Arbitration CAS 2010/A/2174 Francesco De Bonis v. Comitato Olimpico Nazionale Italiano (CONI) & Union Cycliste Internationale (UCI), award of 15 June 2011

Panel: Mr Bernhard Welten (Switzerland), President; Mr Jacopo Tognon (Italy); Prof. Ulrich Haas (Germany)

Cycling
Doping (Athlete's Biological Passport, ABP)
Arbitrability of a dispute according to Swiss law
Article R56 of the CAS Code and production of new documents
Admissibility of the ABP as evidence –Panel's appreciation of the Experts' opinion
ABP as a scientific method for the detection or ascertainment of an anti-doping rule violation
Right of an athlete to collect his own samples or to have them collected by a third person

1. **The proceedings before CAS are governed by Swiss law and, in particular, by the Swiss Federal Act on Private International Law (PILA): in this respect, a dispute is arbitrable independently of any classification by the Italian law of the appealable decision as an act of administrative law.**

2. **Article R56 of the CAS Code does not exclude the submission of documents in CAS proceedings that were not produced in the previous instance. Instead the provision refers to the production of documents after the closing of submissions in proceedings before the CAS. Furthermore, the power to admit evidence not produced in the previous instance(s) has been expressly affirmed by CAS.**

3. **A CAS Panel is in a position to evaluate and assess the weight of a (party-appointed) expert opinion submitted to it. It does so by evaluating the facts, on which the expert opinion is based and by assessing the correctness and logic of the conclusions drawn by the experts. In fulfilling this task the Panel takes into account the statements and opinions of (all) the parties. It is on the basis of this evaluation and balancing of the various submissions that the Panel will form its own opinion on the facts and consequences that follow thereof. This opinion may be in line with the evidence provided by a party-appointed expert. However, the contrary may be equally true. The Panel's activity is, thus, not a "pure referral" to some other's opinion.**

4. **The ABP does not establish new anti-doping rule. Instead, the ABP is – in essence – a method to detect an anti-doping rule violation. As long as the "enhancement of oxygen transport" already constituted an anti-doping rule violation at the time of the first sample taking, there is no issue of a retrospective application of an anti-doping provision. It is the application of a certain scientific method in order to detect or ascertain an anti-doping rule violation. As such, the use of the newest and most advanced scientific methods in order to uncover anti-doping rule violations is perfectly**

legitimate, provided that these techniques do not violate fundamental human rights and that they can be considered as a "reliable means" by virtue of Article 3.2 of the WADA Code.

5. **For the good functioning of the fight against doping, a system in which the doping controls are carried out exclusively by anti-doping organizations is essential. The doping controls cannot depend on the athletes' will to be "controlled" and that, obviously, the athletes cannot be the "controller" and the "controlled" at the same time. The latter would, however, be the case if the athlete would be allowed to collect his own samples, or to have them collected by a third person (even an analyst) at the time he wishes or deems appropriate.**

Mr Francesco De Bonis (the "Athlete" or the "Appellant"), born in Isola del Liri on 14 April 1982, is a professional cyclist who holds a license of the Federazione Ciclistica Italiana (FCI).

The Comitato Olimpico Nazionale Italiano (CONI or the "First Respondent") is the National Olympic Committee for Italy and has its seat in Rome. The CONI has legal personality under Italian law. Its tasks are the promotion and regulation of sport in Italy and, thus, also the fight against doping. The CONI is, indeed, the competent anti-doping organization in Italy and is recognized by the World Anti-Doping Agency (WADA). The Ufficio Procura Antidoping (UPA) is an independent body established by the CONI. The main task of UPA is the fight against doping at national level and, thus, the undertaking of any activity aimed at the discovering and sanctioning of anti-doping rule violations and also representing the CONI in the disciplinary proceedings – relating to doping – before the competent sport judicial bodies. For the purposes of the present award, CONI and UPA will be referred to – jointly – as UPA-CONI.

The Union Cycliste Internationale (UCI or the "Second Respondent") is the association of national cycling federations. UCI has its seat in Aigle and has legal personality under Swiss Law. Among the various tasks of UCI, the latter is – *inter alia* – responsible for the promotion, development and supervision of the sport of cycling worldwide.

Mr De Bonis has been included in the "International Registered Testing Pool" (IRTP) of the UCI. Cyclists included in the IRTP have to submit to doping controls by the UCI. Between 27 November 2007 and 18 May 2009, a total of eight (8) blood samples were taken from the Appellant in order to issue an "Athlete Biological Passport" (ABP). The ABP is an instrument aiming at the discovery of potential anti-doping rule violations, based on longitudinal monitoring of relevant individual values of markers.

On 7 June 2009, a panel composed of three (3) experts appointed by UCI analyzed independently the data recorded in the ABP of the Appellant. Based on this data, the panel of experts reached the conclusion that *"the haematological profile (…) demonstrate[d] convincing evidence of the use of a prohibited method listed under category* ***M1. Enhancement of Oxygen Transfer*** *of the* Prohibited List *maintained by the*

World Anti-Doping Agency" (WADA). The panel further stated to have *"considered and excluded any other explanation, physiological or pathological"*.

On 17 June 2009, UCI sent to the Appellant a communication, via mail, informing him of the panel's conclusion and advised him of a potential anti-doping rule violation, concerning the use of a prohibited method of the category M1 of the 2009 WADA Prohibited List.

On the same date, *i.e.* 17 June 2009, UCI informed FCI of the Appellant's potential anti-doping rule violation and advised FCI to initiate a disciplinary proceeding against the Appellant in accordance with Articles 251-282 of the UCI Anti-Doping Rules (UCI ADR).

On 6 July 2009, Dr Paolo Borrione – an expert appointed by UPA-CONI to examine the data contained in the Appellant's ABP – confirmed the conclusions reached by the panel of experts of the UCI.

On 8 July 2009, the Appellant was summoned by UPA-CONI to state his position in relation to the charges brought against him. The Appellant declared in this meeting that he never took prohibited substances or applied prohibited methods.

On 8 July 2009, the WADA-accredited laboratory of Châtenay-Malabry advised UCI of an Adverse Analytical Finding for "Recombinant Erythropoietin" (CERA). The sample for which this analytical finding had been recorded regarded the Appellant's blood sample provided on occasion of an anti-doping control carried out during the competition "Giro d'Italia" on 7 May 2009.

On 6 October 2009, UCI informed the Appellant about this finding.

On 29 October 2009, the Appellant filed a brief with UPA-CONI, with which he commented on the alleged violations. In his submissions the Appellant pointed out, *inter alia*, that on 7 May 2009 only one blood sample had been collected from him and that therefore, no "B sample" was available for the counter-analysis. Furthermore, the Appellant submitted that the identification number of the sample indicated in the UCI's letter dated 6 October 2009 did not match with the one of the blood sample provided on 7 May 2009.

On 2 November 2009, UCI informed UPA-CONI that in the correspondence of 6 October 2009, due to an administrative error, a wrong sample identification number had been indicated. According to UCI this error *"should not be considered to cast any doubt on the chain of custody requirements"* related to the sample provided by the Appellant. Furthermore, the letter specified that *"[t]here was no B sample collected (…) because the sample was originally collected for the purposes of the biological passport"*.

On 15 March 2010, UPA-CONI charged the Appellant with an anti-doping rule violation pursuant to Articles 2.2 and 10.2 of the World Anti-Doping Code (WADC) and Article 293 of the UCI ADR before the Tribunale Nazionale Antidoping (TNA). UPA-CONI requested the TNA – *inter alia* – to impose a two-year period of ineligibility on the Appellant.

On 27 May 2010, the TNA issued a decision with the reference number 15/2010 ("the Decision") in which it found the Appellant to be responsible for an anti-doping rule violation according to article

2.2 WADC and M1 (Use of a Prohibited Method) of the WADC (*"ritenuta la responsabilità dell'atleta (…) in ordine alla violazione antidoping prevista dall'art. 2.2 e dalla lett. M1 (uso di metodo proibito) del Codice WADA"*). The TNA imposed on the Appellant a sanction of two (2) years of ineligibility (starting from 18 June 2009). Furthermore, the TNA imposed a fine on the Appellant in the amount of EUR 13'750 and an obligation to refund UCI EUR 3'500 and CONI EUR 15'737.20 for the costs incurred in the proceedings.

On 21 July 2010, the Appellant filed a Statement of Appeal against the Decision with the CAS Court Office. In his Statement of Appeal the Appellant requested a stay of the Decision.

On 3 August 2010, the Appellant submitted that his Statement of Appeal should be considered also as his Appeal Brief.

On 3 August 2010, UPA-CONI sent a letter to the CAS requesting that UCI be joined as a party in this proceeding since it had already participated in the proceedings before the TNA. Furthermore, UPA-CONI requested an extension of the time-limit for filing its Answer and its position on the Appellant's request for provisional measures.

In his letter dated 5 August 2010, the Appellant objected to an intervention of UCI in the present proceedings and to an extension of the time-limit in favour of UPA-CONI.

By letter of 6 August 2010, the Deputy President of the CAS Appeals Arbitration Division decided to grant UPA-CONI a short additional deadline.

On 24 August 2010, UPA-CONI filed its Answer and formally requested the intervention of UCI in these proceedings.

On 27 August 2010, the CAS Court Office informed UCI of the present proceedings and of UPA-CONI's request for UCI to intervene according to Article R41.2 of the Code of Sports-related Arbitration and Mediation Rules (the "CAS Code").

On 6 September 2010, UCI informed the CAS of its intention to participate in the proceedings.

In its communication to the CAS of 8 September 2010, the Appellant – *inter alia* – objected to the participation of UCI in the proceedings.

On 5 October 2010, the CAS Court Office communicated to the parties the decision of the President of the CAS Appeal Arbitration Division to admit UCI as a party in the present proceedings, subject to a final decision to be taken by the Panel on the matter, upon its constitution.

On 8 October and 25 October 2010, UPA-CONI and UCI filed their Answers as well as their position on the Appellant's application for a stay of the TNA decision.

On 10 November 2010, the CAS Court Office notified the parties of the decision of the Deputy President of the Appeal Arbitration Division to dismiss the Appellant's request for a stay.

On 18 January 2011 the Panel of CAS arbitrators for this case ("the Panel") confirmed the decision of the Deputy President of the Appeal Arbitration Division regarding UCI's request for intervention in the present procedure.

On 18 February 2011, UCI filed with the CAS Court Office its Answer.

On 25 February 2011, a hearing was held in Lausanne at the premises of the CAS. During the hearing the following experts where heard: on behalf of the Appellant: Dr Edmondo Iafrate (by teleconference); on behalf of UPA-CONI: Prof. Giancarlo Isacchi (by teleconference), Prof. Paolo Borrione (by teleconference), Prof. Giuseppe D'Onofrio; on behalf of UCI: Dr Giuseppe Fischietto, Dr Neil Robinson; Dr Pierre-Edouard Sottas.

In his Statement of Appeal /Appeal Brief, the Appellant submitted the following request to the Panel:

(a) [p]rincipally, will revoke and cancel the sentence indicated [i.e. the TNA decision] (…), and with its reform revoke the economical situations derived from it and to adopt any other measure necessary in order to release [him] from the charge of doping;

(b) [i]n a subordinate way, in case of rejection of the main request will reduce the disqualification penalty and annul or reduce the financial penalty, considered high, arbitrary and inadmissible, inflicted at the sentence challenged.

In its Answer, UPA-CONI requested the Panel to decide:

(a) the decision No. 15/2010 dated 27 May 2010 of the TNA is upheld and the appeal dismissed;

(b) the cyclist Mr Francesco De Bonis is declared ineligible for two years and sentenced to pay the financial sanction and the costs as stated in the TNA decision;

(c) UPA-CONI is entitled to receive from Mr De Bonis a contribution towards its legal fees and other expenses incurred in connection with this arbitration.

In its Answer, the Second Respondent (UCI) requested the Panel *"to dismiss the appeal of Mr De Bonis and to confirm the appealed decision as following, regarding the UCI*:

(a) Mr De Bonis committed an anti-doping rule violation under 21.2 ADR (use of a prohibited method, in particular enhancement of oxygen transfer);

(b) Mr De Bonis is sanctioned with a period of ineligibility of two years starting on 18 June 2009;

(c) Mr De Bonis is sanctioned with a fine of 13,750.00 euros, to be paid to UCI;

(d) Mr De Bonis is ordered to pay an amount of 3,500.00 euros to UCI, for costs incurred until the TNA decision;

(e) The UCI also requests that Mr De Bonis is ordered to pay a contribution to the legal and expert costs of the UCI before CAS".

LAW

CAS Jurisdiction

1. The present proceeding is an Appeals Arbitration proceeding. The jurisdiction of the CAS must be, thus, ascertained in accordance with Article R47 of the CAS Code. This provision stipulates three prerequisites, which must be met, in order for the Panel to ascertain its jurisdiction, namely:
   - there must be a "decision" of a federation, association or another sports-related body;
   - the "internal remedies available prior to the appeal" to CAS must have been exhausted, in accordance with the statutes or regulations of the mentioned bodies, and
   - the parties must have submitted to the competence of the CAS.

2. In the present case the Decision is the "object" of the appeal before the CAS. Since the TNA is a judicial organ of CONI, its decision must be considered as a "decision of an association" within the meaning of Article R47 of the CAS Code, so that the first prerequisite is fulfilled. The second prerequisite is also met. This can be inferred from reading Article 1, paragraph 3, of the "Appendice H" of the NSA (2010), denominated *"Istruzioni operative del TNA"*, according to which after the conclusion of the proceeding before TNA, an appeal may be filed only to the CAS. It is, thus, evident that, once the proceeding before TNA is concluded, the ordinary internal remedies available to the parties have been exhausted and the only means to challenge the decision is the filing of an appeal to the CAS. The third prerequisite is also met. This follows from the reading of Article 4, paragraph 23, of the *"Istruzioni operative del TNA"* of NSA, which establishes that any decision issued by TNA may be appealed by the interested parties to the CAS. The jurisdiction of the CAS to rule on the present dispute can be also inferred from the entry form of FCI, signed by the Appellant in the years 2007, 2008 and 2009. It must be, finally, noted that the jurisdiction of the Panel has not been contested by any party to this proceeding.

3. The Panel, moreover, considers the dispute arbitrable, independently of any classification by the Italian law of the Decision as an act of administrative law. The present proceedings are governed by Swiss law and, in particular, by the Swiss Federal Act on Private International Law of 18 December 1987 (PILA). Article 177 (1) PILA provides the arbitrability of any pecuniary claim. To this purpose, it must be recalled that, according to the jurisprudence of the Swiss Federal Tribunal, a claim can be considered of pecuniary nature if it has, at least for one party, an economic value or if it can be economically evaluated (sentences published in ATF 118 II 353, ATF 108 II 77 and ATF 119 II 271). The Swiss Federal Tribunal has also expressly confirmed the arbitrability of doping-related disputes (decision of 15 March 1993, in *Digest of CAS Awards*, 1986-1998, p. 545 ff.).

Mission of the Panel

4. The mission of the Panel must be determined, in principle, by reference to Article R57 of the CAS Code, according to which the Panel has full power to review the facts and the law of the

case. Article R57 also gives the Panel the power to issue another decision – which replaces the one challenged – or to annul the appealed decision and refer the case back to the previous instance.

Admissibility

5. Article R49 of the CAS Code foresees a time-limit of twenty-one (21) day for filing the appeal, running from the receipt of the decision appealed against. An exception is made for the case of a different time-limit set in the statutes or regulation of the relevant federation, association or sport-related body or by the parties in a previous agreement. In this regard paragraph 23 of Article 4 of the *"Istruzioni operative del TNA"* of the NSA 2010 establishes a time-limit of thirty (30) days for filing the appeal to the CAS, starting on the day on which the reasoned decision is received by the party. The Decision was issued by the TNA on 27 May 2010. The grounds of the decision were communicated to the parties on 25 June 2010. The Athlete filed his Statement of Appeal with the CAS Court Office on 21 July 2010 and, thus, within the thirty (30) days time-limit prescribed by the NSA.

6. Article R51 of the CAS Code provides a ten (10) days time-limit for filing the Appeal Brief, following the expiry of the time-limit for the Appeal. On 3 August 2010 the Athlete filed a communication with the CAS Court Office, requesting that the Statement of Appeal would be considered also as the Appeal Brief, in accordance with the provision of Article R51 of the CAS Code.

7. The Appellant complied with the time-limits prescribed by the NSA and by the CAS Code. The appeal is, therefore, admissible.

Applicable Law

8. Article R58 of the CAS Code provides that:

"[t]he Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

9. In the present case, the applicable regulations for the purposes of Article R58 of the CAS Code are the UCI ADR and the NSA. In view of the principle *tempus regit actum* both regulations apply in their respective versions in force for the year 2009 (as far as the material questions of this case are concerned). The purpose of both the UCI and the CONI anti-doping regulations is to implement and enforce the WADC 2009.

The Merits

A. On the alleged irregularities in the proceeding before TNA

10. The Appellant argues that the Decision must be declared null and void in view of procedural irregularities before the TNA. In this regard the Appellant complains that his right to a fair and equitable proceeding has been violated – *inter alia* – because of the language in which certain documents were redacted (English) and because of the late filing of certain documents. The Appellant, therefore, submits that these documents should be excluded from the file according to Article R56 of the CAS Code.

11. First of all, it seems appropriate for the Panel to recall the provision of Article R57 of the CAS Code, according to which the Panel has full power to review the facts and the law of the case, and which, expressly, confers the power to the Panel not only to annul the appealed decision and refer the case back to the previous instance, but to issue a new decision which replaces the one challenged. In view of the *de novo* character of the proceedings before the CAS and taking into consideration that the Panel gave the parties ample possibilities to present the facts and legal aspects of the case, this Panel decides to adjudge the present dispute finally. Therefore, any possible irregularity that occurred in the proceeding before the TNA must be considered cured. This is in line with the constant jurisprudence of the CAS (see *e.g.* CAS 2009/A/1920, par. 87). It follows from the above, therefore, that the procedural irregularities raised by the Appellant can be left undecided. This is all the more true that the Appellant's counsel expressly accepted – at the hearing – the use of the English language in the proceeding before the CAS.

12. The Appellant also contested the production of certain documents on the basis of Article R56 of the Code. The Panel notes that the Appellant's interpretation of this article cannot be followed. This provision, in fact, does not exclude the submission of documents in CAS proceedings that were not produced in the previous instance. Instead the provision refers to the production of documents after the closing of submissions in proceedings before the CAS. Furthermore, the power to admit evidence not produced in the previous instance(s) has been expressly affirmed by this Court (see *e.g.* CAS 2008/A/1700 and CAS 2008/A/1710, paras. 62-69). There are, thus, no reasons for not admitting the production of the documentation at issue. It must also be noted that it does not appear logical to contest – as the Appellant does – the regularity of the chain of custody and, at the same time, object to the production of the documentation which could be useful to ascertain whether, or not, some irregularities actually occurred.

B. The admissibility of the ABP as evidence

13. The Appellant argues that it would not be correct for the Panel to base its decision on the ABP because this would constitute a *"pure referral to the expert's opinion" – i.e.* to the opinion of the UCI experts' Panel. The Panel cannot follow this argument. This Panel is in a position to evaluate and assess the weight of a (party-appointed) expert opinion submitted to it. It does so by evaluating the facts, on which the expert opinion is based and by assessing the correctness and logic of the conclusions drawn by the experts. In fulfilling this task the Panel takes into account

the statements and opinions of (all) the parties. It is on the basis of this evaluation and balancing of the various submissions that the Panel will form its own opinion on the facts and consequences that follow thereof. This opinion may be in line with the evidence provided by a party-appointed expert. However, the contrary may be equally true. The Panel's activity is, thus, not a "pure referral" to some other's opinion. In particular, the Panel is of the view that the ABP can be evaluated and assessed according to the above principles and is, thus, not excluded from the evidence from the outset.

14. The Appellant also maintains that the system of the ABP entered into force only on January 2008, while the first sample of his ABP, examined by the UCI's experts-panel, was collected on 2007. In this regard, the Panel notes that the ABP does not establish new anti-doping rule. Instead, the ABP is – in essence – a method to detect an anti-doping rule violation. It is uncontested between the parties that the "enhancement of oxygen transport" already constituted an anti-doping rule violation at the time of the first sample taking in November 2007. Therefore, in the case at hand there is no issue of a retrospective application of an anti-doping provision. Rather, this case deals with the application of a certain scientific method in order to detect or ascertain an anti-doping rule violation (see also TAS 2010/A/2178, paras. 33-35; in a different, but comparable context, see also CAS 2009/A/1931, par. 8.10). In the Panel's view, the use of the newest and most advanced scientific methods in order to uncover anti-doping rule violations is perfectly legitimate, provided that these techniques do not violate fundamental human rights and that they can be considered as a "reliable means" by virtue of Article 23 of the UCI ADR and of Article 3.2 of the WADC. In the case at hand the techniques applied do not violate the Appellant's fundamental rights, since the sample was provided by the Appellant for anti-doping purposes. Furthermore, the Appellant did not object to the use of the sample collected on November 2007 for the purposes of the ABP (see also CAS 2009/A/1912 and CAS 2009/A/1913, par. 100). For all the reasons set out above, the Panel considers that the results of the analysis of the blood sample provided by the Appellant on November 2007 have been validly included in the ABP. Just as a side note the Panel would like to recall, that the Respondents have not submitted that the inclusion of the November 2007 sample in the ABP is essential for the experts' conclusion that an anti-doping rule violation has been committed. Prof. Isacchi – e.g. – stated to have examined only the data relating to the years 2008 and 2009. Dr Borrione submitted to have examined also the data in relation to the sample of November 2007. However, he stated that he did not take the latter into account when issuing his expert opinion. Prof. D'Onofrio and Dr Fischietto stated to have examined and taken into account the data relating to all the samples (including the sample of November 2007) but expressly affirmed that, in their opinion, the data relating to the sample of November 2007 was not decisive for their conclusions.

C. The Reliability of the ABP

15. The Appellant contends that no conclusion can be drawn from the values of the ABP because they are based on a sample taking procedure that is not reliable. In order to be reliable an A and a B sample should have been collected for every single value entered into the ABP. The Panel notices that no such requirement is expressly mentioned in the UCI protocols on blood collection in force in the years 2007, 2008 and 2009. The Appellant did not indicate on which

provision he bases the requirement for an A and B sample. The applicable rules for blood collection related to the ABP only provide for one sample to be taken at the time. The Panel is not of the opinion that in order to protect the fundamental rights of an athlete an A and B sample is required in this context. The principal reason why the latter is provided for in order to ascertain "the presence of a prohibited substance" (cf. Article 2.1 WADC) is to avoid any possible manipulation of the sample after the latter has been provided. In particular the B sample is needed to exclude the – remote – possibility that the prohibited substance is added to the athlete's sample after sample taking. In order to eliminate this risk – which is beyond the control of the athlete – the predominant view holds that a safeguard in the form of a B sample is needed to protect the athlete's fundamental rights. Whether this is still true today can be left unanswered here. The Panel only notes that the risk situation in the context of the ABP is different, since the latter is not designed to detect a particular prohibited substance, but measures individual blood values instead. Because of this fundamental difference this Panel sees no compulsory necessity for an A and a B sample when taking samples for the purpose of the ABP.

16. The Appellant questions the admissibility of the ABP because the system does not establish the use of a prohibited substance or method, but only formulates probabilities in relation to a possible anti-doping violation. Thus, according to the Appellant the method used by the Respondents is neither "infallible" nor "undisputable" and cannot be relied upon. The Panel cannot follow this reasoning. The Appellant appears to believe that only such techniques to detect anti-doping practices are admissible that provide proof beyond reasonable doubt. However, Article 22 of the UCI ADR and Article 3.1 of the WADC clearly state that an Anti-Doping Organization discharges its duty of establishing an anti-doping rule violation if the Panel is *"comfortably satisfied"* that an anti-doping rule violation has occurred (*"bearing in mind the seriousness of the allegation which is made"*). The standard "comfortable satisfaction of the hearing panel" is further defined as a standard that *"is greater than a mere balance of probability but less than proof beyond a reasonable doubt"*. It follows from this that "infallibility" is by no means a standard required or expected of the ABP.

17. As for the probative value of the ABP, the Panel is of the view that it provides a satisfactory level of reliability (and, thus, has to be considered a "reliable mean" in the sense of Article 23 of the UCI ADR and of Article 3.2 of the WADC). The ABP is essentially a three-step-process. In a first step the ABP has to be established for an individual athlete. To this end blood samples collected from the athlete in and out of competition are analysed by haemochromo-cytometry. Essentially there are three (3) values obtained through this analysis which are of interest for the ABP: the haemoglobin value, the reticulocytes-percentage and the "off-score". The haemoglobin value shows the athlete's capacity to produce red blood cells and, thus, his capacity concerning oxygen transfer. This value is – in the absence of specific pathological conditions – a very stable one and only subject to very minor changes. The reticulocytes-percentage shows the percentage of the athlete's "young" red blood cells. The concentration of reticulocytes increases in case of an erythropoietic stimulation (deriving, for instance, from bleeding or administration of erythropoietin) and decreases if this stimulation ceases (*e.g.* after a blood transfusion or when the taking of erythropoietin is suspended). The "off-score" is obtained by a calculation of the ratio between the two former values (haemoglobin and reticulocytes). A high off-score value indicates that there is – in relation with the overall level of haemoglobin –

a low concentration of reticulocytes, whereas a low off-score value indicates a rather high concentration of reticulocytes in comparison with the haemoglobin value.

18. For every sample analysed the three values are inserted in the ABP. A specially designed software then calculates a minimum and maximum range for each parameters (haemoglobin, reticulocytes and "off-score"). Thus, a corridor is established showing a range of values which can be considered as physiologically normal (see also TAS 2010/A/2178, paras. 38-42). The basic values for the calculation are based on the average values of the population which are part of the specially designed software. With the first ABP values entered in the software this corridor basically reflects the individual specificities of the person being tested.

19. Once the software registers a variation which – with a probability of 99.9% or more – is the result of a non-physiological or abnormal cause, the second step, *i.e.* the interpretation of the data by a panel of experts is triggered. The panel of experts will then evaluate the data and express its opinion on the cause of the abnormal values. Only if factors not relating to the use of a prohibited substance or method can be excluded, the panel of experts will issue a report which then will initiate the final step of the procedure, *i.e.* the institution (by UCI or by the requested Anti-Doping Organization) of a disciplinary proceeding against the athlete for an alleged anti-doping rule violation. The condition precedent for this third and final step of the procedure is that all members of the panel of experts separately and unanimously come to the conclusion that all other causes but doping can be excluded to be the source of the abnormal values. The documentation provided to the panel of experts for interpretation and evaluation does not identify the athlete concerned. The evaluation process is, thus, anonymous.

D. Does the ABP support the finding of an anti-doping rule violation?

20. The ABP in the Appellant's case is based upon eight samples – collected between 27 November 2007 and 18 May 2009 – and shows an abnormality for the Appellant's values with a probability of 100% in relation to the haemoglobin and the reticulocytes values and with a probability of 99.97% for the "off-score". Considering the relevancy of such indications, the submission to experts-panel for the evaluation of the Appellant's ABP was clearly appropriate (leaving aside the fact that, as mentioned above, the submission to the experts-panel is perfectly legitimate also in cases where the values do not indicate such a high probability). This evaluation leads to the conclusion – reached unanimously by the experts-panel – that the ABP shows the use of a Prohibited Method listed under Category M1 of the Prohibited List, issued by WADA, *i.e.* the Enhancement of Oxygen Transfer. In reaching its conclusion the experts-panel considered and excluded "any other physiological or pathological" explanation. In the Panel's view, this opinion is correct.

21. The analysis of the first sample (that of 27 November 2007) of the Appellant's ABP shows a haemoglobin value of 13.8 g/dl which raises to 17.3 g/dl (above the former limit established by the "no-start rule") on 30 April 2008. This variation cannot be considered to be physiological. The Appellant contends that those haemoglobin values should be considered "normal" because, on the one hand, before the collection of the sample of November 2007 he had suffered from pathological conditions, causing bleedings, and, on the other hand, the high value

of 30 April 2008 would be the consequence of an iron therapy, to which he had undergone. As far as the haemoglobin value of November 2007 is concerned, it can be, firstly, noted that the alleged pathological conditions, were not reported at the time of the taking of the samples. Furthermore, the alleged bleedings and the supposed iron therapy are not confirmed by the other values obtained through the analysis of the relative sample. The latter shows a Mean Cellular Volume (MCV) which is perfectly in line with those of the other samples provided by the Appellant. In addition, in view of the alleged bleedings (and the erythropoietic stimulation that goes along with it) one would have expected an increase of the reticulocytes values. The latter, however, could not be recorded. As for the haemoglobin value obtained from sample collection dating 30 April 2008, it cannot be explained by an alleged iron therapy. The analysis of this sample shows an increase of reticulocytes, which is definitely not in line with the reticulocytes-values of the other samples and cannot be explained by an iron therapy. Moreover, an iron therapy – which, in the Appellant's case, was carried out at a very low dosage – cannot cause such an increase of the haemoglobin value (the same holds true for the reticulocytes). This is particularly so in the case of individuals who – as in the Appellant's case – do not suffer of a severe anaemic disease.

22. The values of the Appellant's ABP, concerning the samples collected between 20 June 2008 and 28 April 2009, show a constant decrease of the haemoglobin value, which, on the latter date, reaches 14.1 g/dl. On 7 May 2009 (*i.e.* only eight days later), however, this value suddenly increases to 16.3 g/dl. This variation cannot be explained physiologically. The Appellant alleges insofar to have suffered from enteritis, a circumstance – again – not reported at the time of the sample taking. Furthermore, at the time of the sample taking the Appellant did not mention any of the drugs he maintains to have taken for the respective medical treatment. The Panel is of the view – in line with the opinion expressed by the experts – that the alleged disease (of which the Appellant declared to have suffered until 2 May 2009), cannot lead to such dehydration to influence the analysis carried out only five (5) days later. Furthermore, the kind of drugs used and the dosage (allegedly) applied by the Appellant in the context of the therapy are not consistent with the pretended important pathological condition. In addition, given such pathological condition the Appellant would never have been able to participate in a demanding competition like the "Giro d'Italia" only a few days later. In this respect the Panel also notes that the two "peaks" in relation to the haemoglobin values (that of 17.3 g/dl and that of 16.3 g/dl) and, thus, the maximum capacity for oxygen transfer were recorded from the analyses of samples, which were collected on the evening before the two competitions in which the Appellant participated, *i.e.* the "Tour de Romandie 2008" and the "Giro d'Italia 2009".

23. Possible degradations of the Appellant's samples must also be excluded as source of explanation for the values obtained, since the documentation relating to the analyses of the samples show that the samples were of good "quality". The Appellant did not contest the data in the analysis-reports. The latter, however, represent clear and reliable evidence that the quality of the samples was good and that no degradations occurred. In addition, the Appellant's submission in relation to the poor quality of the sample is mainly directed against the analysis carried out in the Laboratory of Châtenay-Malabry. It must be noted, however, that the analysis carried out in the French laboratory does not relate to the ABP but to the detection of CERA. On this point the Panel will come back later.

24. The Appellant raised another issue before the TNA and in the hearing before the Panel regarding the last two values entered in his ABP (samples collected on 7 May 2009 and on 18 May 2009) which show a decrease of the haemoglobin value from 16.3 g/dl to 14.6 g/dl in eleven (11) days. In this context, the Appellant refers to the explanatory notes for the medicine MIRCERA which indicates that after the suspension of its use, the haemoglobin-value is expected to decrease of about 0.35 g/dl per week. The Appellant follows from this that the decrease of 1.7 g/dl in only eleven (11) days observed for his values is, therefore, not consistent with the Appellant's use of that substance. The Panel states, that this argument must be rejected. From the cross-examination of the parties' experts, it emerged clearly that during the course of stage-races (like the "Giro d'Italia"), the haemoglobin-value tends to decrease more rapidly than in normal conditions. This could in itself already explain the decrease at issue. There is, however, also another important circumstance to be considered. As stated by the experts of UCI and UPA-CONI, the explanatory notes refer only to the treatment of individuals suffering from important diseases where the endogenous production of erythropoietin is strongly reduced or inexistent. For this reason the prognosis reported on the explanatory notes cannot be deemed to be transferred without modifications to healthy individuals. This is all the more true, considering that there is no reliable scientific data concerning whatsoever experimentation of the medicine MIRCERA on healthy individuals. The latter was after all also acknowledged by the Appellant's expert.

E. The observance of basic athlete's rights

25. The Appellant, finally, requested at the hearing a new ABP be established on the basis of blood values that were taken on his initiative and analysed by private laboratories. Such new ABP would show – according to the Appellant – that his values are completely "normal". Such a request – expressed firstly at this stage of the proceedings –, obviously, cannot be granted. First of all, it seems to be pretty clear that for the good functioning of the fight against doping, a system in which the doping controls are carried out exclusively by anti-doping organizations is essential. This means, *inter alia*, that the doping controls cannot depend on the athletes' will to be "controlled" and that, obviously, the athletes cannot be the "controller" and the "controlled" at the same time. The latter would, however, be the case if the athlete would be allowed to collect his own samples, or to have them collected by a third person (even an analyst) at the time he wishes or deems appropriate. In the case at hand, however, there are also further reasons, for which the analyses carried out on the Appellant's own initiative cannot be admitted: The Appellant's analyses do not report all the fundamental data for the purposes of the ABP, like e.g. the data concerning the number or percentage of the reticulocytes. Furthermore, even if the Panel does not intend to put in question the quality of the private laboratory which carried out the analyses for the Appellant, there is no evidence showing that the standards followed by the latter are the same as requested and followed by the WADA accredited laboratories. The athlete's right is, however, to request and check that the testing procedure (*i.e.* sample collection, transportation, sample analysis, etc.) is following the required standards and therefore the athlete is guaranteed a high quality of the procedure. In the Appellant's case the evidences show that the whole ABP procedure followed the requested WADA and UCI standards.

26. For the reasons set above, the Panel is of the view that the Appellant committed the anti-doping rule violation, i.e. the "Use of a Prohibited Substance or a Prohibited Method" according to Article 21.2 of the UCI ADR, consisting in the "Enhancement of Oxygen Transfer" within the meaning of the Category M1 of the WADA Prohibited List.

F. The Chain of Custody

27. The next issue to be dealt with is the one relating to the chain of custody. The Appellant contests the regularity of the procedure (in particular the transportation and the analysis of the blood sample). He basis his objections on the communication sent by UCI to the Appellant on 6 October 2009. With this letter UCI informed the Appellant of the Adverse Analytical Finding for the substance CERA detected in the sample provided on 7 May 2009. On the document attesting the said Adverse Analytical Finding also the ID sample-number was reported. The latter, however, was different from that of the Appellant's sample collected on the same date. It is uncontested between the parties that there was a mistake on behalf of UCI. The consequences to be drawn from it, however, are disputed. UCI qualifies the mistake as an "administrative" one, meaning that the Appellant – mistakenly – received the notification of an Adverse Analytical Finding issued for another sample. With letter of 2 November 2009 UCI sent the correct document regarding the Appellant's Adverse Analytical Finding. In the view of the Panel, this explanation of UCI is convincing and is evidenced when examining the whole documentation regarding the chain of custody. The latter shows that any single step of the chain of custody was duly observed and recorded. It must be further noted that the Appellant does not indicate a particular part of the chain of custody, where a mixing up of samples (and not just the documents issued for the various samples) could have occurred. He generically contests its validity, without giving any explanations other than the notification of a wrong Adverse Analytical Finding on 6 October 2009. However, this does not cast any doubt on the reliability of the chain of custody. Therefore, the Panel does not follow the Appellant's arguments that the tested sample was possibly not his.

G. The test for CERA

28. The Appellant submits that the blood-sample collected on 7 May 2009 could not be analysed for detection of CERA. He contends that he consented only to the use of his blood for the purpose of the ABP and that this consent does not cover the use of his sample for different ends such as the analysis for prohibited substances like CERA. He follows from this, that the analysis was not legitimate and that, therefore, the results from such analysis cannot be used in the present proceedings. The Panel does not share this point of view. Article 120 of the UCI ADR lists the various scopes for which samples may be collected and analyzed, *i.e.*: *"1) to detect the Presence and/or Use of a Prohibited Substance or Prohibited Method; 2) for profiling relevant parameters in a Rider's urine, blood or other matrix, including DNA or genome profiling, for anti-doping purposes ('athlete passport'), including as a means for establishing the Use of a Prohibited Substance or Prohibited Method; 3) to detect substances as may be directed by WADA pursuant to the Monitoring Program described in article 4.5 of the Code; 4) for screening purposes"*. This provision goes on specifying that no sample collected under the UCI ADR *"may be used for any other purpose without the Rider's written consent"*. The wording of

article 120 of the UCI ADR must be considered as granting the Anti-Doping Organization the permission to carry out any of the activities listed in the provision. This is confirmed, *e contrario*, by the second part of the provision, which points out that the use of a sample for any other purpose is not permitted without the athlete's express (written) consent. If, however, a (new) express consent of the athlete is only required for purposes other than those listed in Article 120, then – as a matter of logic – it is not necessary to get a separate consent of the athlete for any of the actions enumerated in the provision. This conclusion is further supported by the reading of article 200 of the UCI ADR, which provides that *"any Sample may be reanalyzed for the purpose described in article 120 at any time exclusively at the direction of UCI or WADA"*. This article is based on article 6.5 WADC which states: *"A sample may be reanalyzed for the purpose of Article 6.2 at any time exclusively at the direction of the Anti-Doping Organization that collected the Sample or WADA. The circumstances and conditions for retesting Samples shall conform with the requirements of the International Standard for Laboratories"*. Here the possibility to "reanalyze" a sample seems to be directed also – given the "broad" wording of the text – to the case in which the first analysis has been carried out for a purpose which is different from that for which the second (or further) analysis must be executed. Therefore, the Panel considers that, since both the analysis for the scope of the ABP and that for the detection of a prohibited substance are included in the categories of article 120, the use of the Appellant's sample for the detection of CERA was legitimate (see also CAS 2009/A/1912 and CAS 2009/A/1913, par. 101).

29. The Appellant also complains about the fact that no "B sample" was collected and that he has not been given the opportunity to reanalyze the sample or to assist at the analysis in person or with the assistance of his expert. UCI contends that no "B sample" is necessary in the context of the ABP and that the sample collected on 7 May 2009 had been taken, precisely, for the purposes of the ABP. The Panel follows this line of reasoning. However, the analysis of one sample only (and the detection of a prohibited substance therein) is not sufficient proof that the Appellant actually committed an anti-doping rule violation in the form of "presence of a prohibited substance" (Article 21.1.2 of the UCI ADR). Neither UCI nor UPA-CONI, anyway, gets to such a conclusion. Instead, their position is that the Adverse Analytical Finding for CERA should be considered as an additional corroborating evidence (alongside the ABP) showing that the Appellant "used a prohibited method or prohibited substance" in order to enhance oxygen transfer. As already mentioned above (see *supra* par. 14), Articles 120 and 200 of the UCI ADR confer on the Anti-Doping Organization the power to analyze a sample for a whole range of different purposes, so that the use of the sample for the detection of CERA was legitimate. Based on these premises, it is evident that if, on the one hand, the Adverse-Analytical Finding at issue does not satisfy the conditions to be met for the application of Article 21.1.2 of the UCI ADR, on the other hand the Panel may take it into account as (an additional) piece of evidence, the probative value of which can be freely evaluated. To conclude, therefore, the Panel is of the opinion that, even if the Adverse-Analytical Finding for CERA (sample of 7 May 2009) is not sufficient proof of an anti-doping rule violation within the meaning of Article 21.1.2 of the UCI ADR, but it may be taken into account as a further element of evidence, reinforcing the conclusions already reached by the Panel on the basis of the ABP.

30. The Appellant contests the probative value of the analysis of the sample collected on 7 May 2009 because the results of the analysis stem from two different laboratories, *i.e.* that of Lausanne and that of Châtenay-Malabry. This opinion contradicts with the clear wording of

Article 197 of the UCI ADR, which states that *"when specific circumstances so justify, the UCI may request that part of a Sample is analyzed in a second laboratory"*. The only condition to be fulfilled, in order to justify the analysis in a second laboratory, is, thus, the presence of "specific circumstances". In the present case the Laboratory of Lausanne was not equipped to conduct a confirmation procedure for CERA with the isoelectric system. The Laboratory of Lausanne only conducted a screening analysis for CERA using the ELISA method. In order to clarify the situation (and the grave suspicions following from the results obtained in Lausanne) UCI decided to send the remaining part of the sample to the Laboratory of Châtenay-Malabry for a confirmation analysis through the isoelectric method. In the Panel's view, all of this constitutes sufficient "specific circumstances" that justify the use of two laboratories in the case at hand.

31. The Appellant, finally, alleges that there is a possibility that the documents from Lausanne reporting an Atypical Analytical Finding for CERA are forged. The Appellant basis this speculation on the fact that in the file there are two documents from the Laboratory of Lausanne reporting the findings of the analysis that are identical but for one point, i.e. the signature of the Laboratory Director. Both documents show the signature of the Laboratory Director in different parts of the documents. However, the Panel finds the evidence given by Dr Robinson convincing. The latter explained that it is absolutely common laboratory practice, to issue several copies of the documents concerning an Atypical or Adverse Analytical Finding, since the results of the analysis have to be notified to several doping authorities. All involved parties will therefore receive an original which is printed and signed by the Laboratory Director separately. It must be further noted that the forgery alleged by the Appellant would be, in the present case, completely useless, as the content of the documents at issue is the same, *i.e.* the Atypical Analytical Finding for CERA. The Panel, thus, rejects the speculation of the Appellant as groundless.

32. The Panel, therefore, considers that the analysis conducted on the Appellant's sample of 7 May 2009 for CERA was legitimate and that the results obtained thereof constitutes further evidence in the case at hand that the Appellant breached the applicable anti-doping rules. The Panel is of the view that – in the end – the results obtained from the laboratories in Lausanne and Paris are not necessary to reach the conclusion that the Appellant committed an anti-doping rule violation in the form of "Use of a Prohibited Substance or a Prohibited Method" (Article 21.2 of the UCI ADR). This violation is already clearly established by the evaluation of the data reported in the Appellant's ABP. The Panel, nevertheless, deemed it appropriate to express its opinion on the points raised by the Appellant regarding the use of the sample for the detection of CERA and the possibility to use the relative results for the purposes of establishing an anti-doping rule violation as most of the Appellant's arguments focused exactly on these issues.

Conclusions

33. For the reasons set above the Panel finds the Appellant responsible of having committed the anti-doping rule violation of "Use of a Prohibited Method" of Article 21.2 of the UCI ADR, consisting in the "Enhancement of Oxygen Transfer" within the meaning of the Category M1 of the WADA Prohibited List.

34. In the light of all of the above-mentioned considerations, the Panel confirms the sanction of two (2) years ineligibility imposed on the Appellant in the previous instance, starting on 18 June 2009. In the Panel's view there are no grounds for a reduction of the sanction provided by the applicable rules.

35. The Panel further confirms the financial sanctions and the restitution of costs imposed on the Appellant by the TNA, in consideration of Article 275 of the UCI ADR, as follows: a fine of EUR 13'750; CHF 3'500 for the costs of UCI before the TNA; EUR 14'737.20 for the costs of CONI.

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

The Court of Arbitration for Sport rules:

1. The appeal of Mr. Francesco De Bonis against the decision No. 15/2010 of the Tribunale Nazionale Antidoping, dated 27 May 2010, is dismissed.

2. The decision No. 15/2010 rendered on 27 May 2010 of the Tribunale Nazionale Antidoping is confirmed, including the ban and financial sanctions.

3. (…).

4. (…).

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