

CAS 2007/A/1356 Tomaž Nose v/ Slovenian Cycling Federation (Kolesarska Zveza Slovenije)

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Conny **Jörneklint**, Chief Judge of the District Court, Kalmar, Sweden

Arbitrators: Dr. Stephan **Netzle**, Attorney-at-law, Küsnacht-Zürich, Switzerland
Dr. Andreas **Reiner** Hon.-Prof, Attorney-at-law, Vienna, Austria

Ad hoc Clerk: Mr Nicolas **Cottier**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Tomaž Nose, Brusnice, Slovenia,

Represented by Mr Gorazd Južina, Ljubljana, Slovenia, Attorney-at-law,

As Appellant

and

Slovenian Cycling Federation (Kolesarska Zveza Slovenije), Ljubljana, Slovenia

Represented by Mr Pavle Pensa, Ljubljana, Slovenia, Attorney-at-law,

As Respondent

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I. FACTUAL BACKGROUND

1. Parties

- 1.1 Tomaž Nose (hereinafter "the Appellant") is a Slovenian citizen domiciled in Brusnice, Slovenia. He is a professional rider and was granted an UCI license with the number 00062, Code number SLO19820421.
- 1.2 The Slovenian Cycling Federation (Kolesarska Zveza Slovenije, hereinafter "the Respondent") is the national federation for cycling in Slovenia with registered office in Ljubljana, Slovenia. It is a member of the UCI (Union Cycliste Internationale).

2. Facts

- 2.1 The Appellant was born on 21 April 1982; he grew up in Slovenia.
- 2.2 Around the age of 18 he joined the Junior national team of Slovenia and became a professional rider at the age of 23 when he joined Phonak, a Swiss professional riding team.
- 2.3 The Appellant participated in several races during the 2005 season until April. As he felt completely exhausted, he stopped competing during 3 months. The Appellant's health status was however not improving and his parents recommended him to visit his primary care physician, who referred him to a specialist at the Endocrinology Clinic of the Ljubljana's Clinical centre. A medical examination, which required a four days hospitalisation, was carried out in October 2005. The results of these tests showed the symptoms of a catabolic condition, namely a "hypogonadotropic hypogonadism", which meant that the Appellant's glands did not excrete enough hormones due to a lack of stimulation. This disease may lead to a reduced bone density and also problems with virility. According to medical experts, who have provided written statements, this status may be the result of overtraining or restrictive diets aimed at reaching the lowest allowed body weight.
- 2.4 The Appellant was then prescribed a Testoviron therapy, a commercial medicine which contains testosterone. The prescribed dose was 250 mg per month, which is considered a relatively low dose, according to professional standards, notably when compared to abuses in sport which can lead to the injection of several 100 mg daily. This application allows the body to keep a reserve of the medication "in stock" which is gradually absorbed over a period of approximately one month. Monthly doses were injected in the Appellant's body from January 2006 until December 2006.
- 2.5 Being aware that the Appellant was a professional rider, a specialist at the Endocrinology Clinic indicated that Testoviron was on the WADA list of prohibited substances. The Appellant thus contacted Mr Milan Bržen who was his coach at the cycling team Adria Mobil with which he had signed a contract for the year 2006 in the meantime. Mr. Eržen recommended him to contact Dr. Joško Osredkar, an international anti-doping expert and Chairman of the Slovenian Olympic Committee's Anti-doping Commission and Dr. Radoje Milič, the representative of the Slovenian Cycling Federation. Dr. Joško Osredkar confirmed to the Appellant that he could not use Testoviron before obtaining a so called Therapeutic Use Exemption (TUE).

- 2.6 The Appellant thus applied for a TUE to the Slovenian Olympic Committee's anti-doping commission. On 4 January 2006 and based on the submitted medical documentation the Slovenian Olympic Committee issued a certificate of approval for therapeutic use. The Slovenian Olympic Committee had never issued such a certificate before. The document, written in Slovenian with English translation, stated that the Appellant was allowed to use the prohibited substance Testoviron up to 250 mg per month during one year from 4 January 2006 until 4 January 2007. Reference was made in the document to the diseases identified by the endocrinologic clinic, namely hypogonadotropic hypogonadism and secondary osteoporosis.
- 2.7 The document, signed by Dr. Joško Osredkar, stated also that *"the dose, method and frequency of administration as prescribed by your physician have to be followed meticulously"* and the Appellant was requested to *"carry a copy of this form with you at all times. This form should be presented to the doping control officer at the time of testing."*
- 2.8 The certificate did not indicate for which type of competition, national or international, it was issued but only mentioned that it was issued for cycling.
- 2.9 Dr. Osredkar notified the TUE to WADA. By letter dated 23 February 2006 Dr. Alain Garnier answered Dr. Osredkar's letter. Dr. Garnier serves as WADA's medical director. In this capacity, he is responsible for supervision of the Therapeutic Use Exemptions program. Dr. Garnier confirmed that he had received the TUE issued for Tomaž Nose.
- 2.10 In his letter Dr. Garnier further mentioned the following:

"Considering the substance the TUE has been given for, we would like to ask you to provide us with all relevant medical information (diagnosis and medical file) as soon as possible, justifying the authorisation. We remind you that the file have to be in English or French.

Furthermore we would like to draw your attention on the fact that a full medical file needs to be sent with every TUE request for the following substances:

- *All anabolic agents*
- *EPO*
- *Growth hormones*
- *Anti-Estrogenic activity*
- *Major Stimulants: (...)*

- 2.11 To his letter Dr. Garnier attached a general overview of the TUE procedure. In essence, the general information provided by Dr. Garnier to Dr. Osredkar may be summarised as follows:

" Overview of TUE procedure

(...) the procedure is: formal registered letter sent to (...) WADA – address in Switzerland

As evident from Article 7.11 of the International TUE standard 7.11, an athlete must send all TUE-related information to the WADA TUEC as initially reported to the Anti-Doping

Organisation, along with proof of the fee payment. Until the procedure has been reviewed, the initial decision is valid. The process of review by the WADA TUEC shall not take longer than 30 days following receipt of the information by WADA. (...). We would also like to bring your attention to Article 7.12 of the International Standards for TUE 7.12. If the decision regarding the granting of a TUE is reversed on review, the reversal shall not apply retroactively and shall not disqualify the athlete's results during the period for which the TUE was granted and shall take effect no later than 14 days following notification of the athlete regarding the decision."

- 2.12 On 6 March 2006, Dr. Osredkar sent a letter to Dr. Garnier with a brief explanation on the type of medicine prescribed to the Appellant, his diagnosis and medical history and the treatment prescribed by his endocrinologist. A copy of the Appellant's medical file was enclosed to that letter.
- 2.13 At the hearing, Dr. Osredkar testified that Dr. Garnier's letter lead him to understand that since WADA did not respond within 30 days, the initial TUE was accepted and could be considered valid for international races. He then informed the Appellant accordingly.
- 2.14 In 2006, the Appellant's club focused particularly on races in Italy or France. The Appellant took part in approximately 25 races from the end of February until the end of July. During this period, the Appellant was subject to 4 doping controls, i.e. 3 during the Tour of Slovenia and one during a race in Italy which took place after the Tour of Slovenia. The Appellant testified that he had not been subject to doping control before the Tour of Slovenia.
- 2.15 The Appellant claims that at each race he had carried the TUE certificate with him and showed it to the race officials, if so requested. According to the Appellant the TUE was never questioned by any official.
- 2.16 The Appellant won the Tour of Slovenia 2006, an international competition supervised by the UCI, which took place between 8 and 11 June 2006. At the control procedures, an anti-doping control test form had to be completed. The answer "Yes" was ticked on line 17 "Therapeutic Use Exemption" of the form, which was signed by the Appellant.
- 2.17 The three samples were analysed by the accredited laboratory Austrian Research Centers in Seibersdorf, Austria. According to the analysis reports dated 17 July 2006 all three samples showed "an elevated testosterone/epitestosterone ratio", between 30.2 and 39.9, the threshold being 4. The analysis reports state that "it is mandatory that the relevant medical authority conducts an investigation before the sample is declared positive. Previous or subsequent tests should be taken into account. Another possibility to gain additional information is to perform isotope ratio analysis of the sample".
- 2.18 Based on the recommendation of the Austrian laboratory, the UCI sent all three samples for further analysis to the Laboratoire Suisse d'Analyse du Dopage, Epalinges, Switzerland. Under the line "Result" of its doping controls reports, all dated 27 October 2006, the Swiss laboratory made reference to the "absence of forbidden substances" and indicated that "IRMS analysis were performed on this sample, but positivity criteria were not completely fulfilled". The Swiss laboratory further commented in its report that the absence of forbidden substances meant that "according to the procedures implemented to analyse the sample, investigations did not reveal any product mentioned on the list of prohibited substances."

- 2.19 On 30 October 2006, the UCI, acting through its manager Anne Gripper, informed the Slovenian Cycling Federation that the Appellant had undergone anti-doping testing and was "*tested positive*". The UCI thus requested from the Slovenian Cycling Federation to implement proceedings according to the applicable regulations and to keep the UCI informed of all measures taken by the national federation.
- 2.20 On 6 November 2006, the Slovenian Cycling Federation informed the UCI that after a discussion with Dr. Osredkar, President of the Slovenian Olympic Committee's anti-doping commission, it had decided not to continue with the proceedings against the Appellant. By email of 6 December 2006, Ms Gripper replied to the Slovenian Cycling Federation that the UCI was aware of the TUE issued by the Slovenian Olympic Committee's Anti-doping Commission but that the UCI had never received an application for an international TUE. Ms Gripper also mentioned that on 26 February 2006, Dr. Garnier of WADA had requested from the Slovenian Olympic Committee a medical file in order to review the application and that the medical file had not been submitted. Ms Gripper mentioned that "*article 24 of the UCI anti-doping rules states that riders must obtain a TUE from the UCI before competing in an international event, regardless of whether they have received a TUE from their NADO [National Anti-Doping Organisation].*"
- 2.21 On 18 January 2007 the Slovenian Cycling Federation requested further instructions from the UCI. By letter dated 31 January 2007 the UCI insisted that a disciplinary proceeding must be taken against the Appellant, since WADA was not the competent body to issue TUEs for international cycling events. In a subsequent email to the Respondent dated 9 February 2007, Ms Gripper indicated that the UCI would never grant TUEs for testosterone products.
- 2.22 On 25 July 2007, the Appellant was called to a hearing of the Anti-doping Commission of the Slovenian Cycling Federation (hereinafter the "ADC" or "the Commission") on 7 August 2007 at the Respondent's headquarter in Ljubljana. The ADC was composed of two of its members, namely its chairman Mr Milan Čuš and another member Mr Hajdinjak. The Respondent's secretary general was assisting to the hearing and took the minutes.
- 2.23 On 10 August 2007, the ADC issued its decision, stating the following, in relevant parts (hereinafter the "ADC-Decision"):
- "*(...) On the basis of the available evidence, the anti-doping commission at the Cycling Federation of Slovenia found indisputably that a prohibited substance from the list of specified substances had been detected in the competitor's body fluid sample, and that the competitor had admitted the substance into his body on the basis of therapy prescribed by the treating physician.*
 - "*The ADC found furthermore that use of Testoviron had been approved for the competitor in a procedure by the national anti-doping commission at the Slovenian Olympic Committee, and that he had been issued with a TUE for the period between 4 January 2006 and 4 January 2007 under No. 1/06.*
 - "*The ADC also found indisputably, with the greatest degree of reliability, that the cyclist failed to obtain a valid TUE form (therapeutic use exemption) from the UCI before the race as set out by Article 24 of the UCI's anti-doping rules, which stipulates that cyclists with documented medical conditions who require the use of prohibited substances or prohibited methods should obtain a TUE from the UCI before appearing in any international event, irrespective of whether a TUE has already been obtained from their national anti-doping organization beforehand.*

- *In examining the results for the samples taken, the ADC found that the result of the analysis conducted at the laboratory in Seibersdorf, Austria, was positive, while the result of the analysis conducted at the laboratory in Lausanne, Switzerland, was negative, with a requirement for additional analysis to make a final confirmation of this finding.*
- *On the basis of the documentation submitted, the results of the laboratory analysis, the cyclist's own statements in which he admitted that at the beginning of each month he was taking 250 mg of Testoviron, and the medical records, the ADC hereby finds without any doubt that the cyclist competed in the aforementioned race under the influence of prohibited substances without a TUE from the UCI.*
- *(...) the ADC adds that under the general principles of law there is no need to prove admitted facts, and any doubts with regard to the commission's conclusions can thus be excluded.*
- *(...) In his [the Appellant] actions, it [the ADC] sees a minor form of culpability as a reflection of willful negligence, as given that he is a professional cyclist of several years' standing and given the UCI's anti-doping rules, he should have been aware that he had to obtain the relevant permit for the use of a prohibited substance for a race at international level. The commission feels that the violation was committed under mitigating circumstances, and the sanction pronounced therefore reflects the seriousness of the violation and the level of his culpably liability.*
- *In accordance with Article 275 of the UCI's anti-doping rules, in determining the period of ineligibility the anti-doping commission opted for a period of 20 months. On the basis of fairness as defined by Article 275, it set the beginning of the period as close as possible to the date when the violation was committed. As a result of the length of the proceedings and their late start, the anti-doping commission ruled that the beginning of the period should be 6 November 2006, when the Cycling Federation of Slovenia received its first registered written notification from the UCI of the violation of the anti-doping rules by the cyclist undergoing the proceedings.*
- *With regard to the disqualification of competitive results following the anti-doping violation as defined in Article 274 of the UCI's anti-doping rules, the ADC ruled that only the result obtained in the Tour of Slovenia race, which took place between 8 and 11 June 2006, should be disqualified, and not the other results achieved, according to the violation and on the basis of fairness.*

2.24 For these reasons, the Commission decided the following:

"Disqualification, and stripping of the title of winner of the Tour of Slovenia race, which took place between 8 and 11 June 2006, and the stripping of all prizes received as the winner of the aforementioned race, and their return to the race organizer, within 15 (fifteen) days of the copy of the ruling by the ADC being received

and

suspension from (a ban on participation in) competitions for a period of 20 (twenty) months, this period beginning on 6 November 2006 and ending on 5 July 2008."

3. Proceedings before the Court of Arbitration for Sport

3.1 On 17 August 2007, the Appellant filed a Statement of Appeal with the CAS. He challenged the ADC-Decision, submitting the following request for relief:

" the appellant requests that the CAS Panel considers this matter as a hearing de novo and upon hearing the evidence decides:

- (i) *whether Mr. Nose committed the anti-doping rule violation with which he was charged, as defined in UCI Rules; and*

- (ii) *whether, in proper compliance with UCI Rules, Mr. Nose should be declared ineligible from competition for a minimum of 20 Months (from 06.11.2006 until 05.07.2008) and disqualified as a winner of the race "Po Sloveniji" that took place from 08.06.2006 to 11.06.2006 with dispossession of all awards that he received as a winner of the said race."*

3.2 On 3 September 2007, the Appellant filed his Appeal Brief, within the extended deadline granted by CAS until 10 September 2007. The Appellant's submissions may be summarized, in essence, as follows:

3.2.1 The Appellant considers that the decision taken by the ADC is based on "*erroneous and incomplete determination of the circumstances, erroneous application of material law (in particular, the UCI's anti-doping rules)*" and "*material breaches of procedure that impacted on the correctness and legality of the decision being appealed.*"

3.2.1 According to the Appellant, there is an anti-doping violation only when a rider does not have a valid TUE and is tested positive. As the results of the test analysis of the samples conducted in Lausanne did show "no adverse analytical findings", the Appellant was not tested positive and can thus not be sanctioned. The Appellant does not agree with the ADC when it alleges that the Appellant's admission of the injection of a prohibited substance replaces a positive result on the testing of his urine samples. He further argues that if the ADC had any doubt on the results of the test analysis, it was its duty to demand the analysis of the B sample. Eventually, the Appellant concludes that Dr. Tadej Malovrh's expert opinion shows that the test results were negative and do not entail the proof of the exogenous administration of a prohibited substance.

3.2.2 The Appellant then quotes an email dated 30 March 2007 sent by an official from WADA, which states: "*Participating in international competition, an adverse analytical finding would be considered as a doping violation as he didn't have a TUE granted by his International Federation.*" Based on the foregoing, the Appellant considers that an anti-doping rule violation is based on two conditions, namely the non-existence of an international TUE and a positive test.

3.2.3 Referring to an expert opinion from Dr. Malovrh and to a medical certificate issued by Dr. Tomaž Kocjan, the Appellant argues further that the relatively low dose of the product which was monthly injected in his body, shows that he did not have the objective to enhance his sporting capacities by using the prohibited substance and that in any case it would not have been technically possible to reach such objective.

3.2.4 Moreover, the Appellant claims that he did not know before July 2007 that the TUE n° 01/06 was not valid for international races. He had relied on experts to obtain a valid TUE and all assurances had been given by those experts as to the validity of that document. According to the Appellant, also the response of WADA gave him sufficient reasons to believe that the TUE issued by the Slovenian Olympic Committee was valid for international competitions.

3.2.5 The Appellant is thus of the opinion that he cannot be accused of serious negligence, as he took all reasonable efforts to obtain a valid international TUE and, based on all the above, trusted that eventually, he had received such an international TUE. The ADC-

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Decision did therefore not sufficiently consider the mitigating circumstances when the Appellant's period of ineligibility was calculated.

- 3.2.6 As to the way the proceedings were conducted before the ADC, the Appellant raises various issues. The Appellant claims that only article 15.1 of the UCI Rules is applicable since the Commission did was the only rule to which the ADC-Decision referred to. Moreover the Appellant argues that the ADC-Decision is inconsistent and confusing which lead to an arbitrary result which contravenes against the basic standards of human rights such as the right to a fair trial, the right to a defence, the right to an impartial judge and the right to appeal. The Appellant questions as well the position of the ADC's chairman, who was a member of the executive committee of the Perutnina Ptuj cycling club, a direct competitor of the Appellant's club. The Appellant claims that this created a situation of conflict of interests. Eventually, the Appellant stresses that the ADC was not validly constituted since only two of the three members had been validly called to the hearing.
- 3.2.7 The Appellant submits that the ADC was not the competent body to render a decision against the Appellant. Based on the Slovenian Cycling Federation's rules on disciplinary liability of 17 November 1999 a board of three members of the Disciplinary Commission of the Respondent should have been appointed. According to the Appellant, the ADC is only competent to determine whether an anti-doping violation has occurred. If this is the case, it is the ADC's duty to transfer the case to the Disciplinary Commission to determine the sanction.
- 3.2.8 In his final submissions the Appellant raised several points regarding the proceedings of the ADC, namely, the non respect of the procedure related to the B sample analysis, as provided notably under articles 191 and 200 of the UCI Rules, the non respect of the various deadlines set by the UCI Rules with respect to the transmission of the summons to the License-Holder, namely articles 225 and 226 of the UCI Rules, and more generally, violation of the procedural rules as set forth under articles 227 to 235 of the UCI Rules.
- 3.3 On 9 October 2007, the Respondent submitted its Answer to CAS, within the extended deadline granted by CAS. The Respondent's submissions, in essence, may be summarized as follows:
- 3.3.1 The Appellant's club had been informed on 30 October 2006 of the procedure and of the results of all three blood samples, through a fax sent to Adria-Mobil, to the attention of Mr. Martin Derganc. As a national TUE had been issued, it took time for the Respondent to get all relevant information from the UCI in order to assess its validity on an international level. The Respondent alleges that the ADC was in fact trying to find all the evidences concerning the validity of the TUE. Many correspondences were thus exchanged between the Commission and Dr. Osredkar, Škraban, Lozej as well as Mr. Čuš. The national TUE appeared not to be issued according to the TUE Rules. In fact, it was only signed by Dr. Osredkar, without the approval of a special Panel of sports medicine physicians, as provided by the TUE Rules. The Respondent mentions moreover that the approval was not sent to the Slovenian Cycling Federation.

- 3.3.2 The proceedings were initiated on 25 July 2007 and all the relevant parties were informed. On 28 July 2007, the Appellant received a notice of the hearing scheduled on 7 August 2007 and was informed of the allegedly violated anti-doping rules, of his right to be represented, his right to propose witnesses and to submit evidence in defence. On 28 July 2007, the Appellant's coach visited the Respondent's headquarters and received the full documentation related to the case. At the hearing before the ADC the Appellant had confirmed that he had no objection to the way the proceedings were conducted.
- 3.3.3 As to the B sample analysis, the Respondent argues that the fact that the Appellant admitted and produced a TUE indicating the use of Testoviron lead to the conclusion that no B sample analysis was needed.
- 3.3.4 The Respondent admits that two conditions needed to be met to violate article 15.1 of the UCI Rules, namely the non-existence of an international TUE and a positive test at an international race. However, both conditions were met in the present case.
- 3.3.5 As to the question of the Appellant's level of negligence, the Respondent submits that as a professional rider, the Appellant had to know the UCI Rules and should have known that a specific TUE for international races had to be issued by the UCI competent body. Therefore, the Respondent believes that the ADC-Decision was correct and fair.
- 3.3.6 The Respondent replied to the procedural issues raised by the Appellant by providing a proof of the notification of the hearing date to the third member of the ADC, Mr. Knap, who could not attend for personal reasons. The ADC could still take decisions as provided by article 35 of the Respondent's charter. The Respondent admits that the deadlines were not always respected but this error was corrected upon the Appellant's request. Eventually, the Respondent reminds CAS that the ADC had carried out anti-doping proceedings since many years, which demonstrates that it is clearly the competent body.
- 3.4 With the agreement of the President of the Panel, the Appellant replied to the Respondent's Answer on 29 October 2007. The Appellant's comments may be summarized as follows:
- 3.4.1 Based on a fax report the Appellant claims that his club, Adria Mobil, never received the fax from the UCI dated 30 October 2006.
- 3.4.2 As to the issuance of the national TUE, the Appellant claims that Dr. Osredkar was the only authorized person in its capacity of Chairman of the ADC allowed to issue a TUE. Otherwise, all TUEs issued by the Respondent had to be considered null and void. The alleged omission of Dr. Osredkar to send the TUE to the Respondent cannot be charged to the Appellant, as the Appellant had no such duty.
- 3.4.3 Eventually, the Appellant informed CAS that the ADC was dissolved in September 2007. Based on an article published in a Slovenian newspaper, the Appellant explains that such dissolution had been ordered because of certain erroneous decisions of the ADC in other doping cases.

- 3.5 On 17 August 2007, the Appellant's club, Kolesarski klub ADRIA MOBIL (hereinafter "ADRIA MOBIL"), filed a Statement of Appeal with the CAS. It challenged the ADC-Decision, submitting the following request for relief:

"The Appellant [ADRIA MOBIL] requests that the CAS Panel (...) decides whether the cycling team of Kolesarski klub ADRIA MOBIL, Novo Mesto should be disqualified from the cycling race "Po Sloveniji" in 2006 and whether the cycling club is to be disposed of the received title of the winner of the race "Po Sloveniji" 2006 with obligation to return all the received awards in connection with that race."

- 3.6 On 6 September 2007, ADRIA MOBIL filed its Appeal Brief. Its submissions as to the substance of the case were, in essence, similar to the Appellant's submissions. As to the proceedings, ADRIA MOBIL requested from CAS to suspend the procedure CAS 2007/A/1357 against the Respondent until an award was issued in the procedure between the Appellant and the Respondent. Should CAS not agree with the suspension, then ADRIA MOBIL requested that the two procedures be joined.
- 3.7 On 13 September 2007, the Respondent agreed on the suspension of the procedure CAS 2007/A/1357. The Panel will thus only deal with the procedure CAS 2007/A/1356.
- 3.8 A hearing was held on 19 December 2007 in Lausanne.

The Appellant did attend and was assisted by Mr Gorazd Južina, Attorney-at-law.

The Respondent was represented by Mr Pavle Fensa, Attorney-at-law.

Mr Janez Špendov, who was chosen by the Appellant, acted as interpreter with the agreement of the Respondent.

- 3.9 During the hearing, the Parties made full oral submissions, confirming their written submissions. Both parties confirmed that they accepted that the procedure CAS 2007/A/1357 be suspended.
- 3.10 The following persons were called to testify:
- Dr. Joško Osredkar, pharmacologist and specialist in medical biochemistry,
 - Dr. Tadej Malovrh, veterinarian doctor, Dr. of medical sciences and President of the anti-doping commission of the Slovenian Federation of Athletics
 - Mr. Milan Eržen, coach and sport director of ADRIA MOBIL, the Respondent's club
 - Mr. Bogdan Fink, ADRIA MOBIL's Chief Executive Officer

- 3.11 The declarations of the witnesses may be summarised as follows:

3.11.1 Dr. Joško Osredkar.

Dr. Osredkar explained all the circumstances of the Appellant's application for a TUE. Dr. Osredkar explained in particular that the anti-doping commission of the Slovenian Olympic Committee issued the TUE on the basis of guidelines which were still considered as drafts. It was in fact the first time that the ADC had issued that

kind of TUE for an unlimited number of races during a fixed period of time. Since the Appellant specifically applied for an international TUE, Dr. Osredkar decided to send the file to WADA. As he did not hear anything from WADA within 30 days he considered, based on general information provided by Dr. Alain Garnier from WADA on the TUE procedure that "*everything was ok*" and the TUE was thus valid internationally. He thus assumed that the Appellant was allowed to compete in international races and confirmed this to the Appellant and his club.

3.11.2 Dr. Osredkar further explained that according to his knowledge only two sources dealt clearly with the matter, namely the Copenhagen Convention on doping and the WADA regulations. However as it was the first time to deal with this subject matter, he found it necessary to ask for general information from Dr. Alain Garnier and acted according to the information received.

3.11.3 As to the effect of Testoviron on the Appellant, the witness explained to the Panel that he could check the results of the tests made on the Appellant's urine samples and that they were clearly negative. This appeared logical to Dr. Osredkar who considered the prescribed dose to be very low compared to the common use of similar products in sports. The witness pointed out that the quantity of prescribed product injected monthly in the athlete's body could not enhance the Appellant's performance, taking into consideration that the Appellant had a very low natural level of Testosterone and that even under the influence of the injected dose of Testoviron he could not even achieve standard levels of testosterone. The witness underlined the medical necessity to proceed with that treatment. Based on the foregoing the Anti-doping Commission of the Slovenian Olympic Committee decided unanimously to issue the TUE.

3.12 Dr. Tadej Malovrh.

3.12.1 Dr. Malovrh confirmed that he had had similar cases within the Anti-doping Commission of the Slovenian Federation of Athletics and TUEs had been issued in accordance with the WADA rules. The clinical symptoms of the Appellant show clearly that he needed that treatment. As to the results of the test, the striking ratio of 30 between Testosterone and Epitestosterone is obviously triggered by the Appellant's disease. Based on the foregoing, the results must be considered as negative and no B testing was required. According to Dr. Malovrh, between 500 and 700 mg per week are required to enhance performance and that there is no doubt that the monthly dose of 250 mg prescribed to the Appellant could not have any impact on his athletic performance. The expert could however not answer the Panel's question whether according to the test results one could exclude that the Appellant was under any influence of the product.

3.12.2 The expert also confirmed that the high ratio discovered during the test analysis in Austria required a complementary IRMS analysis. The substance was not detected in Lausanne because the dose which is stocked over the month corresponds to 8 mg per day. This dose only initiates the metabolism and is thus too low for detection. The witness then went through the report of the Appellant's doctor and confirmed that injections took place once per month during one year, notably on 2 June 2006, a few days before the beginning of the Tour of Slovenia.

3.13 Mr. Milan Eržen.

- 3.13.1 Mr. Eržen explained to the Panel that he had been in contact with the Appellant already in 2005 while the Appellant was still under contract with his Swiss club. At that time the Appellant informed him that he needed to be hospitalised due to health problems and that he had been prescribed a medicine which was on the list of prohibited substances. As the Appellant intended to join ADRIA MOBIL, Mr. Eržen explained to the Appellant that he could not use the prescribed medicine before obtaining a TUE and thus referred him to Dr. Osredkar, whom he considered the highest authority on this matter. Once the TUE was issued, Dr. Radoje Milič, Dr. of Medicine and Head of the Sport Physiology Laboratory, Faculty of Sport in Ljubljana, confirmed that this certificate was valid and that the Appellant could compete in any race, be it national or international.
- 3.13.2 Based on the foregoing, the Appellant and Mr. Eržen were specifically instructed by the experts to keep the certificate with them for any race and to show it to any official, who would require them to do so. According to Mr. Eržen the certificate was shown to several UCI officials during international races which took place in France and Italy. Mr. Eržen declared before the Panel that the officials did not make any remark on the document. It was actually only in July 2007 when he was informed of the procedure against the Appellant, that the coach heard that there was a problem with the TUE. The Panel then asked Mr. Eržen if and when doping controls on the Appellant took place in 2006. Mr. Eržen explained that the Appellant was controlled four times in 2006: three times during the Tour of Slovenia and once during a race in Italy which took place afterwards. During the year 2006 there had not been a doping control on the Appellant before the Tour of Slovenia.
- 3.13.3 Then Mr. Eržen testified on the circumstances under which the proceedings against the Appellant were communicated to him and ADRIA MOBIL. Mr. Eržen indicated that in October 2006, Mr. Martin Derganc, who was the person mentioned in the UCI fax, was not the team director anymore. However Mr. Eržen confirmed that this was the correct fax number of the club.

3.14 Mr. Bogdan Fink.

- 3.14.1 Mr. Fink explained that he knew the Appellant since he was the trainer of the Junior national team, to which the Appellant belonged from 1999 to 2001. Mr. Fink testified on the circumstances of the proceedings, telling the Panel that he was informed at the same time as the Appellant at the end of July 2007. He participated in the hearing and declared that he was then told that the Appellant had been tested positive. After the ADC had issued its decision, meetings were held at the Slovenian Cycling Federation with the result that the members of the Commission were dismissed for having acted in an unprofessional manner and for personal interests. He further explained that the Disciplinary Commission was now the competent body for anti-doping cases. In that context, Mr. Fink pointed out that the persons in charge of the decision in the Appellant's case were apparently members of the team which ended second in the Tour of Slovenia 2006, Mr. Fink is thus of the opinion that they had an interest in the Appellant's disqualification. As to the specific issue of the notification of the UCI proceeding, Mr. Fink confirmed that the fax number indicated on the UCI fax dated

30 October 2007 was correct but he was not aware that this fax ever arrived on ADRIA MOBIL's fax machine.

3.15 The Appellant's own statement

3.15.1 The Appellant provided information on his health status in 2005 which basically confirmed the diagnosis of the doctors as provided in the proceeding. When his doctors prescribed him Testoviron, he mentioned it to his coach, Mr. Eržen who told him that this product was on the list of prohibited substances. Mr. Eržen, recommended to contact Mr. Milič who directed him to Dr. Osredkar in order to prepare a TUE application. The Appellant then confirmed that he got Testoviron at the hospital in Ljubljana and that his private doctor was injecting him the monthly dose according to the prescriptions. Apparently, the treatment did not succeed as the Appellant was told lately by his doctors that his current status was worse than before the treatment was initiated. A new treatment should be initiated in the beginning of 2008. As to his relation with doping substances, the Appellant insisted on the fact that he had always been tested negative during his career until he started his treatment. Eventually, the Appellant explained that his contract with ADRIA MOBIL will terminate on 31 December 2007. The club is waiting for the results of the procedure before proposing him a new contract.

II. IN LAW

4. CAS Jurisdiction

- 4.1 The jurisdiction of CAS, which is not disputed, derives from art. 280 ff. of the Anti-doping rules of the UCI, as entered into force on 13 August 2004, (hereinafter "the UCI Rules") and art. R47 of the Code of Sport-related arbitration (hereinafter the "Code"). It is further confirmed by the order of procedure duly signed by the Parties.
- 4.2 Consequently, CAS has jurisdiction to decide the present dispute.
- 4.3 Under art. 289 of the UCI Rules and art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial *de novo*, evaluating all facts, including new facts, which had not been mentioned by the Parties before the anti-doping commission of the Slovenian Cycling Federation.

5. Applicable law

- 5.1 Art. R58 of the Code provides the following:

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

- 5.2 Art. 290 of the UCI Rules further provides for the application of the UCI Rules and the rules of law chosen by the Parties or, in the absence of such a choice, Swiss law.

5.3 In the present matter, the application of the UCI Rules was not disputed by the Parties. Therefore, the Panel confirms that the UCI Rules shall apply primarily and Swiss law shall apply subsidiarily.

6. Admissibility

The appeal was filed within the deadline provided by art. 284 of the UCI Rules. It follows that the appeal is admissible, which is also undisputed.

7. Review of the Parties' submissions

7.1 Before taking its decision on the merits of the case, the Panel reviewed the various submissions of the Parties. The results of such review can be summarized as follows:

7.2 Decision *de novo* or setting aside the ADC-Decision?

7.2.1 In his Statement of Appeal dated 17 August 2007, the Appellant requested

"that the CAS Panel consider this matter as hearing de novo and upon hearing the evidence decide:

- (i) whether Mr. Nose committed the anti-doping rule violation with which he was charged, as defined in UCI Rules; and*
- (ii) whether, in proper compliance with UCI-Rules, Mr. Nose should be declared ineligible from competition for a minimum of 20 Months (from 06.11.2006 until 05.07.2008) and disqualified as a winner of the race "Po Sloveniji" that took place from 08.06.2006 - 11.06.2006 with dispossession of all awards that he received as a winner of the said race."*

7.2.2 In his Appeal Brief dated 3 September 2007, the Appellant stated that his Appeal is based on the following grounds:

- "- erroneous and incomplete determination of the circumstances,*
- erroneous application of material law (in particular, the UCI's anti-doping rules),*
- material breaches of procedure that impacted on the correctness and legality of the ruling being appealed.*
- the decision of the sanction pronounced."*

and requested

"that the panel hear the evidence submitted and grant the appeal, annulling the ruling being appealed in its entirety, or subordinately that the appeal be

granted, and the pronounced sanction be reduced, or the sanction against the appellant be dismissed in consideration of all the circumstances of the case."

- 7.2.3 In the course of the oral hearing, the Appellant requested that the ADC-Decision be declared void and that the case be sent back to the competent body of the Slovenian Cycling Federation, in case the Panel would reach the conclusion that the Appeal is not justified on the merits.
- 7.2.4 For the following reasons the Panel considered that this amendment is not permissible and that the Panel has to render a decision on the merits of this case.
- 7.2.5 It is true that the Appellant argued in the Appeal Brief that certain "*material breaches of procedure*" occurred at the level of the Slovenian Cycling Federation which "*impacted on the correctness and the quality of the ruling*" (see point 2.7.2.1 above). The Appellant's request both in the Statement of Appeal and in the Appeal Brief was, however, that the Panel should examine the merits of the case and render a decision on the merits.
- 7.2.6 According to art. R48, the *Appellant's Request for Relief* shall be contained in the Appellant's Statement of Appeal.
- 7.2.7 It is a basic principle of procedure, applicable in state courts as well as in arbitration, that jurisdictional objections must be raised *in limine litis*. The same applies to the request that an appellate body does not deal with the merits of the case but limits itself to setting aside the appealed decision and sending the case back either to the body that has rendered the first decision or to another body which, according to the Appellant, would have been competent in the first place.
- 7.2.8 In the Panel's view art. R56 according to which
- "Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer."*
- is not applicable to modifications of the Request for Relief.
- 7.2.9 But even if and to the extent a later modification of the Request for Relief may be considered admissible, the condition required under art.R56 for implementing arguments or producing new evidence after the submission of the grounds for the appeal and of the answer, i.e. the existence of "*exceptional circumstances*" would equally apply. The Appellant, however, has neither argued nor shown the existence of any such "*exceptional circumstances*."
- 7.2.10 For all the above reasons, the Panel decided to deal with the merits of the case and to decide *de novo*. The Panel therefore does not have to deal with the procedural irregularities which, according to the Appellant, occurred at the level of the Anti-doping Commission of the Slovenian Cycling Federation, nor with the issue whether this commission did have jurisdiction according to the rules and regulations of the Slovenian Cycling Federation or whether this was not the case.

- 7.2.11 According to art. 289 of the UCI Rules and art. R57 of the Code, the Panel used its power to review the facts and the law and held a trial *de novo* as required by the Appellant himself in his request for relief and at the hearing. The Panel evaluated all facts, including new facts, which had not been mentioned by the Parties before the Commission. Both Parties had the opportunity and used this opportunity to make all possible submissions and to produce any relevant evidence. All witnesses called by the Appellant were heard by the Parties at the hearing.
- 7.3 Did the Appellant violate the applicable anti-doping rules?
- 7.3.1 Article 15 of the UCI-Rules defines by a list what constitutes an anti-doping rule violation. This list is conclusive but an anti doping rule violation is established if one of the listed circumstances has been established.
15. *"The following constitute anti-doping rule violations*
1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.*
(...)
 2. *Use or Attempted Use of a Prohibited Substance or a Prohibited Method*
 - 2.1 *The success or failure of the 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.*
(...)
17. *Facts related to anti-doping rule violations may be established by any reliable means, including admissions."*
- 7.3.2 Presence of a Prohibited Substance?
- 7.3.2.1 The Respondent claims that the Panel should consider that the Appellant was tested positive as the Austrian laboratory detected an abnormal ratio between testosterone and epitestosterone in the Appellant's urine samples. The Appellant claims that the results of the analysis made in Lausanne did show "no adverse analytical findings", which would mean that the Appellant was not tested positive. It is true that as a general rule, "Presence of a Prohibited Substance" requires proof by a positive A-sample analysis and, if requested by either party, a confirmation by a positive B-sample analysis.
- 7.3.2.2 The Panel finds that although the Austrian analysis report identified an abnormal ratio between testosterone and epitestosterone in the Appellant's urine samples, it still concluded that "*it is mandatory that the relevant medical authority conducts an investigation before the sample is declared positive.*" The Austrian laboratory report has therefore not established an anti-doping rule violation.
- 7.3.2.3 The samples were then sent to the Laboratoire in Epalinges, Switzerland for further analysis. The Swiss laboratory found the "*absence of forbidden substances*" and indicated that an "*IRMS analysis were performed on this sample, but positivity criteria are not completely fulfilled*". The Swiss laboratory further commented in their

report that the absence of forbidden substances meant that "*according to the procedures implemented to analyse the sample, investigations did not reveal any product mentioned on the list of prohibited substances.*"

7.3.2.4 Based on the above, the Panel concludes that the A-samples of the Appellant were not tested positive and there was no reason to ask for a confirmatory analysis of a B-sample.

7.3.2.5 As a consequence, all submissions of the Parties related to the need of a B sample analysis are thus irrelevant and do not need further review.

7.3.3 Use or attempted use of a Prohibited Substance?

7.3.3.1 It is not necessary that a prohibited substance is detected by occasion of a doping test to establish that an anti-doping rule violation has been committed. As set out by Article 17 of the UCI-Rules, an anti-doping rule violation can be proven by any reliable means, including admissions.

7.3.3.2 An admission constitutes an independent means to establish an anti-doping rule-violation and does not require further sample testing for verification. The significance and credibility of an admission is subject only to the panel's judicial appreciation.

7.3.3.3 It is common ground that the Appellant disclosed and confirmed that he had applied Testoviron on a regular basis, namely by a treatment prescribed by his doctors as also mentioned in the TUE. Also during the hearing, the Appellant confirmed that he was injected a monthly dose of 250 mg of Testoviron during the whole year 2006. There is no doubt that the consistent statements of the Appellant which are supported by medical files and the TUE are to be considered as an admission of a "use of a prohibited substance" as defined in Article 15.2 of the UCI Rules. The Panel concludes therefore that when the Appellant was administered Testoviron and still trained and participated in road races, he basically committed a doping offence under the relevant UCI Rules and that he therefore needed a Therapeutic Use Exemption (TUE).

7.4 The validity of the Therapeutic Use Exemption (TUE) issued by the Anti-Doping Commission of the Slovenian Olympic Committee

7.4.1 The basic finding of the "use of a prohibited substance" is not the end of the considerations. The next question is whether the Appellant was in possession of a legitimate TUE which allowed him to train and race still under the influence of a prohibited substance. In that case, the use of a prohibited substance would have been justified and the Appellant would not have violated the applicable Anti-Doping Rules.

7.4.2 A rider may be authorized to use a Prohibited Substance subject to certain conditions set under chapter IV of the UCI Rules. If the conditions are met, a TUE certificate is issued in favor of the rider, who will then be allowed to compete despite the fact that he is using a Prohibited Substance.

7.4.3 The Appellant claims that he was issued a valid TUE by the Anti-doping Commission of the Slovenian Olympic Committee and could thus compete in the Tour of Slovenia. TUEs are issued for national and international competitions. The crucial issue is therefore whether the TUE in question allowed the Appellant to compete at the international level, i.e. under the applicable rules of the competent international

federation, i.e. the UCI. Whether the TUE was valid on a national lever is not subject to the review of this Panel.

- 7.4.4 The Panel must thus decide in the present case whether the Appellant was granted a valid TUE as provided under the UCI Rules, namely chapter IV of those Rules.

“Chapter IV THERAPEUTIC USE EXEMPTION (TUE)

(...)

24. Riders with a documented medical condition requiring the Use of a Prohibited Substance or a Prohibited Method must, prior to their participation in any International Event, obtain a Therapeutic Use Exemption (TUE) from the UCI, regardless of whether the Rider previously has received a TUE from his National Anti-Doping Organization. (...)

25. Riders with a documented medical condition requiring the Use of a Prohibited Substance or a Prohibited Method who are not planning to participate in an International Event must, prior to their participation in any National event, obtain a Therapeutic Use Exemption from their National Anti-Doping Organization or such authority as appointed by their National Anti-Doping Organization. The procedure for granting such TUE is governed by the rules of that National Anti-Doping Organization. (...)

28. Decisions regarding the grant, withdrawal and denial of TUE's are taken in the first instance by the Therapeutic Use Exemption Committee of the UCI. (...)

44. The decision of the TUEC will be conveyed in writing to the Rider by the Anti-Doping Commission. “

- 7.4.5 The evidence produced by the Parties shows that the UCI was never informed of the TUE procedure initiated by the Appellant through Dr. Osredkar of the Anti-doping Commission of the Slovenian Olympic Committee. The Therapeutic Use Exemption Committee (TUEC) of the UCI did thus never grant a TUE. According to the Article 28 of the UCI-Rules, the TUEC takes “*in first instance*” decisions regarding the grant of TUEs.
- 7.4.6 Based on the above provision, the Panel concludes that the TUE issued by the anti-doping commission of the Slovenian Olympic Committee was not valid for international events. As the Appellant was not granted a TUE during his treatment, he was not allowed to use the prohibited substance Testoviron while competing.
- 7.4.7 The Panel notes that the Appellant relied on certain statements by the Respondent and even WADA (see, e.g. the letter quoted in paras. 2.9f above) which led him to believe that in his case, Article 15.2 of the UCI Rules would no longer apply with regard to the use of the prohibited substance which was subject to the TUE but it required in any event a positive doping test under Article 15.1 of the UCI-Rules to establish an anti-doping offence.
- 7.4.8 Although this view is certainly accurate when a *valid* TUE has been issued, it cannot be accurate when the TUE turned out to be *invalid*. The admission of the Appellant to having administered Testoviron under a putative TUE is not a legitimate excuse for the use of a prohibited substance but rather constitutes a conclusive evidence for a violation of Article 15.2 of the UCI-Rules if it turns out that the TUE was not valid. This may be seen as an unfortunate or even a harsh consequence of what seems to be a procedural error in the TUE application. However, that is an issue to be reviewed when

it comes to the sanction of the anti-doping rule violation but it may not alter the fact that objectively, the Appellant has used a prohibited substance without a valid TUE.

- 7.4.9 The fact that certain statements of the ADC and the Respondent seem to support the Appellant's view on this mere question of law does not bind the Panel to come to a different conclusion. According to Article 289 of the UCI Rules and art. R57 of the Code, the Panel can review the law and confirm a decision of first instance based on other legal grounds. The arbitral tribunal can apply any part of the law which it deems applicable in the case at stake. The Swiss Federal Tribunal held that an arbitral tribunal did not decide *ultra petita* if it upholds a party's claim for different legal grounds than those invoked (Jean-François Poudret, Sébastien Besson, Comparative Law of International Arbitration, 2nd ed., Sweet & Maxwell, N 571 and Swiss Federal Tribunal, ASA Bulletin, pp. 217).
- 7.4.10 Therefore, the Panel came to the conclusion that the Appellant committed an anti-doping rule violation according to article 15.2 of the UCI Rules by using a Prohibited Substance without a valid TUE.

7.5 Proportionality of the sanction

- 7.5.1 The Appellant never violated an anti-doping rule before and Testosterone is not on the WADA list of specified substances. The Panel must thus apply article 261 of the UCI Rules which provides for a 2 years' ineligibility in the case of a first violation of article 15.2 of the UCI Rules. As provided in article 261.2 of the UCI Rules, the Appellant has *"the opportunity to establish the basis for eliminating or reducing this sanction as provided in articles 264 and 265"*.
- 7.5.2 According to article 264 of the UCI Rules, *"if the Rider establishes in an individual case involving an anti-doping rule violation under article 15.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under article 15.2) (...) [sic], that he bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated."*
- 7.5.3 Article 265 of the UCI Rules, which, among others, applies to an anti-doping violation according to article 15.2 of the UCI Rules, provides that *"if a License-Holder establishes in an individual case involving such violations that he bears no Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable."*
- 7.5.4 In order to fix the sanction, it is therefore the Panel's duty to determine whether, under the circumstances of the particular case, the Appellant established that he bore no fault or negligence, or no significant fault or negligence.
- 7.5.5 According to Appendix 1 *"Definitions"* of the UCI Rules, a rider does not bear a fault or negligence if he establishes *"that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance (...)"*. A rider does not bear a significant fault or negligence if he establishes *"that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."*
- 7.5.6 In the WADA Code, Section 10.5 from which the UCI Rules are derived there are rules corresponding to Art 264 and 265 of the UCI Rules. Art 10.5.1 of the WADA Code deals

with No Fault or Negligence and Art. 10.5.2 handles No Significant Fault or Negligence. Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

- 7.5.7 The Appellant argues that the relatively low dose of the product which was monthly injected in his body shows that he did not want to enhance his sporting capacities and that also from a physiological point of view, the low dose could hardly have such a performance-enhancing effect. The Appellant claims further, that he took all necessary advice and relied on expert opinions before undergoing the medical treatment. He also took his duties as a professional athlete seriously and applied for a TUE, which he initiated before the anti-doping commission of the Slovenian Olympic Committee. This included not only expert opinions from Slovenia, namely Dr. Osredkar and Dr. Milič, but also the opinion obtained by Dr. Osredkar from Dr. Garnier of WADA. The Appellant considers therefore that there were mitigating circumstances which should lead the Panel to lift or at least significantly reduce any sanction against him.
- 7.5.8 The Respondent submitted that the Appellant, who is a professional rider, had a professional duty to pay attention to the UCI Rules, which clearly require that a specific TUE be issued by the UCI as the competent body for international events.
- 7.5.9 The Panel accepts that (1) this was the Appellant's first exposure to an anti-doping procedure, (2) he had no intention to gain an unfair advantage when he administered the prohibited substance, (3) the prohibited substance was prescribed and applied for necessary medical treatment only, and (4) the Appellant did not conceal the use of the prohibited substance but openly admitted it. However, according to consistent CAS-jurisprudence, these grounds do not qualify for an exemption from, or reduction of the sanction which otherwise applies to an anti-doping rule violation.
- 7.5.10 The Panel finds, however, that the circumstances related to the issuance of the TUE deserve closer review. The Appellant would not have been subject to an anti-doping procedure if a valid TUE had been issued. As a principle, it is the responsibility of the athlete concerned to be in possession of a valid TUE, if he undergoes medical treatment which requires the administration of a prohibited substance. The respective rules and procedures are no secret but published in the rules of the UCI and available on the UCI's website. Basically, it is the professional duty of an athlete to consult the rules, which the Appellant admittedly failed to do. It is for this reason the Panel finds that the Appellant did not act without any fault.
- 7.5.11 However, it is undisputed that the Appellant was aware of his duty to take care that he had to obtain a TUE if a prohibited substance was administered and he still intended to continue to train and race. The Panel accepts that the Appellant had never followed a TUE-procedure and that there was no experience with TUEs in cycling at all. It also accepts that the Appellant, instead of personally consulting the UCI-rules decided to get the advice of his coach who referred him to Dr. Osredkar, undoubtedly the best qualified expert on anti-doping matters in Slovenia at the time. In addition, he fully relied on Dr. Osredkar's advice and did not compete before he received "green light" from him. He was also informed of the steps which Dr. Osredkar took to get a confirmation of the validity of the TUE also for international races, namely that Dr. Osredkar liaised with WADA, which seemed to be reasonable and appropriate to the Appellant. And last, but not least, no alarming signal was given by WADA and Dr. Garnier that this was not the proper procedure to follow to obtain an international TUE for cycling. Instead, Dr. Garnier's letter did not refer to the UCI but rather to a review

by WADA and a 30-day period. Although this was not a description of the specific procedure which was to be followed by the Appellant but rather of a review of TUEs already granted, Dr. Osredkar trusted that after expiration of the 30 days mentioned in that letter, there was no objection of WADA against the TUE and his request to confirm the TUE's international validity.

7.5.12 Under these very particular circumstances, the Panel finds that the Appellant took his professional duty of care with regard to doping very seriously and took appropriate and reasonable steps to avoid a violation of the anti doping rules. In fact, it is difficult for the Panel to say what the Appellant should have done more to safeguard that he complied with the respective rules than what he did when he consulted Dr. Osredkar and followed his advice. Whether a personal consultation of the UCI-Rules would have led him to a different behaviour is somewhat doubtful since these Rules do not provide a clear guideline to the athletes how to proceed. In particular, the reference under article 41 of the UCI Rules to the fact that "*a Rider may not apply to more than one anti-doping organization for a TUE*" could lead to the opposite impression that the procedure is coordinated both nationally and internationally by one single organisation. The vague definition of an anti-doping organisation under Appendix 1 of the UCI Rules can moreover give *prima facie* the wrong impression that the Anti-doping Commission of the Slovenian Olympic Committee was indeed the competent body in Slovenia.

7.5.13 The Panel finds it also irrelevant whether the UCI would not have been in a position to issue an international TUE for a treatment with Testoviron, as indicated in Ms Gripper's mail of 9 February 2007 because no evidence was submitted which would support that statement or at least put the conclusions of the Anti-Doping Commission of the Slovenian Olympic Committee into question. It would also be mere speculation to predict the course of the events *if* Dr. Osredkar had followed the proceeding provided by the UCI-Rules or *if* Dr. Garnier had immediately informed Dr. Osredkar of his erroneous application.

7.5.14 The Panel emphasizes that the circumstances in this case have been very exceptional and must be seen as a chain of unfortunate circumstances which may not easily be found in another case where an athlete failed to follow the appropriate way to obtain a TUE. Most important, the Appellant did not rely on a team doctor, his personal doctor or any other person in his personal environment but on an independent and renown expert in the fight against doping. The Panel also finds that the Appellant shall not bear the entire responsibility of the facts that not even Dr. Osredkar was unfamiliar with the international TUE-procedure and that Dr. Garnier did not immediately inform Dr. Osredkar's of his erroneous application but rather provided confusing information.

7.5.15 Based on all the evidence produced and on the jurisprudence on the definition of significant fault or negligence the Panel finds that the Appellant in this coherence cannot be blamed for relying on the officials' advice. He had no intention at all to break the Anti Doping Rules but rather the reverse. Therefore the Panel finds that he bears No Significant Fault or Negligence pursuant to article 265 and the related definition of the UCI Rules.

7.6 The Sanction

7.6.1 According to article 261 of the UCI Rules the period of Ineligibility imposed for a violation of article 15.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method), shall be 2 (two) years' Ineligibility for the First violation.

- 7.6.2 When a License-Holder establishes in an individual case involving a violation against among others article 15.2 that he bears No Significant Fault or Negligence, then the period of Ineligibility according to article 265 may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.
- 7.6.3 Given no guidance in determining the reduction by the UCI Rules the Panel looked to past CAS cases where *No Significant Fault or Negligence* was found and the period of ineligibility reduced based on medical prescriptions being the cause of the Doping Offence, see WADA v/ Lund (CAS OG 06/001, Squizzato v/ FINA (CAS 2005/A/830) and Vlasov v/ATP (CAS 2005/A/873) and Cañas v/ATP (CAS 2005/A/951). In each of these cases, the CAS panels reduced the periods of ineligibility by the maximum allowable except in the last mentioned case where the reduction was nine months. Because of the truly exceptional circumstances of the case, the Panel finds that also in this case, the maximum reduction shall be granted. The sanction is therefore fixed at one year ineligibility.

7.7 Commencement date of the period of ineligibility

- 7.7.1 According to article 275 of the UCI Rules, *"the period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. (...). Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of the anti-doping violation."*
- 7.7.2 The ADC fixed the commencement date of the ineligibility period at the date of notification of the procedure to the Appellant's club, namely 6 November 2006. Referring to the evidence produced before CAS, the Panel considers that the Respondent failed to prove that the procedure was effectively notified on that date. In any case it appears that the testing procedure which took place before the alleged notification was substantially delayed and that the coordination between UCI and the Slovenian Cycling Federation was not as effective as one should expect in such an important procedure for a rider.
- 7.7.3 The Panel finds as well that the Appellant is not the type of athlete who has been found to have used prohibited substances with the objective of enhancing performance and thus to gain a competitive advantage. He proved to the Panel that the prohibited substance was used for therapeutic purposes and that his objective was to obtain a TUE in order to be allowed to compete internationally.
- 7.7.4 The Appellant's fault consists of having not read the UCI Rules. However the Panel found mitigating circumstances which means that he bears No Significant Fault or Negligence. These circumstances also have to be taken into account in the application of the fairness requirement under article 275 of the UCI Rules (see e.g. Hipperdinger v. ATP Tour (CAS 2004/A/690), para. 99). In addition to the various mitigating circumstances mentioned above, the Panel notes further that the Appellant showed total transparency with regard to the anti-doping rule violation and constantly collaborated with the competent bodies. The Panel thus finds that the commencement date should be

earlier than the date of the fax sent to the Appellant's club. To take also the delays in the procedures before the ADC into account, the Panel finds it appropriate to deviate from the general rule, which provides for a commencement of the ineligibility at the date of the hearing.

- 7.7.5 For reason of fairness the Panel decides that the period of ineligibility should commence on the date of the third sample collection, plus a reasonable period for the respective legal proceeding of three months, which leads to a technical commencement date of 11 September 2006. The Period of Ineligibility of 12 months thus ended on 11 September 2007.

7.7 Disqualification of results

7.7.1 Article 257.2 of the UCI Rules provides that "*if the violation involves (a) the presence, Use or Attempted Use of a Prohibited Substance or a Prohibited Method (articles 15.1 and 15.2), other than a Specified Substance(...) all of the Rider's results are disqualified, except for the results obtained (i) in Competitions prior to the Competition in connection with which the violation occurred (...).*

7.7.2 Based on this provision and not on article 274 of the UCI Rules as wrongly mentioned by the ADC-Decision, the Panel hereby confirms the Decision with respect to the Appellant's disqualification of the Tour of Slovenia. The Commission ruled that only the result obtained in the Tour of Slovenia race should be disqualified, and not the other results achieved. As the Respondent did not request that further results be disqualified and did therefore not provide any further evidence as to other results that could fall within the scope of article 257.2, the Panel, in accordance with the prohibition to decide *ultra petita*, did not further inquire on this part of the sanctions taken against the Appellant.

8. Costs

Art. R65 of the Code is in the following terms:

R65 Disciplinary cases of an international nature ruled in appeal

R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free.

The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

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As this is a disciplinary case of an international nature, the proceedings will be free, except for the minimum Court Office Fee, already paid by the Appellant, which is retained by the CAS.

- 8.3 Having taken into account the outcome of the arbitration, the conduct and the financial sources of the parties, the Panel has decided by majority that the Respondent shall pay to the Athlete a contribution, determined in the amount of CHF 5,000 (five thousand Swiss Francs), towards the expenses incurred by the Appellant in connection with these arbitration proceedings, including the costs related to the witnesses called by the Appellant.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Tomaž Nose is partially admitted.
2. The decision issued by the Anti-doping Commission of the Slovenian Cycling Federation is amended as follows: The period of Ineligibility is set to 12 months and the commencement date of the period of Ineligibility is fixed on 11 September 2006 instead of 6 November 2006. The period of ineligibility thus ended on 10 September 2007.
3. Tomaž Nose is disqualified from the Tour of Slovenia race, which took place between 8 and 11 June 2006, and his results obtained at this Tour are annulled.
4. All other motions or prayers for relief are dismissed.
5. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss francs) paid by Tomaž Nose, which is retained by CAS.
6. Slovenian Cycling Federation shall pay to Tomaž Nose the amount of CHF 5,000 (five thousand Swiss Francs) as a contribution towards the expenses incurred by Tomaž Nose in connection with these arbitration proceedings.

Lausanne, 11 March 2008

THE COURT OF ARBITRATION FOR SPORT

Conny Jörneklint
President of the Panel

Stephan Netze
Arbitrator

Andreas Reiner
Arbitrator

Nicolas Cottier
Ad hoc Clerk