Arbitration CAS 2018/A/5580 Blagovest Krasimirov Bozhinovski v. Anti-Doping Centre of the Republic of Bulgaria (ADC) & Bulgarian Olympic Committee (BOC), award of 8 March 2019

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Aquatics (swimming)
Doping (ostarine)
World Anti-Doping Code as interpretative tool
Status of sports justice body in CAS appeals
Sanction for ADRV not involving a specified substance
Interpretation of statutes and principle of confidence
Determining intent of minor in the absence of establishment of source of the prohibited substance
Determining level of fault/ negligence of minor in the absence of establishment of source of the prohibited substance

1. **The World Anti-Doping Code (WADC) has no direct effect. Rather, the WADC may be used only as an aid in interpreting the applicable Anti-Doping regulations.**

2. **An appeal can be made against the sports organization that rendered the contested decision and/or the body that acted on its behalf. In order to determine whether or not a given sports justice body pertains in some way to the structure of a given sports organization, the "stand-alone test" is decisive: if it appears that, would the sports organization not exist, the sports justice body would not exist and would not perform any function, then the sports justice body has no autonomous legal personality and may not be considered as a respondent on its own in a CAS appeal arbitration concerning one of its rulings. Consequently, the procedural position of the sports justice body before the CAS must be encompassed within that of the sports organization.**

3. **A finding of an Anti-Doping Rule Violation (ADRV) that does not involve a specified substance results, *prima facie*, in a period of ineligibility of four (4) years under the 2015 WADC. In order for the period of ineligibility to be reduced to two (2) years, the athlete has to establish, on the balance of probability, that the ADRV was not intentional.**

4. **Statutes or similar instruments shall be interpreted in the same way as the interpretation of declarations of intent. The interpretation of declarations of intent follows the 'principle of confidence', that is, the declaration is neither understood in the sense of what the declaring party may have had in mind nor in accordance with the literal meaning of the wording, but in the meaning the addressee could in good faith attribute to it. While this is a somehow 'objective' approach, the addressee himself is deemed to be obliged to give all possible attention to the 'subjective element', *i.e.* to consider all aspects allowing the understanding of the declared intent. Under these two aspects interpretation is less strict than under the English and American tradition, *i.e.* focused**

on the "objective" meaning of the existing texts. Such "objective" interpretation is justified as usually, at the moment of the drafting of the statutes/regulations, the future addressees of them are not privy to them.

5. **In light of the fact that under the 2015 WADC, when establishing "No fault or negligence"/"No significant fault or negligence", a minor does not have to prove how the prohibited substance entered his or her system, it is questionable whether a minor athlete, in order to establish lack of intent, is obliged to establish the source of the prohibited substance detected in his or her sample. Considering the objective meanings of the definitions of "intent" and "No fault or negligence" and "No significant fault or negligence", an addressee could conclude in good faith that – as a minor does not have to prove how the prohibited substance entered his or her system at the stage of "No fault or negligence"/"No significant fault or negligence" – a minor should also not be mandatorily obliged to establish how the prohibited substance entered his or her system when proving that the ADRV was not committed intentionally. Consequently, if a minor is not able to prove the source of the prohibited substance, one has to evaluate – based on the overall circumstances of the specific case – if the respective athlete acted with or without intent. In this context various criteria may be taken into account, *e.g.* an athlete's credible testimony or evidence *e.g.* by an athlete's staff that s/he had no intent to use a prohibited substance.**

6. **Under the 2015 WADC, in case a minor is not able to prove how the prohibited substance entered his or her system, in order to determine whether "No fault or negligence" or "No significant fault or negligence" applies, CAS panels have to evaluate the surrounding circumstances of the ADRV.**

I. INTRODUCTION

1. This appeal is brought by Mr. Blagovest Krasimirov Bozhinovski (the "Athlete" or the "Appellant") against the decision of the Bulgarian Sports Arbitration at the Bulgarian Olympic Committee ("BSA"), dated 19 January 2018, which found that the Athlete had committed an Anti-Doping Rule Violation ("ADRV") pursuant to Article 6 para. 2 of the Bulgarian State Regulations on Doping Control in Training and Competition Activity („RDCTCA") and thereby imposed a period of ineligibility of four-years on the Athlete in accordance with Article 70 para. 1 RDCTCA (the "Appealed Decision").

II. PARTIES

2. The Athlete and Appellant is a swimmer of Bulgarian nationality, born on 25 March 2000. At the moment of the doping control the Athlete was a registered swimmer for the Swimming Sports Club Cherno More Varna (the "Club"), a Bulgarian Swimming Club that is a member of the Bulgarian Swimming Federation ("BSF").

3. The First Respondent, the Anti-Doping Centre of the Republic of Bulgaria ("ADC"), is an entity of the Ministry of Youth and Sport of the Republic of Bulgaria, responsible for testing national athletes in and out-of-competition, as well as athletes from other countries competing within that nation's borders; adjudicating Anti-Doping rules violations; and Anti-Doping education. Its responsibilities hence include the enforcement of its Anti-Doping program in compliance with the World Anti-Doping Code (the "WADC").

4. The Second Respondent is the Bulgarian Olympic Committee ("BOC"), Sofia, Bulgaria. It is the National Olympic Committee of Bulgaria.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and the evidence adduced by the parties. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion below. While the Sole Arbitrator has considered all the facts, evidence, allegations and legal arguments submitted by the parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 5 May 2017 at 8 am, the Athlete underwent a doping control test and provided a urine sample to the ADC, in the hotel Diana 3 in Sofia.

7. On 15 June 2017, the Athlete was notified of an Adverse Analytical Finding for Ostarine in the sample provided on 5 May 2017. These results were provided by the WADA accredited laboratory in Austria, the Seibersdorf Laboratories. Ostarine is a substance prohibited at all times, both in-and-out of competition, and is not a specified substance.

8. Also on 15 June 2017, the BSF handed a letter, issued on 14 June 2017, to the Athlete whereby it provisionally suspended the Athlete from his sport rights and competitive rights until the final clarification of the case at review.

9. On 19 June 2017, a preliminary hearing took place at the ADC. The Athlete, respectively his lawyer declared that the Athlete would waive his rights for the opening of the B sample and that the analytical result from the A sample was accepted as final.

10. On 19 October 2017, a hearing was conducted before the Disciplinary Commission of the Bulgarian Olympic Committee ("DC"). The factual conclusions taken by the DC can be summarized as follows:

    - The presence of Ostarine in the Athlete's sample was indisputably established.

    - The Athlete did not succeed to prove how the detected substance had entered his system. The explanation provided by the Athlete, *i.e.* that the prohibited substance originated from a polluted product, remained unproven.

- The Athlete was a minor at the moment of testing.

- The Athlete has rendered full assistance for the disclosure of the absolute and objective truth.

- The Athlete has taken food supplements given to him by his father in whom he had absolute confidence. The DC further was of the opinion that such confidence in a parent on the part of a minor child is completely normal.

11. The DC, in its decision issued on 3 November 2017, decided to deprive the Athlete of his competitive rights for a period of one year.

12. With letter issued on 22 November 2017, the BSF confirmed the ban imposed by the DC of one year, starting on 3 November 2017, but deducted the period of provisional suspension from this period.

13. On 27 November 2017, the ADC submitted an appeal against the decision of the DC to the BSA.

14. On 19 January 2018, the BSA rendered a decision increasing the sanction determined by the DC from one to four years of suspension (the "Appealed Decision"). The BSA motivated its decision *inter alia* providing the following grounds:

    - The provision allowing the sanction for non-specified prohibited substances to be reduced from 4 to 2 years is inapplicable. As evident from the WADA 2017 Prohibited List, the substance Ostarine is part of class S1 Anabolic Agents, which are prohibited at all times (and not only in-competition such as the substances from classes from S6 to S9 from the WADA List for 2017).

    - The correct qualification for determination of the sanction for the detected non-specified substance Ostarine, namely under Article 70, para. 2, sec.1, read together with Article 70, para. 2, sec. 2 RDCTCA, deprives the DC of the possibility to consider "mitigating the fault" circumstances for the purpose of determining the sanction. Neither the minor age, nor the fact that the positive finding resulted from out-of-competition testing are relevant to the above mentioned provisions. As regards the remaining circumstances taken into account by the DC, the BSA held that they fortified the conviction for the presumption of risky behaviour committed by the Athlete. Specifically, as the Athlete was taking not only a small amount of various different nutritional supplements which had been "prescribed to him" by his father, he should have been aware that his conduct bears a significant risk to breach the Anti-Doping rules, and that the Athlete had apparently disregarded that risk. Moreover, the father of the Athlete is neither his coach, nor a medical person. And, as followed from Protocol No 25 of 19 June 2017, related to the preliminary hearing of the Athlete, the Athlete's coach does not provide him with food supplements because he is afraid of them being contaminated. Despite this, and as expressly explained during the hearings, the Athlete had taken the food supplements in order to improve his physical endurance.

- In the view of the above stated, the ABS concluded that the DC decision, as regards the sanction, appeared to be incorrect due to non-compliance with the RDCTCA, and lacking grounds. The ABS therefore held that based on the information collected by the DC, the DC had no legal ground to determine a sanction lower than the 4 years suspension provided for in Article 70, para. 1, sec.1 RDCTCA.

15. The Appealed Decision was notified to the Appellant on 31 January 2018.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 21 February 2018, the Athlete filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against the Anti-Doping Centre of the Republic of Bulgaria. He further identified the BSF and the BOC as "interested/affected parties". In his statement of appeal, the Appellant requested the nomination of a Sole Arbitrator.

17. On 26 February 2018, upon request by the CAS Court Office, the Appellant explained that indeed, the BOC had to be considered as second respondent, and further explained his reasons for identifying the BSF as interested party.

18. On 12 March 2018, the Appellant filed his appeal brief.

19. With letter issued on 14 March 2018, the BOC informed CAS that in its opinion, it does not have capacity to be respondent in the present proceeding.

20. On 4 April 2018, the Second Respondent filed its answer to the Appeal and on 11 April 2018, the First Respondent filed its answer.

21. On 17 April 2018, the Second Respondent requested that the Sole Arbitrator should decide the case based only on the parties' written submissions. The First Respondent filed a very similar request on 19 April 2018.

22. With letter issued on 19 April 2018, the Appellant asked for a hearing to be held in the present matter.

23. On 1 May 2018, the CAS Court Office informed the parties that Mr. Patrick Lafranchi, Attorney at law in Bern, was nominated as a Sole Arbitrator in the present matter.

24. On 17 May 2018, the parties were informed about the decision of the Sole Arbitrator to hold a hearing in the present case.

25. With letter issued on 14 June 2018, the parties were informed that a hearing would be held on 14 August 2018, in Lausanne at the CAS Court Office.

26. On 2 July 2018, the Second Respondent informed the CAS Court Office that it will not attend the hearing of 14 August 2018 as it did not consider itself as a party to the present proceeding.

27. The parties signed the Order of Procedure on 5, 15 and 17 July 2018, respectively.

28. On 14 August 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Sole Arbitrator was assisted by Mr. Achim Kohli, attorney-at-law in Bern with lafranchi meyer and Ms. Carolin Fischer, CAS Counsel. The hearing was attended by the following persons:

For the Appellant:

Mr. Blagovest Bozhinovski, Appellant

Mr. Krasimir Bozhinovski, father of the Appellant and witness

Mr. Nikola Petrov, coach of the Appellant and witness

Mr. Boris Kolev, attorney at law, counsel for the Appellant

Ms. Elena Todorovska, attorney at law

Ms. Zlatka Chervenkova, interpreter

For the First Respondent:

Ms. Sylvia Mindova, Legal Advisor of the Bulgarian Anti-Doping Centre

Ms. Irina Gantcheva, translator.

29. Two attempts to reach Mr. Kristian Minkovski, head manager of the Bulgarian national swimming team and a witness of the First Respondent, by Skype or phone failed as Mr. Minkovski did not pick up the call. Mr. Minkovski did hence not testify during the hearing.

30. During the hearing the Appellant asked to be able to submit further testing results of nutritional supplements that had not been tested earlier. The First Respondent objected to the submission of such documents. The Sole Arbitrator did not see any exceptional circumstances allowing him to admit them. The submission of those documents was hence rejected based on Article R56 of the Code.

31. Before the hearing was concluded, all parties expressly stated that they did not have any objection to the constitution or conduct of the Sole Arbitrator or to the procedure adopted by the latter and that their right to be heard had been respected.

V. MAIN ARGUMENTS OF THE PARTIES

32. The Appellant, in challenging the Appealed Decision, in particular submits the following arguments:

- The Appellant is of the opinion that the following considerations of the BSA base on a wrong interpretation of the RDCTCA:
    - The finding that the provision allowing a reduction of the sanction from four (4)

to two (2) years was inapplicable to the present case.

- The opinion that the presumption of intent is irrebuttable.

- For these reasons the BSA failed to consider the mitigating factors that could influence the reduction of the sanction.

- It is the firm opinion of the Appellant that he did not act with any intent and that he observed all the diligence required in choosing his food supplements.

33. The First Respondent brings forward the following core arguments against the appeal of the Appellant:

- The Appellant was not able to prove that he acted without intent. Therefore, the applied sanction in the Appealed Decision is correct and in accordance with Article 70.1.1 of the RDCTCA.

- Especially, the BSA did rightly qualify the behaviour of the Appellant as risky. As he took various nutritional supplements he should have known that this behaviour creates a significant risk of violation of the Anti-Doping rules. A risk he obviously ignored.

- Further, the Appellant's father, responsible for purchasing and checking the food supplements is not a medical person. Also, the coach of the Appellant did not give nutritional supplements to his athletes as he was afraid that they could be contaminated. Last but not least, the Appellant did explicitly state that he took nutritional supplements for enhancing his physical endurance.

34. More specific arguments of the parties are listed in the subsequent evaluation of the award. As the arguments of the Second Respondent are mainly related to its capacity to be called as a party in the present proceedings they are discussed below, in the context of the section addressing standing to be sued.

35. The Sole Arbitrator has carefully taken into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

VI. JURISDICTION

36. Article R47 of the Code provides as follows:

> *An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*

37. The Athlete asserts that the jurisdiction of the CAS derives from Article 2 para. 3 of the BSA Statutes and Article 66 para. 9 Sec. 2 RDCTCA.

38. Article 2 para. 3 of the BSA Statutes states what follows:

> *3. BSA hears and resolves: Appeals against decisions of the Disciplinary Committee of BOC, of the executive director of the Anti-Doping Centre with the minister of physical education and sport and of a licensed sports organization regarding doping control.*
>
> *(3) The decisions rendered under point 3 of the Bulgarian Sports Arbitration (BSA) may be appealed before the Court of Arbitration for Sport in Lausanne, Switzerland, in accordance with the Code of Sports-Related Arbitration. The time limit for the appeal is 21 calendar days from the receipt of the decisions.*

39. Article 66 para. 9 RDCTCA reads as follows:

> *(9) The time for filing appeals shall be as follows:*
>
> *1. The decisions of the Disciplinary Commission, the Executive Director of the Antidoping [sic] Centre, and licensed sports organizations may be appealed to the Bulgarian Sports Arbitration, being the appellate instance, within fourteen days from their receipt.*
>
> *2. The time to file an appeal to the Court of Arbitration for Sports in Lausanne, Switzerland, shall be twenty one days from the date of receipt of the decision by the appealing party.*

40. The First Respondent did not raise any explicit or implicit objection against the jurisdiction of CAS, neither before nor after its statements on the merits. Moreover, all parties confirmed CAS jurisdiction by execution of the Order of Procedure, and no party objected to the proceedings or the jurisdiction of the Sole Arbitrator.

41. The Second Respondent objected to its status as a party in the present proceedings but did not object to the jurisdiction of CAS to hear the present dispute.

42. It follows, therefore, that CAS has jurisdiction for this appeal.

VII. ADMISSIBILITY

43. Article R49 of the Code provides as follows:

> *In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*

44. Similarly Article 66 para. 9 Sec. 2 RDCTCA and Article 2 para. 3 of the BSA Statutes both provide that *"The time to file an appeal to the Court of Arbitration for Sports in Lausanne, Switzerland, shall be twenty one days from the date of receipt of the decision by the appealing party"*.

45. The Appeal was filed on 21 February 2018 *i.e.* within twenty-one (21) days of notification of the Appealed Decision that was communicated to the Appellant on 31 January 2018.

46. The appeal is therefore admissible.

VIII. APPLICABLE LAW

47. Article R58 of the Code provides as follows:

> *The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

48. Both parties base their submissions on the RDCTCA. The Appellant, in his appeal brief, additionally argues that the Sole Arbitrator could directly apply the WADC as applicable regulation to the dispute due to the general harmonization of the Bulgarian Anti-Doping legislation with the WADC.

49. Based on constant CAS-jurisprudence, the WADC has no direct effect (see *inter alia* CAS 2011/A/2612, para. 98 *et seq.*; CAS 2008/A/1572, para. 4.58; CAS 2008/A/1718, para. 61). Rather, the WADC may be used only as an aid in interpreting the applicable Anti-Doping regulations (CAS 2009/A/1817 & 1844, para. 131).

50. § 4 of the Additional Provisions of the RDCTCA reiterates this principle in stating that the RDCTCA shall be interpreted in a manner that is consistent with the WADC. And § 2 of the Additional Provisions of the RDCTCA repeats the interpretation principles of the WADC.

51. This dispute is hence governed by the RDCTCA. The WADC shall thereby serve as an aid of interpretation of the RDCTCA but not apply directly.

IX. RELEVANT RDCTCA REGULATIONS AND DEFINITIONS

52. The following provisions of the RDCTCA, which are based on the WADC, are material to this appeal:

> Article 6 RDCTCA (Anti-Doping rule violation) provides in its pertinent part:
>
> *(1) Doping is the occurrence of one or more of the anti-doping rule violations set forth in paragraph 2 beneath.*
>
> *(2) The following constitute anti-doping rule violations:*
>
> *1. The presence of a prohibited substance or its metabolites or markers in an athlete's sample:*
>
> *a) It is each athlete's personal duty to make sure that no prohibited substance enters his or her body.*

Each athlete is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in a Sample that has been collected from them and it is not necessary that intent, fault, negligence or knowing use on the athlete's part be proved in order to establish the violation.

b) There shall be sufficient proof to establish the violation in case of presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives the right to analysis of the B Sample and such analysis does not take place; or, where the Athlete's B Sample is analyzed and the analysis result confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

c) Excepting those substances for which a quantitative threshold is specified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

d) As an exception to the general rule of item 1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2. *The use or attempted use by an athlete of a prohibited substance or a prohibited method where the following conditions and exceptions are taken into consideration:*

   a) It is each athlete's personal duty to make sure that no prohibited substance enters his or her body and that no prohibited method is used and it is not necessary that intent, fault, negligence or knowing use on the athlete's part be proved in order to establish an anti-doping rule violation related to use of a prohibited substance or a prohibited method;

   b) The success or failure of the use or attempted use of a prohibited substance or prohibited method is not material. To establish that an anti-doping rule violation has been committed, it is sufficient that the prohibited substance or prohibited method was used or attempted to be used.

Article 14 RDCTCA (definition of prohibited substance) provides:

(1) WADA shall, as often as necessary and no less often than annually, determine and publish as an International Standard the Prohibited List, which thoroughly itemizes the prohibited substances and prohibited methods. The changes and amendments to the List of Prohibited Substances and Methods shall enter into force for the Republic of Bulgaria as provided in the International Convention against Doping in Sport, which was ratified with a law adopted by the 40th National Assembly (SG No 105/2006).

(2) The Prohibited List shall be distributed by the Anti-Doping Centre to each licensed sports organization and the Bulgarian Olympic Committee and shall be published on the websites of the Anti-Doping Centre and the Ministry of Youth and Sports.

(4) For purposes of the application of Chapter V of these Regulations, all prohibited substances shall be "specified substances" except: (a) substances in the classes of anabolic agents and hormones; (b) those stimulants, and hormone antagonists and modulators so identified on the prohibited list.

(5) Prohibited methods shall not be specified substances.

(6) WADA's determination of the Prohibited List and the classification of substances into categories on the Prohibited List, and the classification of a substance as prohibited at all times or in-competition only, is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method is not a masking agent or does not have the potential to enhance performance, does not represent a health risk or does not violate the spirit of sport.

WADA Prohibited List 2017 provides in its pertinent part:

Substances & methods prohibited at all times (in- and out-of-competition):

In accordance with article 4.2.2 of the world anti-doping code, all prohibited substances shall be considered as "specified substances" except substances in classes S1, S2, S4.4, S4.5, S6.a, and prohibited methods M1, M2 and M3.

S1: Anabolic Agents: Anabolic Agents are prohibited

(…)

2. Other Anabolic Agents

Including, but not limited to:

• …

• *Selective androgen receptor modulators (SARMs, e.g. andarine and ostarine);*

• …

Article 70 RDCTCA:

The period of ineligibility for violations under Article 6(2)1, Article 6(2)2, and Article 6(2)6, shall be as follows, subject to potential reduction or suspension, when no fault or negligence is established or due to no-fault reasons:

The period of ineligibility shall be four years, where:

1. *The anti-doping rule violation does not involve a specified substance, unless the athlete or other person can establish that the anti-doping rule violation was not intentional;*

2. *The anti-doping rule violation involves a specified substance and the anti-doping organization can establish that the anti-doping rule violation was intentional;*

3. *If item 1 above does not apply, the period of ineligibility shall be two years;*

4. *As used in Articles 70 and 71, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct, which he/she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an adverse analytical finding for a substance, which is prohibited only in-competition, shall be rebuttably presumed to be not "intentional" if the substance is a specified substance and the athlete can establish that the prohibited substance was used only out-of-competition. An anti-doping rule violation, resulting from an adverse analytical finding for a substance, which is prohibited only in-competition, shall not be considered "intentional" if the substance is not a specified substance and the athlete can establish that the prohibited substance was used only out-of-competition in a context unrelated to sport performance.*

Article 72 RDCTCA:

(1) Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

(2) In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

Article 73 RDCTCA:

(*1) If an Athlete establishes that he/she bears no fault or negligence, the otherwise applicable period of ineligibility shall be eliminated. In the event the period of ineligibility otherwise is eliminated, the anti-doping rule violation shall not be considered a violation when determining the period of ineligibility for multiple violations under Article 77.*

(2) If an athlete or other person establishes in an individual case, where Article 72(1) and Article 72(2) are not applicable, that he/she bears no significant fault or negligence, then, subject to further reduction or elimination as provided in Article 68, the otherwise applicable period of ineligibility may be reduced based on the athlete or other person's degree of fault, but the remaining period may not be less than one-half of the period otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime period with no right to reinstatement, the reduced period under this article may be no less than eight years.

RDCTCA Additional Provisions § 1 Within these Regulations:

"*Contaminated product*": *A product that contains a prohibited substance, which is not disclosed on the product label or in information available in a reasonable Internet search.*

"Fault": *Any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an athlete or other person's degree of fault include, for example, the athlete's or*

other person's experience, whether the athlete or other person is a minor, special considerations such as impairment, the degree of risk that should have been perceived by the athlete and the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk. In assessing the athlete's or other person's degree of fault, the circumstances considered must be specific and relevant to explain the athlete's or other person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of ineligibility, or the fact that the athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of ineligibility under Article 72(1) and Article 72(2), or under Article 73(2).

"List of Prohibited Substances and Methods" *(i.e., the Prohibited List, as defined in the Code): The list adopted by WADA that identifies the prohibited substances and prohibited methods.*

"No fault or negligence"*: The athlete or other person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had used or been administered a prohibited substance or prohibited method, or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 6(2), the Athlete must also establish how the Prohibited Substance entered his or her system.*

"No significant fault or negligence"*: The athlete or other Person's establishing that his/her fault or negligence (when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence) was not significant in relationship to the anti-doping rule violation. Except in a case of a minor, for any violation of Article 6(2), the athlete must also establish how the prohibited substance entered his/her system.*

X. MERITS

A. Evaluation of the status of the Bulgarian Olympic Committee

53. The first question which needs to be clarified in this merits' section is the role of the Second Respondent in the present proceedings. The Second Respondent contests being a party in the present proceeding as the dispute has evolved between the ADC and the Athlete. According to the Second Respondent, the BOC is an appellate instance exercising control over the decisions of the Disciplinary Committee. Those proceedings do not involve any other subjects as parties. Therefore, only the ADC shall be brought as respondent to the Athlete's appeal in the present proceedings.

54. As determined in previous decisions of the CAS (such as CAS 2010/A/2083), an appeal can be made *"against the National Federation that made the contested decision and/or the body that acted on its behalf"*. In the present case, the BOC is the "Federation" in the above meaning and the BSA is the body that acted on its behalf (cf. amongst others for a similar case CAS 2013/A/3115 & CAS 2013/A/3116, para. 108).

55. The Sole Arbitrator also agrees with the Panel in CAS 2007/A/1376, para. 18, and finds that the "stand-alone test" is the decisive test to reveal whether or not a given sports justice body

pertains in some way to the structure of a given sports organisation. Presently, would the BOC not exist, the BSA with BOC would not exist either and would not perform any function (cf. amongst others CAS 2013/A/3115 & CAS 2013/A/3116, para. 111).

56. The Sole Arbitrator therefore determines that the Second Respondent has standing to be sued and shall thus be considered as a party in the present proceedings.

B. Overview of the Legal Analysis of the Sole Arbitrator

57. It is common ground between the parties that Ostarine was present in the Athlete's sample and that the Athlete is guilty of an Anti-Doping-Rule-Violation ("ADRV") under Article 6 RDCTCA. A finding of an ADRV results, *prima facie*, in a period of suspension of four (4) years under Article 70 para. 1 RDCTCA as Ostarine – according to WADA's Prohibited List 2017 that is applicable through Article 14 RDCTCA – is not a specified substance. In order for the period of suspension to be reduced to two (2) years, it is for the Athlete to establish on the balance of probability that his ADRV was not intentional. The term "intentional" is defined in Article 70 para. 4 RDCTCA.

58. The period of suspension may be reduced or eliminated under Article 73 para. 1 or Article 73 para. 2 RDCTCA, if the Appellant can establish on the balance of probability that he bears "No fault or negligence" or "No significant fault or negligence" for the presence of Ostarine in his system. According to the RDCTCA's definition of the terms "No fault or negligence" and "No significant fault or negligence" a minor must not prove how the prohibited substance entered his or her system.

C. Main Issues

59. The following are the main issues which arise in this appeal:

(i) In order to establish absence of intent, is it necessary for the Athlete to establish the source of the prohibited substance present in his sample?

(ii) If it is not necessary, has the Athlete established lack of intent?

(iii) If the Athlete did establish lack of intent, has he also established that he bears "No fault or negligence" or, at least, "No significant fault or negligence" for the rule violation?

D. Case relevant Facts

a) Undisputed Facts

60. The following facts are undisputed between the parties:

- That the Appellant committed an ADRV as Ostarine was found in his system.
- That it is unknown how the prohibited substance entered the Appellant's system.

- That the Appellant disclosed all the supplements he took before the doping test.
- That only one of the supplements taken by the Appellant (specifically, the Beta Ecdysterone) has been tested for prohibited substances and that it did not contain Ostarine.
- That the Appellant, at the date of the respective doping control, was 17 years old and hence a minor of age.

b) Disputed Facts

61. The following facts are disputed between the parties:

- Whether the Appellant knew in advance that he will be submitted to an Anti-Doping control on 5 May 2017.
- Whether the Appellant complied with the required diligence.

62. Subsequently, the Sole Arbitrator evaluates which of those disputed facts have to be considered as established for the present proceeding.

i. First disputed fact: Whether the Appellant knew in advance that he will be submitted to an Anti-Doping control on 5 May 2017

63. The Appellant represents the following position:

> According to the coach of the Appellant, Mr. Nikola Petrov, the head manager of the Bulgarian national team in swimming, Mr. Kristian Minkovski, called him on 3 May 2017 at about 10:30 - 11:00 a.m. Mr. Minkovski informed him regarding his two athletes Blagovest Bozhinovski and Tihomir Todorov. The two swimmers were supposed to travel from Varna to Sofia. This in order to join the national team in view of taking part in the forthcoming Junior Balkan Games on 6 and 7 May 2017 in Sofia, Bulgaria. Mr. Petrov witnessed that Mr. Minkovski told him also that they need to be in the hotel on 5 May 2017 because in the morning they would have to attend a doping test. During said phone call Mr. Petrov and the two athletes were together in the gym for training. Mr. Petrov was hence able to deliver the information about the doping test scheduled on 5 May 2017 instantly to the Appellant and to Mr. Todorov. Consequently, Mr. Petrov and the two athletes travelled to Sofia by plane in the evening of 4 May 2017 at about 8:00 p.m. and were accommodated in hotel Diana 3 like all other athletes from the national team.

64. The First Respondent in contrast brings forward the following:

> According to the First Respondent, the written statement of the Appellant's coach, Nikola Petrov, is untrue as the athlete has not been planned for doping control. To the contrary, the circumstances about the testing of Blagovest Bozhinovski were as follows:

In connection with the quotas attained by athletes in swimming for the participation at the European Youth Championships in Swimming, the BSF addressed the ADC requesting doping controls for the athletes with quotas. Thereby, the BSF sent a request to the ADC for the testing of Diana Petkova, Petar Bozhilov, Lyubomir Epitropov, Antani Ivanov and Tihomir Todorov.

The letter of BSF thereby shows that Blagovest Bozhinovski is not enlisted in the request for testing. Further, it is indisputably proven that the testing of the national athletes was conducted on 4 May 2017, *i.e.* after the alleged discussion between Mr. Petrov and Mr. Minkovski. Hence, as Bozhinovski has not been provided for testing and thus by no means could be noticed in advance that he has to undergo doping control, it is proven that the testimony of the coach is untrue.

65. During the hearing, Mr. Petrov, provided *inter alia* the following witness statement:

- On 3 May 2017, a Thursday, the Appellant and Tihomir Todorov were cycling in the gym under the instruction of Mr. Petrov. At this very moment Mr. Minkovski called Mr. Petrov on the phone. Mr. Minkovski asked Mr. Petrov if "you" are coming to Sofia for doping control? As Mr. Petrov confirmed Mr. Minkovski told him that "you" will have to be ready on Friday morning for doping control. Mr. Petrov interpreted that Mr. Minkovski meant all of the persons present in the gym, hence the Appellant, Tihomir Todorov and he himself. However, as it turned out later, Mr. Minkovski – by mentioning "you" - only meant Mr. Petrov and Tihomir Todorov.

- On 5 May 2017, when the doping control officers in Sofia were astonished that two athletes were present instead of the only person expected, Tihomir Todorov, the doping control officers called their office to ask for instructions of how to proceed with the Appellant who was not listed on their list of the athletes to be controlled - Mr. Petrov realized, at this very moment, that there must have been a misunderstanding. By mentioning "you", Mr. Minkovski only meant Tihomir Todorov and Mr. Petrov instead of Tihomir Todorov, Mr. Petrov and the Appellant.

66. The Sole Arbitrator considers the written and oral testimony of Mr. Petrov as credible. His oral testimony was consistent and without contradictions. The narrations of Mr. Petrov were placed in a space-time microstructure as he knew what his two athletes were doing during the phone call of Mr. Minkovski. Furthermore he was able to emotionally portray the astonishment of the doping control officers when they discovered that there were two athletes present for the doping control instead of one, and Mr. Petrov expressed that he himself had been surprised that only one of his athletes was foreseen for a doping control.

67. The father of the Appellant described during the hearing in a coherent manner that his son had called him on 3 May 2017 - after completing his training session in the gym and after the phone call of Mr. Minkovski - in order to tell him that when going to Sofia the next day, he will have to undergo doping control. The Sole Arbitrator considers the respective statement of the Appellant's father credible as it is placed in a realistic space-time microstructure, enhanced with details and without contradictions.

68. As stated above, it was not possible to reach Mr. Minkovski during the hearing, in order to confirm that indeed, he had called Mr. Petrov on 3 May 2017 and informed him about the Anti-Doping control scheduled to take place on 5 May 2017. However, Mr. Minkovski had provided a written witness statement, reporting amongst others about his phone call to Mr. Petrov, and the content of this witness statement has not been contested or disputed by any of the parties. Accordingly, and furthermore in light of the credible statements provided by both Mr. Petrov and the Appellant's father, the Sole Arbitrator considers it as established that the Appellant knew from 3 May 2017 on that he will have to undergo doping control on 5 May 2017.

ii. Second disputed fact: Whether the Appellant did comply with the required diligence

69. The Appellant is of the opinion that he complied with his diligence and that he wasn't aware of any reproachable behaviour on his end for which he could be held responsible. In detail, he contends the following:

1. The voluntary travel to Sofia and the doping control test

70. The Athlete brings forward that he knew about the doping test 48h before it was actually conducted. If he had intended to cheat or if he had known that there would be a significant risk of an ADRV he would obviously not have travelled voluntarily from Varna to Sofia in order to undergo doping control.

2. The concentration of Ostarine at the moment of testing

71. The Athlete - relying on the expert opinion of Dr. Dilyan Ferdinandov, submitted together with the appeal brief (Exhibit 16 of its statement of Appeal) - brings forward that:

- the Ostarine-concentration in his sample at the moment of testing was at 15 ng/mL;
- that in order to have a concentration of 15 ng/mL, the Athlete would have had to ingest 3mg of Ostarine about 12 – 13.5h before the testing;
- that a dose of 3mg of Ostarine is a very high dose and does not represent a case of contamination only; it is the recommended dose for people suffering from cancer and taken through respective cancer-medication.

72. Therefore, in order to reach a concentration of 15ng/mL at the moment of testing, the Athlete would have had to take 3mg of Ostarine 12 – 13.5h before the actual doping control test. This is highly unrealistic as at that moment, the Athlete already knew that he will be tested.

73. The First Respondent did not submit any expert opinion nor disputed the content of the expert opinion submitted by the Appellant.

3. The collaboration of the Athlete in disclosing the supplements taken

74. The Athlete brings forward that he disclosed all the supplements used 14 days before the test and 3 more used 40 days before the test.

4. The food consumed by the Athlete

75. The Athlete contends that he only consumed food supplements given to him by his father, to whom he had absolute confidence. Such confidence is – according to the Athlete – completely normal for a minor with such a close relationship to his father and cannot be considered as reproachable behaviour.

5. The counter-argument of the First Respondent

76. The First Respondent considers that the fact only that the Athlete consumed food supplements constitutes in itself a violation of the Appellant's of his diligence. As his coach declined to give him such supplements he should have known that this is a risky behavior to be considered as a breach of diligence. And the fact that he had full confidence in his father does also not substantiate the lack of intention.

6. The oral witness statements of the Appellant, the coach and the father of the Appellant regarding the nutritional supplements taken by the Appellant

77. As regards the nutritional supplements taken by the Appellant the following witness statements were provided:

78. The Appellant explained that he regarded his father as a person of authority in whom he had absolute confidence and whose decisions he would not question. In his eyes, there was absolutely no reason not to trust his father. He therefore never had any doubts that his father would provide him with nutritional supplements that were not "safe". When he moved away from his parents' house to live on his own in Varna he reported to his father that he would get very tired after the hard training sessions in Varna. Up to this moment the Athlete only took Omega3 as nutritional supplements. In order to help him regenerate and facilitate his recovery, his father hence started to buy nutritional supplements.

79. The food consumed by the Appellant in Varna was also mostly provided by his parents. From time to time, his parent would drive to Varna and the three of them together would buy big quantities of food, mainly meat. They would then cut the meat into several portions and freeze it. This food would then serve the Appellant almost until the next visit of his parents.

80. During training, the Appellant, according to his own statement, would keep his water bottle and his bag either in a locked locker or close to his coach who would supervise it.

81. The Appellant's father underlined that he did not allow his son to buy any nutritional supplements on his own. This because he didn't want anybody to cheat on his son in selling

him products that are not save and/or not in compliance with the WADA Prohibited List. Rather, the Appellant's father, while specifically acknowledging that he didn't know the prohibited list of WADA by heart, explained that he would diligently examine all the nutritional supplements he bought with the help of a specialist catalogue, and conducted internet researches, double checking the products' ingredients with the prohibited list, in order to make sure that the purchased supplements did not contain any prohibited substances. According to his statements, he only bought supplements that were meant to help his son with general recreation.

82. During a certain period of a couple months as the Athlete was living and training in Varna, the Appellant's father was unemployed. During this period the father changed the company who produced the nutritional supplements from a more expensive to a cheaper one in order to save money.

83. Also, after the purchase, the father double checked the nutritional supplements bought with the Appellant's coach, prior to giving them to the Appellant. This was also confirmed by the coach. The coach as well as the Appellant's father both confirmed being aware that a certain risk existed that the food supplements could be contaminated. It is for this reason that the father of Appellant as well as the Appellant's coach tried to diligently check if the purchased products contained prohibited substances or if there was a risk of contamination.

84. The supplements considered safe by both, the father and the coach of the Appellant, were stored in a locker in the Appellant's apartment.

85. Neither the coach nor the father of the Appellant have any medical background. Furthermore, the Athlete's swimming club did not have any medical person which could be consulted in regards to nutritional supplements.

86. According to his father the Appellant himself did not have any money to buy supplements on his own, in particular as his pocket money was not sufficient for such purchases.

87. The Appellant's coach witnessed that – at the beginning of each professional season - he informed all of his athletes that there were some substances such as vitamins that would help them with regeneration after training. The coach further expressed the opinion that it is not possible for a professional swimmer to regenerate in an adequate manner while only consuming ordinary food.

7. The appreciation of evidence in regard to the level of diligence observed by the Appellant

88. Having heard and questioned the Appellant, his father and his coach, the Sole Arbitrator comes to the firm opinion that indeed, the Appellant had absolute trust in his father. He neither questioned, nor dared to question the decisions of his father, or his parents. Furthermore he had no say in the evaluation of which dietary supplements were bought. Rather, the family setting seems to attribute an absolute, patriarchal authority to the Appellant's father and to the Appellant's coach.

89. Further, having questioned all the parties, the Sole Arbitrator is of the opinion that neither the Appellant nor his father or his coach had any intent to cheat. To the contrary, the Athlete' s father, within his limited financial resources, and with the desire to act in accordance with the applicable rules, tried everything to provide his son with the best conditions to be successful. Due to his patriarchic thinking he was of the firm opinion that his son was simply not able to evaluate which nutritional supplements should be purchased. Rather, he exercised the absolute control to ensure that his son did not consume any contaminated food supplements. Obviously, he as well as the Athlete's coach were aware of the inherent risk that the nutritional products purchased could be contaminated with prohibited substances. The father however tried to mitigate such risk within the scope of his capacities, in particular by comparing the list of ingredients on the products with the WADA Prohibited List, by checking with his catalogue, on the internet, and finally, by discussing the purchased products with the coach.

90 Additionally, the findings of the expert opinion submitted by the Appellant were not contested by the Respondents, neither in a qualified manner by a medical counter-assessment nor in simple way in the written submissions. As the medical conclusions of Dr. Ferdinandov sound reasonable to the Sole Arbitrator and remained uncontested by the counterparties the Sole Arbitrator deems them as established. Consequently, one has to emanate from the fact that the Appellant ingested a dose of 3 mg of Ostarine 12h to 13.5h before the critical doping control. As the Appellant – at this moment – already knew that he will undergo doping control 12h to 13.5h later, it is hence highly unlikely that he did such ingestion of Ostarine in a deliberate and/or conscious manner. Rather, it is most likely that the Athlete did not know that he did ingest Ostarine 12h to 13.5h before the critical doping control.

E. Legal Appreciation

1. Lack of Intent

91. A finding of an ADRV that does not involve a specified substance results, *prima facie*, in a period of ineligibility of four (4) years under Article 70 para. 1 RDCTCA. In order for the period of ineligibility to be reduced to two (2) years, it is up to the Athlete to establish on the balance of probability that his ADRV was not intentional. The term "intentional" is defined in Article 70 para. 4 RDCTCA as follows:

> *As used in Articles 70 and 71, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct, which he/she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*

92. Article 70 RDCTCA is based on Article 10.2.3 WADC and uses a similar language as well as similar sanctions and consequences to a finding of lack of intent. Together with the increase under the 2015 version of the WADC of the "standard" period of ineligibility from two (2) years (under the 2009 version of the WADC) to four (4) years, it was also made clear that in case there was no intent, the applicable period of ineligibility "returned" to the "standard" two (2) years of ineligibility. In this context it was further clarified that the term "intentional" was meant to identify those players who cheat (cf. amongst others CAS 2016/A/4676, para. 68).

93. In this context it is questionable whether a minor athlete, in order to establish lack of intent in the sense of Article 70 RDCTCA, is obliged to establish the source of the prohibited substance detected in his sample.

94. In order to answer this question the Sole Arbitrator carefully considered the definition of intent contained in Article 70 para. 4 RDCTCA and the following definitions as stated in the Additional Provisions § 1 of the RDCTCA (they are identical in their wordings with the respective definitions of the WADC):

> ***"No fault or negligence"***: *The athlete or other person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had used or been administered a prohibited substance or prohibited method, or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 6(2), the Athlete must also establish how the Prohibited Substance entered his or her system.*
>
> ***"No significant fault or negligence"***: *The athlete or other Person's establishing that his/her fault or negligence (when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence) was not significant in relationship to the anti-doping rule violation. Except in a case of a minor, for any violation of Article 6(2), the athlete must also establish how the prohibited substance entered his/her system.*

While comparing the definition of "intent" contained in Article 70 para. 4 RDCTCA with the definitions of "No fault or negligence" and "No significant fault or negligence" the Sole Arbitrator observes that in the definition of "intent" neither minors nor the obligation to establish the source of the prohibited substance are explicitly mentioned. This is notable insofar given that the definitions of "No fault or negligence" and "No significant fault or negligence" explicitly exclude minors from the duty to establish the source of the prohibited substance.

Consequently, the concrete question to be answered is whether minors, in the same way as while proving that they acted with "No fault or negligence" or "No significant fault or negligence", also at the stage of intent do not have to establish how the prohibited substance entered their system. In order to answer such question, the Sole Arbitrator has to interpret the relevant regulations of the RDCTCA. The question is thus how the RDCTCA shall be interpreted. The Sole Arbitrator consequently has to determine the presently applicable rules of interpretation of the RDCTCA. This is a question of the merits.

The PILA as the presently applicable *lex arbitri* defines in its Article 187 para. 1 that the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected.

In *casu* the parties, through the signing of the Order of Procedure, declared the Code as applicable to the present case. According to Article R58 of the Code the Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

Therefore, the applicable regulations, *i.e.* the RDCTCA shall primarily guide the Sole Arbitrator in interpreting those rules.

The RDCTCA contains the following rules of interpretation:

> § 1. […] *"Code"*: the World Anti-Doping Code […]
>
> § 2. The official text of the *Code* shall be maintained by *WADA* and shall be published in English and French. When interpreting the Code, the following rules shall be observed:
>
> 1. In the event of any conflict between the English and French versions, the English version shall prevail.
>
> 2. The comments annotating various provisions of the *Code* shall be used to interpret the *Code*.
>
> 3. The *Code* shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the *Signatories* or governments.
>
> 4. The headings used for the various Parts and Articles of the *Code* are for convenience only and shall not be deemed part of the substance of the *Code* or to affect in any way the language of the provisions to which they refer.
>
> 5. The *Code* shall not apply retroactively to matters pending before the date the *Code* is accepted by a *Signatory* and implemented in its rules. However, pre-*Code* Anti-Doping rule violations would continue to count as "First violations" or "Second violations" for purposes of determining sanctions under Article 10 for subsequent post-*Code* violations.
>
> 6. The Purpose, Scope and Organization of the World Anti-Doping Program and the *Code* and Appendix 1, Definitions and Appendix 2, Examples of the Application of Article 10, shall be considered integral parts of the *Code*.

However, those rules – strictly read – only refer to the interpretation of the WADC and not the RDCTCA. And even if applied to the RDCTCA, they do not define general rules of how to interpret the RDCTCA (*i.e.* if the RDCTCA shall be interpreted in the same way as a law or rather in the same way as a contract) but rather stipulate specific interpretation rules. Therefore, in order to define general interpretation rules of the RDCTCA, the Sole Arbitrator turns to Swiss law. This as it is longstanding and established CAS jurisprudence that statutes or similar instruments shall be interpreted according to Swiss law (cf. amongst others CAS 2001/A/354 & CAS 2001/A/355 para. 7 *et seq.*; and CAS 2008/A/1502; CAS OG 12/002).

Under Swiss law, statutes are being interpreted in the same way as the interpretation of declarations of intent (cf. amongst others RIEMER H. M., Berner Kommentar to Article 80-89bis ZGB, N 76). The interpretation of declarations of intent follows the 'principle of confidence', that is, the declaration is neither understood in the sense of what the declaring party may have had in mind nor in accordance with the literal meaning of the wording, but in the meaning the addressee could in good faith attribute to it. This is in some way an 'objective'

approach to the problem. On the other hand, the addressee is deemed to be obliged to give all possible attention to the 'subjective element', *i.e.* to consider all aspects allowing the understanding of the declared intent. Under these two aspects interpretation is less strict than under the English and American tradition, *i.e.* focused on the "objective" meaning of the existing texts (cf. amongst others BUCHER E., OR Allgemeiner Teil, p. 112 f.). Such "objective" interpretation is justified as at the moment these regulations were drafted the athletes to whom the principles apply were not privy thereto (cf. amongst others CAS 2008/A/1502, cipher 21).

Therefore, while considering the objective meanings of the RDCTCA definitions of "intent" and "No fault or negligence" and "No significant fault or negligence" the Sole Arbitrator comes to the following conclusion:

While reading those definitions an addressee could conclude in good faith that – as a minor does not have to prove how the prohibited substance entered his system at the stage of "No fault or negligence"/"No significant fault or negligence" – a minor should also not be mandatorily obliged to establish how the prohibited substance entered his system when proving that the ADRV was not committed intentionally. Another reading would be illogical and against the principle of good faith.

Therefore, the existing CAS jurisprudence (cf. *inter alia* CAS 2016/A/4534, CAS 2016/A/4676 and CAS 2016/A/4919) regarding whether adults are mandatorily obliged to prove the source of the prohibited substance in the context of proving absence of intent does not apply for minor athletes. However, the criteria elaborated in CAS 2016/A/4534, CAS 2016/A/4676 and CAS 2016/A/4919 to determine if an athlete acted with or without intent in the absence of proof of source shall – also in the context of minors – be taken into account.

Consequently, if a minor is not able to prove the source of the prohibited substance this should not be held against him or her. Rather, in such a case, one has to evaluate - based on the overall circumstances of the specific case - if the respective athlete acted with or without intent. Thereby, various criteria may be taken into account. For example an athlete's credible testimony or evidence *e.g.* by an athlete's staff that he had no intent to use a prohibited substance (cf. amongst others MANNINEN M., Proof Of Source – A Prerequisite For An Unintentional Anti-Doping Rule Violation?, Finnish book Sports and Law 2017, p. 186 -188, where the criteria elaborated in CAS 2016/A/4534, CAS 2016/A/4676 and CAS 2016/A/4919 are analyzed).

This result of interpretation is in line with the (sparsely) scientific literature existing in this regard. According to some scholars the "minor-exception" *de facto* results in the creation of a special status for minors in general (RIGOZZI/VIRET/WISNOSKY, Does the World Anti-Doping Code Revision Live up to its Promises?, in: Jusletter 11 novembre 2013, Rz. 136 ff.).

Again, CAS jurisprudence interpreting the cited regulations of the RDCTCA or a similar national regulation (also aligned with the wording of the WADC) in cases of minors does not seem to exist yet.

95. In the case under review it is not established how the prohibited substance entered the Athlete's system; whether via a nutritional supplement or by other means. Further, as demonstrated, the Sole Arbitrator is of the opinion that the Athlete did not know that he was ingesting Ostarine. Nor was he aware that a specific food supplement taken by him would inherit a high risk of contamination with Ostarine or any other prohibited substance.

96. Rather, the Athlete – in a childlike and naive manner – handed over all his control about the choice of nutritional supplements to his father and his coach, fully and absolutely trusting both of them to act with all the diligence required. Whether such behavior is to be considered as diligent will be discussed when examining the level of fault and negligence of the Athlete. However, evaluating whether the Athlete acted with intent or not, the Sole Arbitrator concludes that the Athlete – besides the knowledge about the general risk that products and food supplements could be contaminated with prohibited substances – was not aware that a specific conduct by himself, his father or his coach could constitute an Anti-Doping rule violation. Nor that a specific conduct of the same could inherit a significant and considerable risk resulting in an Anti-Doping rule violation and that the Athlete manifestly disregarded that risk.

97. The First Respondent argues that the consumption of nutritional supplements *per se* shall be considered as intentional behavior by the Athlete. This, as the Athlete, when consuming food supplements, actively accepted the risk that the respective supplements could contain prohibited substances. In the opinion of the Sole Arbitrator such argument has to be rejected. WADA's athlete reference guide, on p. 7, does not prohibit the ingestion of food supplements in itself. Rather, it advises athletes not to use any dietary supplements if they are unsure about the ingredients of that product. The pure fact that the Athlete consumed dietary supplements is hence not a reproachable act.

98. Consequently, having considered the overall circumstances of the case, the Sole Arbitrator concludes that the Appellant has established, by a balance of probability that he did not act with intent. The applicable sanction therefore lies in the spectrum of 0 to 24 months. In the subsequent considerations the Sole Arbitrator will examine the degree of negligence or fault of the Appellant in order to determine the concrete sanction to be applied in the present case.

2. No fault or negligence/No significant fault or negligence

99. In order for the Athlete to benefit from the provisions of Article 73 para. 1 or Article 73 para. 2 RDCTCA and to have the period of ineligibility be reduced or even completely eliminated, it has to be evaluated whether, on a balance of probability, the Athlete bears "No fault or negligence" or "No significant fault or negligence" for the presence of Ostarine in his system. According to the RDCTCA's definition of the terms "No fault or negligence" and "No significant fault or negligence", if a minor is not able to prove how the prohibited substance entered his or her system this shall not be held against him or her. The wording of the RDCTCA originates from the wording of the WADC that is identical in this regard.

100. Presently, as seen above, the Athlete could not establish how the prohibited substance entered his system. However, this shall, based on the explicit wording of the RDCTCA, not be held against him. Rather, the period of ineligibility shall be determined within the ban-frame of "No

fault or negligence" or "No significant fault or negligence", hence between zero and 24 months.

101. If a minor is hence not able to prove how the prohibited substance entered its system, in order to determine whether "No fault or negligence" or "no significant fault or negligence" applies, CAS panels have to evaluate the surrounding circumstances of a doping violation (cf. amongst others RIGOZZI/HAAS/VIRET/WISNOSKY, Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code, in: Int Sports Law J (2015) 15:3–48, p. 12-13).

102. Therefore, in the present case, the Sole Arbitrator has to take into account all surrounding circumstances of the doping violation in order to evaluate to what degree the Appellant complied with his diligence. Concretely, the specific actions of the Appellant trying to comply with his diligence and his efforts to avoid the ingestion of any prohibited substances have to be considered.

103. According to CAS jurisprudence as well as legal experts in the field of Anti-Doping the following principles and factors shall be taken into account to evaluate the level of fault (cf. amongst others CAS 2013/A/3327, CAS 2013/A/3335, award of 11 April 2014, cipher 74 *et seq.*; Still need proof sugar is bad for you? Cilic, glucose, "light" fault, and four months out, VIRET/WISNOSKY, WADC Commentary, 23 October 2014):

- As to the objective elements of the level of fault :
  - At the outset, it is important to recognise that, in theory, almost all Anti-Doping rule violations relating to the taking of a product containing a prohibited substance could be prevented.
  - The athlete could always
    (i) read the label of the product used (or otherwise ascertain the ingredients),
    (ii) cross-check all the ingredients on the label with the list of prohibited substances
    (iii) make an internet search of the product,
    (iv) ensure the product is reliably sourced and
    (v) consult appropriate experts in these matters and instruct them diligently before consuming the product. »
  - For substances that are prohibited at all times an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.

- As to the subjective elements of the level of fault :
  - Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also DE LA ROCHEFOUCAULD E., CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 *et seq.*):

a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 *et seq.*; CAS 2010/A/2107, para. 9.35 *et seq.*).

b. Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para. 62).

c. The extent of Anti-Doping education received by the athlete (or the extent of Anti-Doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).

d. Any other "personal impairments" such as those suffered by:

i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para. 73).

ii. an athlete who has previously checked the product's ingredients. iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 *et seq.*). iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).

104. Subsequently, the Sole Arbitrator has to evaluate to which degree the Appellant complied with the above mentioned criteria.

105. In order to evaluate the level of objective fault the following behaviour of the Appellant can be qualified as positive:

- He and his auxiliary persons did diligently check all dietary supplements purchased by comparing the list of ingredients of the supplements with the prohibited list, the internet and with a specialist nutrition catalogue. This was established by means of the credible testimonies during the hearing of the Appellant, his father and his coach. Such testimonies – similar as in the case CAS 2013/A/3327, CAS 2013/A/3335 – serve as fully adequate proof for the evaluation of such diligence.

106. In contrast, the following aspects have to be appraised as negative in the light of the level of objective fault of the Appellant:

- The Athlete, together with his father and coach, when changing the nutritional supplement provider to a cheaper one during the period of unemployment of his father - should have exercised a more active role and should have evaluated several alternative scenarios for the purchasing process of new and cheaper nutritional supplements instead of blindly trusting his father. In particular, the Athlete should have sought external expert advice and reference about safe supplement alternatives.

- Additionally, the Appellant should have sought qualified advice of a sports-medical or an internationally established institution for controlling and evaluating his purchase process of dietary supplements.

107. As regards the level of subjective fault the Sole Arbitrator concludes the following:

- As correctly noted by well-known scholars the age of the minor athlete at the moment of doping control as well as his or her maturity in the concrete type of sport (in some sports athletes at the age of 15 or 16 are already on the peak of their career while in others they are still juniors) shall also be taken into account while evaluating the reproachable degree of missing diligence (cf. amongst others RIGOZZI/HAAS/VIRET/WISNOSKY, Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code, in: Int Sports Law J (2015) 15:3–48, p. 12-13).

- The fact that the athlete was of minor age at the moment of the doping control and did blindly and naively trust his father and coach was already considered while evaluating the lack of intent of the Appellant. The fact of minority can therefore not be taken into account a second time while evaluating the reproachable degree of missing diligence.

- Rather, as the Athlete was seventeen years old at the moment of the doping control he had almost reached the threshold of being an adult. In the eyes of the Sole Arbitrator, he should therefore have exercised a more active control in the selection and purchasing process of the nutritional supplements than he did in the present case.

108. Consequently and in consideration of the overall circumstances, the Sole Arbitrator concludes that the Appellant did comply to some degree with the diligence that may reasonably be expected by him, without meeting fully the required duty that a meticulous sportsman at his age and level of competition should have put in place. Therefore, the Sole Arbitrator is of the opinion that the Athlete's reproachable fault has to be qualified in the upper scale of the 24 months.

3. Determination of the applicable Sanction

109. Considering the above elaborated criteria of the specific case and in reference to the cases CAS 2013/A/3327, CAS 2013/A/3335 the Sole Arbitrator comes to the conclusion to grant some reduction on the maximum possible sanction of 24 month. This, as in the cases CAS 2013/A/3327, CAS 2013/A/3335, para. 85, the following, similar behaviour was qualified as diligent and accredited to the athlete:

> *"The Panel notes that the Athlete did take some precautions (even though they were not enough to prevent the antidoping rule violation): a. The Athlete asked his mother to purchase the product from a safe environment, namely a pharmacy. b. The Athlete's mother did try to ascertain from the pharmacist whether or not the Coramine Glucose would be safe for the Athlete as a competitive tennis player. c. The Athlete looked at and read the label on the product.*

110. Unlike in the present case, in the above cited case the athlete was not a minor but an experienced athlete that delegated the purchase process to an auxiliary respectively a very close family member. A family member that checked the respective product in a comparable manner as the coach and the father of the Appellant did check the supplementary supplements taken by the

Appellant.

111. However, in contrast to the cases CAS 2013/A/3327, CAS 2013/A/3335, in the present case, a substance prohibited at all times was found in the organism of the Appellant. Therefore, a higher degree of diligence and thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.

112 Consequently, in reference to the cases CAS 2013/A/3327, CAS 2013/A/3335 and with regard to the specific case at hand, the Sole Arbitrator qualifies a reduction of 3 months on the maximum sanction of 24 months as reasonable. The appropriate sanction for the Athlete is hence determined at 21 months.

113. In order to avoid any misunderstandings, the period of ineligibility shall start on 15 June 2017, the date of commencement of the provisional suspension, and not on the date of the award of the BSF as foreseen in Article 80 para. 1 RDCTCA. Such method is applied for practical reasons by constant CAS jurisprudence (cf. amongst others CAS 2017/O/5039, para. 121 or CAS 2016/A/4676, para. 91).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 21 February 2018 by Mr. Blagovest Krasimirov Bozhinovski against the decision of the Bulgarian Sports Arbitration at the Bulgarian Olympic Committee of 19 January 2018 is partially upheld.

2. The decision of the Bulgarian Sports Arbitration at the Bulgarian Olympic Committee of 19 January 2018 is amended as follows:

   Mr. Blagovest Krasimirov Bozhinovski is suspended from participation in any swimming-related activity for a period of twenty-one (21) months, commencing on 15 June 2017.

(…)

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