assumption is strengthened by the decrease in band intensity from A- to B-sample confirmation analysis."*

91. Furthermore, the matter is addressed in the Second Seibersdorf Opinion as well, which holds *inter alia* that

> *"The most likely cause of the difference is a degradation of the EPO in the B-sample. This holds for the recombinant as well as the endogenous part of the EPO band. Due to the fact that in the A-sample the endogenous form appears to be much more abundant than the recombinant one, a degradation of the total EPO content will most likely lead to a disappearance of the recombinant part, while the endogenous part is still visible"*

and that

> *"As explained above, there are at least two clear indications of degradation (drastic decrease of the signal intensity and elevated pH). The only two other possible explanations in the present case are theoretical and are not supported by the documentation. Of course, if such alternative explanations were established, they would also constitute a satisfactory explanation. In the present case however, based on the documentation and evidence that we have reviewed, degradation constitutes a satisfactory explanation for the lack of confirmation in the Bsample."*

92. The Single Judge points out that the Rider, although he has submitted his own explanation regarding the A-sample results and the non-conclusive results in the B-sample analysis (see paragraphs 94 et seq *infra*), he has not at any point of this proceeding rebutted or objected to the findings of the experts explaining the lack of confirmation of the atypical finding in the Rider's B-sample.

93. In the course of the proceeding before the UCI Disciplinary Commission, the Rider has provided different explanations for the presence of rhEPO in his A-sample and for the lack of confirmation of the A-sample analysis from the analysis results of the B-sample. These are addressed in the following sections:

<u>The accidental swap scenario</u>

94. The Rider argues that there is a number of possibilities that could have led to the rhEPO finding in his A-sample, one of which is that urine samples analysed together with the Rider's alleged

A-sample were accidentally swapped at the Laboratory. The Rider supports his argument entirely on the findings of the First de Boer Opinion (part 1), which concludes as follows:

> *"1. The probability of a possible exchange of aliquots during the A-sample and having the same results is very small if making aliquots in the presence of several samples is being performed adequate;*
> *2. However, no guarantee can be given by persons independent from the WADA and/or the Lausanne WADA laboratory, that processing of aliquots of the A-sample has been performed adequately;*
> *3. In contrast to that, a guarantee can be given by persons independent from the WADA and/or the Lausanne WADA laboratory, that processing of aliquots of the B-sample has been performed adequately;*
> *4. No indications of manipulation were reported for which the athlete could be responsible;*
> *5. Considering these observations and remarks only the results of the B-sample analysis seem to be adequate and the urine should be labelled to be atypical;*
> *6. In order to exclude the scenario of exchange of aliquots during the A-sample procedure, the UCI should the supply (sic) the defence team of the athlete with the results of the initial testing procedure."*

95. In the Second Laboratory Report, the UCI expert evaluated the Rider's arguments regarding that scenario. The UCI expert noted the following:

> *"The standard operating procedure for the EPO testing makes swapping of sample very unlikely in and of itself:*
> *An aliquot of the A-sample is distributed from the original container to initial testing procedures (ITP, see p. 13 of the laboratory documentation package; LDP). The distribution is performed by pouring of urine sample to the secondary vessel instead of e.g. pipetting, which guarantees that the original container remains intact throughout the process as nothing external enters the container.*
> *In case if the ITP results indicate a presumptive adverse analytical finding (PAAF; "positive screening result"), an independent, new aliquot is poured again from the original A-sample container for confirmation procedure (CP). This process is witnessed by two staff members who control the external and internal code numbers of the container prior to the distribution (p. 31 of the LDP).*
> *Sample swapping presupposes that:*
> *(i) there have been two independent mistakes in the reading of the original container code numbers (external and internal sample codes) both at the ITP and the CP stage,*
> *(ii) two individual laboratory staff members have made exactly the same reading mistake at two independent stages of the procedure*
> *(iii) the mandatory double-checking conducted for the CP distribution would not have identified the second mistake.*
> *The fact that more than one sample was analyzed for the purposes of the ITP does not increase the likelihood of swapping since only sample 4121328 fulfilled the criteria of a presumptive adverse analytical finding. By reading the Rider's defense documents, I understand that also Dr. de Boer considers that this further rules out sample swapping. The CP batch contained only this particular urine sample 4121328 (as was witnessed by two different laboratory staff members), which was analyzed alone with the quality control samples and without any other sample from the ITP.*
> *As already mentioned in the "Internal Assessment" report, the swapping of sample can also be excluded in the present case due to the fact that the results of sample 4121328 at ITP and CP stage are remarkably similar not only with respect to the ESA test (images of the EPO profiles) but also regarding the measurements of both (i) pH (strongly basic sample) and (ii) specific gravity (high SG). There were no other samples in the ITP batch with such distinctive characteristics. This distinctive combination of basic pH and high SG is also consistent with the results of the B sample."*

96. The Single Judge allocates an important evidentiary value to the Second Laboratory report in that it describes the sequence and combination of mistakes required for the swapping of samples to take place; it confirms that the CP batch contained only this particular urine sample; and asserts that the images of the EPO profiles are remarkably similar. These factual items of the report are not challenged by the Rider. The Single Judge is convinced that these elements suffice to arrive at the conclusion that sample swapping in this case was, at best, extremely unlikely, and can rebut neither the UCI´s argument that the A-sample belonged to the Rider nor the presumption of Article 3.2.2 of the UCI ADR.

97. Therefore, and on this basis, the Single Judge concurs with the UCI expert that it is unlikely that the positive A-sample might not have been the Rider's urine sample.

98. For the sake of completeness, the Single Judge shall also examine the Rider's conflict of interest defence against the findings of the Internal Assessment Report and the Second Laboratory Report.

99. First, as mentioned above, the Single Judge did not find it necessary to allocate evidentiary value in a statement of the Laboratory that sample swapping did not occur. He rather accounted for the factual description of the process and of the findings, not the evaluation of such process and findings by the Laboratory. These were enough to essentially exclude the possibility of sample swapping in this matter.

100. Moreover, the Single Judge notes the contents of the Second Laboratory Report in its relevant part, in which Dr. Tiia Kuuranne, Director of the Laboratory, states the following:

> *"In my capacity as the current director of the LAD, I can confirm that neither my staff nor myself ever felt to be "under public pressure" as claimed by the Rider's defense. The suggestions of wrongdoing related to sample destruction made in the report mentioned by the Rider's defense, which have also been proven wrong in the meantime, have never affected the LAD work in general and had no influence whatsoever on the routine in which urine sample 4121328 was analyzed.*
> *I must also contest the insinuation that the evaluation matrix of WADA external quality assessment scheme (EQAS) would have induced the LAD to provide a false explanation for the B-sample not confirming A-sample result in fear of losing the WADA accreditation status. I can confirm that I have drafted the "Internal Assessment" with the only purpose of following our quality management system to identify "any internal or external factor(s) which could have contributed to the observed differences between the A- and B- sample analysis".*

101. The Single Judge observes that the grounds for the Rider's defence are constructed solely around his perception of an "inherent" conflict of interest that allegedly taints every report and opinion of the Laboratory staff relied upon by UCI. The Single Judge has no reason to doubt the findings of the Internal Assessment Report and the Second Laboratory Report, unless the Rider offers a justifiable and scientifically sound challenge as to the arguments, methodology or conclusions of the relevant expert opinions and reports submitted by UCI. The conflict of interest argument does not fall within that scope.

The endogenous production scenario

102. In part 2 of the First de Boer Opinion, the Rider also offered metabolism disorders (such as a mild congenital or a transient CDG syndrome) as an explanation for the presence of rhEPO in his A-sample, particularly when combined with his chronic alcohol consumption. The conclusions of the expert opinion read as follows:

"1. Besides abuse of EPO, other scenarios, which could explain the atypical result of the B-sample analysis, are a mild congenital as well as a transient CDG syndrome;
2. A mild congenital CDG syndrome can be checked if the UCI supplies the defence of the athlete with all the raw data for EPOETINS (=raw data like on page 29 LDP) of the all (sic) the urine samples analysed of the athlete;
3. A transient CDG syndrome can be checked if the UCI supplies the defence of the athlete with all the data for ethylglucuronide and the concentrations of the endogenous steroids of all the urine samples analysed of the athlete;
4. Only the UCI will supply the defence team of the athlete with the data requested, the athlete will be able to defend himself adequately (sic)."

103. In the Henry/Saugy Report, the UCI experts evaluated the Rider's arguments relating to mild congenital or transient CDG syndrome as an explanation for the presence of rhEPO in his A-sample. The UCI experts noted that disorders of glycosylation do lead to a decrease in the complexity of the glycan moiety of the glycoproteins, whereas chronic alcohol intake is indeed able to induce a defective N-glycosylation but only in the liver (sCDG) and depending on the time course of the abuse and on the level of ingested ethanol. However, both experts rejected the Rider's argument that CDG or sCDG can affect the glycosylation of EPO based on a study of Kristiansson, Stibler and Wide, who are among the top specialists worldwide in glycoproteins and CDG syndrome and their study is widely considered as fundamental in the field (Kristiansson, Stibler and Wide, *Gonadal function and glycoprotein hormones in the carbohydrate-deficient glycoprotein (CDG) syndrome*, Acta Paediatr 84:655-60, 1995 (the "Kristiansson Study")).

104. In reply to the UCI argument based on the Kristiansson Study, the Rider submitted the Second de Boer Opinion that examines the question whether the Kristiansson Study proves that the scenario of glycosylation of proteins and the possible existence of a mild congenital CDG syndrome or a transient disorder of glycosylation (ethanol induced TDG syndrome) can be rejected and thus disregarded. The Second de Boer Opinion comes to the following conclusion:

"1. Two types of congenital disorder of glycosylation (CDG) exist, namely type I and type II; these types have no relation with the transient disorder of glycosylation (ethanol induced carbohydrate-deficient glycoprotein (TDG) syndrome);
2 .The study Kristiansson et al. only refers to one specific type of CDG, namely type I and not to CDG type II and consequently, indeed would only reject the scenario of CDG type I and not that of CDG type II;
3. The study Kristiansson et al. does not refer to the ethanol induced TDG syndrome;
4. The possible existence of a mild congenital CDG syndrome type II or a ethanol induced TDG syndrome can not be rejected and thus disregarded because of scientific reasons;
5. No scientific reasons exist, why the UCI should not supply the defence team of the athlete with the relevant part of the anti-doping control record of the athlete."

105. In response, the Henry/Saugy Report rejects the chronic alcohol consumption argument advanced by the Rider as an explanation, since in their opinion it is unconceivable that a professional cyclist could consume the amount of alcohol required to provoke sCDG while competing at the highest level. Moreover, the UCI experts concluded by stating the following:

"We carefully studied the statements of Dr de Boer in his reports (15 August and 15 November 2017).
His main conclusions can be summarized by the allegations that CDG type II and TDG (sCDG in our expertise) cannot be disregarded as the origin of deficiency of the EPO glycosylation. Our conclusions are the following:

- CDG types I and type II will affect hepatic glycoproteins like Transferrin, but not the renal glycoprotein like EPO. It has been clearly shown by Kristiansson et al that CDG type I does not affect EPO glycosylation.
- sCDG clearly affects hepatic glycoproteins and not renal glycoproteins like EPO.
- Even if any type of CDG (Types I, Type II, sCDG) would affect the glycosylation of endogenous EPO by an unknown and not scientifically proven phenomenon, this will reduce the glycosylation of EPO and then reduce its Molecular weight (Mw). This would never produce an EPO with a higher Mw, like the r-EPO, which is clearly present in the A-sample of the athlete."

106. The Single Judge notes that, while it is obvious that both the Rider's and UCI's experts agree that a glycosylation disorder (i) may either be congenital or result from chronic alcohol consumption and (ii) leads to a decrease in the complexity of the glycan moiety of the glycoproteins (such as EPO), the UCI experts dispute that the results of the analysis of the Rider's A-sample can be explained by any kind of types of disorders relating to glycosylation, be it congenital or secondary.

107. The Single Judge finds the latter statement of the UCI experts crucial since it provides a scientific explanation (reducing the glycosylation of EPO would reduce the Mw but would not produce an EPO with a higher Mw as in the A-sample of the Rider) which entirely disconnects the alleged glycosylation disorder with the A-sample result. This explanation has not been rebutted by the Rider.

108. In addition, the Single Judge notes that the Rider provides no other evidence whatsoever to support his alleged chronic alcohol consumption or that he actually suffers by any such congenital- or ethanol-induced disorder and relies merely on the fact that these are conditions that may provide an explanation for the presence of rhEPO in his A-sample, a conclusion which is anyway disputed by the UCI experts.

109. Moreover, for the sake of completeness, the Single Judge notes that there was no evidence provided that would link the findings of the De Boer Opinions to the historical analysis data of the Rider and, thus, the UCI was entitled to deny disclosure of all such information requested by the Rider and the latter's right of defence was not violated. Also, the Rider did not file such a disclosure request with the Single Judge although such right is provided for under the ADT Procedural Rules (article 19 paragraph 6).

110. For the reasons stated above, the Single Judge finds that the Rider´s "endogenous production" scenario is not scientifically and factually proven, and shall therefore be rejected as unfounded.

The microbial activity scenario

111. In addition to the above, the Rider has suggested in his explanations before the UCI Disciplinary Commission that the AAF could have been caused *"through microbial activity. This is in particular the case as the Lausanne Laboratory speaks of a specific gravity above normal reference values. Such microbial activity could have been significantly increased due to the fact that it was extremely hot in Portugal during that time; the transport was extremely long (19 hours in the possession of the DCO and additional 38 hours in the possession of the commercial courier); and there is no evidence whatsoever in which temperature the samples were transported. This would also explain the finding in the A Sample and the not conclusive result in the B Sample analysis."* The Rider also submitted a "scientific article" on the possibility of microbial activity.

112. The Second Seibersdorf Opinion has evaluated the Rider's argument. After their assessment, the UCI experts reported the following:

> *"Microbiological activity causes enzymatic degradation of EPO. Both, recombinant and endogenous EPO are affected similarly. Degradation by sialidases will lead to a decrease in molecular mass by removal of neuraminic acids, which are part of the glycans on EPO [1-2]. Sialidases do not affect the amino acid backbone of EPO. Contrary to that, proteases will lead to a partial or complete degradation of EPO, which results in a decreased EPO signal on Western blots. An adverse analytical finding due to microbial activity would require de novo syntheses of e.g. glycans on human EPO - processes, which are too complex to occur in urine.*
> *There is no indication from the analytical data presented that the presence of rec. EPO in the A sample is caused by microbial activity. But, as we will discuss below, microbial activity could explain why the rec. EPO could not be identified in the B sample.*
> *The article of 23 August 2017: „K+U Umwelttechnik, Labor und Hydrologie GmbH – Fachbereich Trinkwasser." does not support the Rider's explanation as it deals with contamination of drinking water by various bacteria with no relation to potential influence on the EPO structure.*
>
> *[1] Yanagawa S, Hirade K, Ohnota H, Sasaki R, Chiba H, Ueda M, Goto M. Isolation of human erythropoietin with monoclonal antibodies. J Biol Chem. 1984;259(5):2707-10.*
> *[2] Reichel C. The overlooked difference between human endogenous and recombinant erythropoietins and its implication for sports drug testing and pharmaceutical drug design. Drug Test Anal. 2011;3(11-12):883-91."*

113. The Single Judge is of the opinion that the Second Seibersdorf Opinion provides a convincing assessment of the question at hand, which has not been rebutted by the Rider since his expert did not discuss the microbial activity scenario in any of his opinions. The Single Judge notes that there is no plausible explanation under which microbial activity could have *created* rhEPO in the Rider´s sample. Thus, the Rider's argument shall be rejected as unfounded.

The UCI should be held responsible for any alleged degradation of the Rider's B-sample

114. For the sake of completeness, and having in mind the findings set out in paras. 76 to 86 *supra*, the Single Judge shall address this argument of the Rider even though it is clearly not directed to challenge or refute any of the UCI arguments and findings of its experts and, in addition, the analysis of the sample in question was inconclusive and therefore not held against the Rider by UCI.

115. The Rider essentially blames the discrepancy between the A- and the B-sample analysis to the dates proposed by the UCI for the B-sample opening and analysis. However, the Single Judge cannot see how UCI is to blame, considering that it had already proposed two alternative (earlier) dates to the Rider for the B-sample opening and analysis which were only 5 and 6 days respectively after the Laboratory had reported the AAF in the A-sample.

Negative blood tests

116. To further support his position that his A-sample analysis result is not reliable means of proof of an ADRV, the Rider has pointed out that his blood test results did not confirm the presence of rhEPO. The Second Seibersdorf Opinion has evaluated the Rider's argument and the UCI experts reported the following:

"11. The Rider provided a blood serum sample on the same day as the urine sample. The blood sample did not test positive for recombinant EPO. Is it possible for a Rider's blood sample to test negative for recombinant EPO on the same day as the same Rider's urine tests positive for recombinant EPO?

Yes, this is possible.
This does not invalidate in any way our conclusion that the rider's A-sample contained rec. EPO. Nor does it explain why the B-sample is inconclusive.

12. If so, how can this be explained?

If the rec. EPO in the urine sample has already left the blood stream, it is consequently no longer present in this bodily liquid, representing the final stage of elimination of rec. EPO from the body.
Urine is considered a reservoir, where excreted substances are collected till urine delivery (micturition). Consequently substances which have left the blood stream via renal elimination are detectable in the urine sample, but might no longer be detectable in the corresponding blood/serum/plasma samples, even if these samples are taken at the same time. An indication of the low concentration of rec. EPO in urine is the low intensity of the rec. EPO band in comparison to the endogenous band. This does not unequivocally prove the final step of elimination, but is compatible with this assumption."

117. The evidence before the Tribunal, which was not rebutted by the Rider, shows to the comfortable satisfaction of the Single Judge that the existence of a blood sample negative for rhEPO does not exclude the possibility that a urine sample collected by the same rider on the same day may test positive for rhEPO.

118. Therefore, the Rider's argument that the result of his blood test directly challenges the reliability of the A-sample result, is rejected as unfounded.

Conclusion

119. On the basis of all of the above, the Single Judge is comfortably satisfied by the assessment of the evidence at hand that the conditions established by Article 2.2 of the UCI ADR (and the comment thereto) which allow a Use ADRV to be established based upon
(a) reliable analytical data from the analysis of an A-sample alone (without confirmation from an analysis of a B-sample) and
(b) where the prosecuting authority provides a satisfactory explanation for the lack of confirmation in the other sample,
are satisfied in this matter.

Moreover, the Rider has failed to substantiate that the presence of rhEPO in his A-sample resulted from an accidental swap of samples or a congenital/ethanol-induced disorder or a microbial activity.

120. Therefore, the Single Judge finds that the Rider has committed an ADRV under Article 2.2 of the UCI ADR.

(b) Consequences

i. Disqualification

121. Article 10.8 of the UCI ADR provides as follows:

"Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes." (emphasis added)

122. The doping control in the case at hand, which gave rise to the results management process and provided the evidence supporting the ADRV, was out-of-competition.

123. UCI requests that all results of the Rider obtained from the date the positive sample was collected, *i.e.* 18 June 2017, until the commencement of his provisional suspension, i.e. 27 June 2017, be disqualified.

124. Considering that the Rider's defense has been rejected; that the Rider competed only for a short period after the doping control in question; and that there are no reasons of fairness that would require otherwise, the Single Judge finds that the Athlete's results from 18 June 2017 until 27 June 2017, if any, shall be disqualified.

ii. Period of Ineligibility

125. Article 10.2 of the UCI ADR provides as follows:

"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the UCI can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years."

126. The Single Judge notes that rhEPO is a non-Specified Substance listed under Section S2 of the 2017 (and 2018) Prohibited List which is maintained by the World Anti-Doping Agency (WADA) and adopted by the UCI.

127. The Single Judge further notes that UCI argues that since the source of rhEPO has not been established by the Rider, his ADRV is presumed to be intentional within the meaning of Article 10.2 of the UCI ADR. In this respect, the Single Judge observes that the Rider denies that he knowingly used a Prohibited Substance, stating that there is a number of possibilities that could have led to the rhEPO finding in his A-sample (the accidental swap scenario, the endogenous production scenario or the microbial activity scenario). As explained in detail in the relevant parts of the present Judgment, the Single Judge found that the Rider failed to

convince this Tribunal that one of the scenarios proposed by him explains the presence of rhEPO in his A-sample or that the violation was not intentional.

128. The Rider did not seek to benefit from the application of Article 10.4 of the UCI ADR ('No Fault or Negligence') in order to have his period of Ineligibility eliminated or reduced. The application of such provision is anyway based on the prerequisite that a rider has established how the prohibited substance entered his/her body. Therefore, no reduction is possible under Article 10.4 of the UCI ADR. Furthermore, the Single Judge notes that no reduction was sought under Article 10.5.2 either. Consequently, there are no fault-related reductions applicable to the case of the Rider.

129. Therefore, a period of ineligibility of 4 years shall be imposed on the Rider in accordance with Article 10.2.1.1 of the UCI ADR.

iii. Commencement of Period of Ineligibility

130. Regarding the commencement of said period of ineligibility Article 10.11 of the UCI ADR provides as a general rule that the period of ineligibility shall start on the date of the final decision providing for ineligibility.

131. However, Article 10.11.3.1 of the UCI ADR also provides that the Rider receives credit for any provisional suspension that was imposed on him, provided that he respected the terms of the provisional suspension.

132. In the present case, the Rider has been provisionally suspended since 27 June 2017. It is not contested that he respected this provisional suspension continuously and up to the date of this judgment.

133. Accordingly, the Tribunal determines that the period of the provisional suspension shall be credited against the 4-year period of ineligibility.

iv. Mandatory Fine and Costs

134. Article 10.10 of the UCI ADR 2015 provides as follows:

> *"In addition to the Consequences provided for in Article 10.1-10.9, violation under these Anti-Doping Rules shall be sanctioned with a fine as follows.*
>
> *10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an <u>intentional</u> anti-doping rule violation within the meaning of Article 10.2.3.*
>
> *[…]*
>
> *The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. In the Event that the anti-doping violation relates to more than one year, the amount of the fine shall be equal to the average of the net annual income from cycling that the Rider or other Person was entitled to during each year covered by the anti-doping rule violation.*
>
> *[Comment: Income from cycling includes the earnings from all the contracts with the Team and the income from image rights, amongst others.]*

The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise.

[…]

10.10.2 Liability for Costs of the Procedures

If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Anti-Doping Tribunal determines otherwise:

1. *The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*
2. *The cost of the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
3. *The cost of the B Sample analysis, where applicable.*
4. *The costs incurred for Out-of-Competition Testing; the amount of this cost shall be CHF 1'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
5. *The cost for the A and/or B Sample laboratory documentation package where requested by the Rider.*
6. *The cost for the documentation package of Samples analyzed for the Biological Passport, where applicable.*

[…]". (emphasis added)

135. In the present matter, the Single Judge notes that the prerequisite of Article 10.10.1.1 is fulfilled.

136. Article 10.10.1.1 further provides that the fine to be imposed shall account to 70% of a rider's gross annual income from cycling for the whole year in which the anti-doping rule violation occurred, unless the rider is able to establish that the applicable national income tax law provides otherwise.

137. With respect to the calculation of the fine, UCI submits that the Rider was entitled to an annual gross income from cycling of [redacted] in 2017. Therefore, according to the UCI, a mandatory fine of [redacted] should be imposed unless the Rider can establish that a reduction of the fine would be justified in application of the criteria set out in Article 10.10.1.1 ADR.

138. The Rider has not contested the above figures and has not put forward any arguments for reduction of the fine.

139. The Single Judge finds, therefore, that a fine in the amount of [redacted] shall be imposed on the rider.

140. Lastly, and as provided for in article 10.10.2, the Single Judge finds that the Rider shall bear the following costs:

- the costs of the results management incurred by the UCI (CHF 2'500);
- the costs of the B-sample analysis (CHF 510);
- the costs of the A and B Sample Laboratory Documentation Packages (CHF 600); and
- the costs of the out-of-competition testing (CHF 1'500).

VI. COSTS OF THE PROCEEDINGS

141. In application of article 28 paragraph 1 of the ADT Procedural Rules, the Tribunal has to determine the costs of the proceedings as provided under Article 10.10.2 paragraph 1 of the UCI ADR.

142. In view of the outcome of the proceedings and in the absence of a UCI request to be awarded a contribution for its expenses, the Single Judge decides, based on article 28 paragraph 2 of the ADT Procedural Rules that the present Judgment is rendered without costs and that each party shall bear its own costs in these proceedings.

VII. RULING

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

1. Mr. André Cardoso has committed an Anti-Doping Rule Violation (article 2.2 UCI ADR).

2. Mr. André Cardoso is suspended for a period of ineligibility of four (4) years commencing on the date of this Judgment, i.e. on 15 November 2018.

3. The provisional suspension already served by Mr. André Cardoso, starting from 27 June 2017, shall be credited against the four-year period of Ineligibility.

4. The results obtained by Mr. André Cardoso between 18 June 2017 and 27 June 2017, if any, are disqualified.

5. Mr. André Cardoso is ordered to pay to the UCI the amount of [redacted] as monetary fine.

6. Mr. André Cardoso is ordered to pay to the UCI:

a) the amount of CHF 2'500 for costs of the results management;
b) the amount of CHF 510 for costs of the B-sample analysis;
c) the amount of CHF 600 for costs of the A and B Sample Laboratory Documentation Packages; and
d) the amount of CHF 1'500 for costs of the out-of-competition testing.

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

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

a) Mr. André Cardoso;

b) the Portuguese National Anti-Doping Organisation;

c) the Andorran National Anti-Doping Organisation;

d) UCI; and

e) WADA.

144. This Judgment may be appealed before the CAS pursuant to Article 30 paragraph 2 of the ADT Procedural Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 of the UCI ADR.

_____

Andreas Zagklis
Single Judge