

**UCI Anti-Doping Tribunal**

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**Judgment**

**case ADT 03.2023**

**UCI v. Mr. Joao Ricardo Cardoso Benta**

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**Single Judge:**

**Ms. Helle Qvortrup Bachmann (Denmark)**

**Aigle, 20 July 2023**

## **I. INTRODUCTION**

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (hereinafter referred to as “the Tribunal”) in application of the UCI Anti-Doping Tribunal Procedural Rules (hereinafter referred to as “the UCI ADT Rules”) in order to decide whether Mr. Joao Ricardo Cardoso Benta (hereinafter referred to as “the Rider”) has violated the UCI Anti-Doping Rules (hereinafter referred to as “the UCI ADR”) as alleged by the Union Cycliste Internationale (hereinafter referred to as “the UCI” and, together with the Rider, collectively referred to as “the Parties”).

## **II. FACTUAL BACKGROUND**

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

### **A. The Parties**

#### **1. The UCI**

3. The UCI is the association of national cycling federations and is a non-governmental international association with a non-profit-making purpose of international interest, having legal personality pursuant to Articles 60 ff. of the Swiss Civil Code according to Articles 1.1 and 1.2 of the UCI Constitution.

#### **2. The Rider**

4. At the time of the asserted Anti-Doping Rule violation, i.e. between 2017 and 2021, the Rider was a professional road cyclist affiliated to the Portuguese Cycling Federation (FPC) and a License Holder within the meaning of the UCI ADR. The Rider started his cycling career in 2009 when he joined the UCI Continental Team Madeinox-Boavista.
5. On 4 January 2011, the Autoridade Antidopagem de Portugal (ADOP) sanctioned the Rider with a period of ineligibility of three (3) years as a result of an ADRV for presence of Darbepoetin Alpha (a non-Specified Substance under class S2 of the World Anti-Doping Agency (WADA)’s Prohibited List) in a sample collected from him out-of-competition on 20 July 2010.
6. After his period of ineligibility, the Rider resumed competition in 2015 with the UCI CTM Louletano – Ray Just Energy before joining the UCI CTM Louletano – Hospital de Loulé in 2016.
7. The Rider was then contracted to the UCI CTM Radio Popular Boavista from 1 January 2017 to 31 December 2021.
8. Following this, the Rider rode for the UCI CTM Efel Cycling in 2022.
9. The Rider retired from cycling on 16 February 2023.

### **B. The ABP**

10. The Rider was part of the UCI’s Athlete Biological Passport Programme (hereinafter the “ABP”). The APB is based on longitudinal monitoring of the athlete and is designed to be an “indirect” method of doping detection. It focuses on the effect of prohibited substances and methods on

the athlete's haematological values rather than the identification of a specific substance or method in the athlete's specimen.

11. The Adaptive Model is a statistic tool which was developed to identify atypical values or profiles that warrant further investigation. It predicts - for the individual athlete - an expected range within which the athlete's biological markers will fall assuming a normal physiological condition.
12. The Adaptive Model flags haematological data as atypical if 1) a haemoglobin (HGB) and/or OFF-score (OFFS) marker value falls outside the expected intra-individual ranges, with outliers corresponding to values out of the 99%-range (0,5 – 99,5 percentiles) (1:100 chance or less that this result is due to normal physiological variation), or 2) when sequence deviations (a longitudinal profile of marker values) are present at specificity of 99,9% (1:1000 chance or less that this is due to normal physiological variation).
13. The OFF-score value is a haematological marker which is a combination of HGB and the percentage of reticulocytes (RET%).

### **C. The alleged anti-doping rule violation**

14. The UCI alleges that the Rider committed a violation of Article 2.2 UCI ADR based on abnormalities detected in the haematological values contained in the Rider's ABP.
15. In the present case, the Rider's biological passport was flagged with abnormalities at 99,0% specificity for HGB and OFF-score as well as reticulocyte percentage (RET%).
16. In particular, the following samples of the Rider's biological passport were flagged:
  - i. Sample 8 was flagged for lower limit RET%;
  - ii. Sample 11 was flagged for lower limit OFF-score and upper limit RET%;
  - iii. Sample 15 was flagged with upper limit OFF-score and lower limit RET%;
  - iv. Sample 16 was flagged with upper limit HGB and upper limit OFF-score;
  - v. Sample 20 was flagged with lower limit HGB, lower limit OFF-score and upper limit RET%;
  - vi. Sample 21 was flagged with lower limit HGB, lower limit OFF-score and upper limit RET%;
  - vii. Sample 25 was flagged for upper limit RET%; and
  - viii. Sample 26 was flagged for upper limit RET%.
17. The following table summarizes the key parameters reported in the Rider's ABP:

#	Sample code	Collection date	HGB	RET%	OFF-score	HCT	RET#	IRF	
1	107565	28.07.2015	15	1.22	83.73	43.3	0.0558	1.4	
2	144529	26.07.2016	Invalid						
3	144313	02.08.2016	Invalid						
4	160957	01.03.2017	Invalid						
5	238002	07.05.2017	Invalid						
6	237947	12.07.2017	14.7	0.84	92.01	45.8	0.0394	3.6	
7	238070	13.08.2017	Invalid						
8	238031	16.08.2017	14.7	0.45	106.75	43.8	0.0202	4.4	
9	363280	28.02.2018	14.5	1.18	79.82	43.3	0.055	8.9	
10	350197	15.03.2018	15.2	1.15	87.7	43.6	0.0551	5.9	
11	362346	26.03.2018	14.1	1.72	62.3	42.5	0.0783	11.9	
12	362199	30.07.2018	14.9	1.67	71.46	43.9	0.0773	3.2	
13	239286	04.08.2018	15.5	0.74	103.4	45.1	0.035	1.1	
14	260151	05.08.2018	Invalid						
15	239477	11.08.2018	15.5	0.51	112.2	45.5	0.0242	0.8	
16	399360	20.08.2018	16.3	0.62	115.8	47	0.0312	5.2	
17	260312	14.04.2019	15.3	0.99	93.3	44.8	0.0485	5.5	
18	260031	07.08.2019	15	1.16	85.4	46.5	0.0542	6.2	
19	663956	10.09.2019	16	1.52	86	46.7	0.0775	11.4	
20	664388	11.11.2019	13	2.84	28.9	40.1	0.1196	13.4	
21	664401	25.11.2019	13.2	2.36	39.83	40.7	0.0984	13.2	
22	664505	18.12.2019	Invalid						
23	684681	19.02.2020	15.9	1.17	94.1	49.3	0.0626	4.8	
24	685157	20.02.2020	15.2	1.08	89.6	46.1	0.0546	4	
25	456235	01.10.2020	15.1	2.06	64.88	44.9	0.0948	8.4	
26	496899	03.08.2021	15.9	2.34	67.2	47.3	0.1133	8.9	
27	746218	12.10.2021	15	2.03	64.5	43.3	0.0942	10.1	
28	932934	10.11.2021	Invalid						
29	932586	27.12.2021	14.3	1.81	62.28	43	0.0827	9.9	
30	1024483	16.02.2022	15.4	1.40	83.00	44.5	0.0682	10.2	

18. Following the initial expert review, the Athlete's Passport Management Unit submitted the Rider's ABP to an expert panel composed of Giuseppe d'Onofrio, Laura Lewis and Yorck Olaf Schumacher; hereinafter: the Expert Panel for independent evaluation.
19. The Expert Panel conducted a review of the Rider's ABP regarding 30 samples obtained in the period between July 2015 and February 2022, the Rider's competition schedule for the same period and the Rider's altitude profile from 2018 to 2022. In a joint expert opinion dated 2 November 2022 (Initial Expert Opinion) the Expert Panel set forth their unanimous opinion on the Rider's haematological profile.
20. The Expert Panel scrutinised each sample of the ABP to exclude that analytical or pre-analytical issues could explain the abnormalities or influence the results in a way that would disadvantage the Rider. As part of this assessment, the Expert Panel decided to invalidate samples 2, 3, 4, 5, 7, 14, 22 and 28 due to: (i) abnormal blood stability scores (BSS) (samples 2, 4, 5 and 14), (ii) sample degradation (samples 3 and 7), or (iii) abnormal collection to analysis time (CAT) (samples 22 and 28). For the sake of clarity and as noted by the Expert Panel, these samples were not taken into account by the Expert Panel when reaching its conclusions on the Rider's profile.
21. The Expert Panel confirmed that the Rider's profile contained several abnormal features in the samples collected around the 2017, 2018, 2020 and 2021 editions of the Volta a Portugal and in the off-season 2019. The Expert Panel particularly noted that:

*“[...] In our view, the data of the athlete bears several features compatible with blood manipulation, with a suppression pattern in 2017 and a stimulation/suppression pattern in 2018, both coinciding with the Tour of Portugal of the respective years and clear pattern of blood loss during the off season in Nov 2019.*

*Specifically, sample 6, 7 (invalid) and 8 were collected around the 2017 Tour of Portugal. with reticulocyte suppression evident in sample 8 at the end of the tour, resulting in an increasing off score. Samples 12-15 were collected around the same race in 2018. Sample 12 was collected 2 days prior to the start, with samples 13 and 15 collected on the 4th and 11th days respectively. Hb remains stable, despite expected hemodilution. Progressive reticulocyte suppression is evident during this period with the off score also increasing. Sample 16 was collected 8 days after the conclusion of the tour and 2 days after another competition. Hb and OFF score are the highest of the entire profile.*

*A high OFF score is typically observed when the red cell mass of the organism has been supraphysiologically increased (high hemoglobin) and the body’s own red cell production was reduced (low reticulocytes) as a consequence to downregulate the excess in red blood cells. This constellation is pathognomonic for the use and recent discontinuation of an erythropoiesis stimulating agent (ESA) or the application of a blood transfusion (2,3).*

*A clear withdrawal pattern is evident in samples 20 and 21 during the off season in 2019 (4, 5), with no blood loss declared. The athlete declares sleeping in an altitude tent at the same time period, however the large retic response contrasts the altitude dose and previous uses.*

*Finally, samples 25 and 26, collected in competition during the 2020 Vuelta and before the Tour of Portugal in 2021, respectively, have elevated reticulocytes that are not consistent with the time course of declared hypoxic use [...].”*

22. The Expert Panel also clarified that the timeline of the stay at altitude declared by the Rider does not support altitude as a potential cause:

*“The athlete declares the use of a hypoxic tent for sleeping (approx. 9 h per night) on the Doping Control Form of the majority of samples, and hence altitude is considered to be a mild confounding factor. The impact of altitude exposure on markers used in the ABP has been studied extensively (6-8). There is agreement that altitude of sufficient duration and height will cause mild changes in the ABP. A main feature, a mild increase in the OFF score, is visible within 7 to 10 days upon return to sea level. In general, the expected haematological response to sleeping in an altitude tent is the same as sleeping at natural altitude, except that the time course required for erythropoiesis is often longer since the daily hypoxic dose is less. Importantly, the expected reticulocyte suppression upon removal of the stimulus should remain present. However, this well-known phenomenon is not observed in samples Sample 12 obtained 3 days after the last night in the hypoxic tent where the reticulocytes remain stimulated. Similarly sample 25 also has elevated reticulocytes, 7 days after the last exposure, and indicates an exogenous form of erythropoietic stimulation.”*

23. The Expert Panel ultimately concluded that:

*“[...] In summary, the profile bears several features of blood manipulation during the preparation for competition.*

*We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause.”*

24. On 4 November 2022, the Rider was (i) informed of the APF, (ii) provided with the Initial Opinion of the Expert Panel and the relevant documentation, and (iii) requested to provide an explanation for the abnormalities identified in his ABP.

25. More specifically, the documents sent to the Rider included the Documentation Package of Samples 2, 3, 7, 8, 13 to 16, 18, 20, 21, 23, 25, and 26 of his ABP, a Certificate of Analysis for the other valid samples of his ABP, the APMU Documentation Package, the Rider's competition schedule and the APF issued by the APMU.

26. On 9 November 2022, the Rider sent his explanation to the UCI.

In substance, the Rider:

- i. explained having always kept an eye on his ABP profile and having timely raised on ADAMS several inconsistencies between the data he obtained from local independent laboratories and the values recorded on ADAMS regarding Samples 20, 21 and 22;
  - ii. complained about having never received any replies to his comments on the above samples which *"in itself demonstrates the complete lack of rigor in the treatment of this entire process"* and provided screenshots of the relevant comments in Portuguese language;
  - iii. claimed that the inconsistencies between the data he obtained from private laboratories and the data reported on ADAMS may be due to the *"form of transport"* of the relevant samples;
  - iv. complained about the fact that Sample 22 was declared invalid without any justifying reasons and that his own analyses showed similar results;
  - v. argued that the values recorded *"in the winter season - preparation period"* may be related to the *"type of training adopted, starting with the high volume of training, thus leading to a load relief in the spring period and successive ones"*;
  - vi. claimed that the values recorded during the period of use of the hypoxic tent may have been influenced by its improper configuration as a result of his lack of knowledge on its use;
  - vii. provided regular clinical analyses performed from 2017 to 2022 *"demonstrating that [the analyses of] the local laboratories for many years coincided with the records of [WADA-accredited laboratories] – so the disparity in these records is strange (...)"*;
  - viii. submitted graphical images of what his profile should look like if the values recorded by the local laboratories were displayed for Samples 20 to 22.
27. On 28 November 2022, the UCI asked the Rider to i) submit English translations of his comments in ADAMS regarding Samples 20-22, ii) clarify which samples may have been impacted by the *"form of transport"*, provide evidence in that regard, and explain how this departure could have influenced the Expert Panel's Initial Opinion, iii) submit evidence of the ownership of a hypoxic tent and any evidence and/or statement confirming its use, and iv) provide any training records or witness statement that would corroborate the *"high volume of training"* during the *"winter season – preparation period"*.
28. On 2 December 2022, the Rider provided supplementary explanations and evidence which included:
- i. English translations of his comments submitted into ADAMS;
  - ii. explanations regarding the incorrect *"form of transport"*. The Rider particularly emphasized that his allegations concerned Samples 20 and 21 and are merely a hypothesis since the *"form of transport"* differed from previous sample collections and

from the one related to Sample 22, which he considered to have been wrongfully declared invalid. Furthermore, the Rider submitted that Samples 20 and 21 were “placed in a simple suitcase, which even contained the team’s belongings of analysis (glasses, flasks, …)” while Sample 22 was stored in “a bag suitable for the purpose, duly equipped with a visible thermometer”;

- iii. claims that he acquired a hypoxic tent online from the website [www.highaltitude-training.com](http://www.highaltitude-training.com) between the end of 2015 and the beginning of 2016 and submitted that the data of his profile may be related to a possible malfunction of the hypoxic tent. He also argued having never received any support in the configuration of the hypoxic tent and not possessing any photographs or element proving the use during the relevant periods;
  - iv. two training plans in Portuguese language from December 2018 and March 2020 which were allegedly similar each year. He further stated being unable to recover other data due to the time having passed and indicated not wishing to contact any former team or structure to obtain them in order to avoid any suspicion or leak of information on his case which would have a ruinous effect on his career.
29. On 15 January 2023, after reviewing the Rider’s explanation, the Expert Panel issued a follow up Report (Second Expert Opinion) in which it considered the Rider’s explanations.
30. In its Second Opinion, the Expert Panel further confirmed that the Rider’s arguments do not explain the stimulation/suppression pattern and that the Rider’s values are compatible with an exogenous erythropoietic stimulation:

*“[...] When evaluating the profile and the explanations of the athlete in view of the above, several inconsistencies appear:*

*The first abnormality of the profile highlighted in our joint expert report is the stimulation/suppression pattern in samples 6-8 taken in 2017 prior to the Volta a Portugal. We refer to our report for the physiological details. The athlete does not provide any explanation for this abnormality.*

*The second abnormality, the stimulation/ suppression picture in samples 12-15, again leading into the Volta a Portugal, is also not consistent with the physiological effect of simulated altitude. In general, the expected haematological response to sleeping in an altitude tent is the same as sleeping at natural altitude, except that the time course required for erythropoiesis is often longer since the daily hypoxic dose is less (see above). Importantly, the expected reticulocyte suppression upon removal of the stimulus should remain present.*

*In sample 12, reticulocyte% remain stimulated despite the sample being taken 3 days after the last night in the hypoxic tent. Similarly sample 25 also has elevated reticulocytes, 7 days after the last exposure, and indicates an exogenous form of erythropoietic stimulation. Following the normal physiological altitude regulation timeline explained above, the reticulocyte% at this point (9 days after the last night of hypoxic exposure) should have been low and not high. It is therefore highly likely that the erythropoietic system of the athlete at this stage was still stimulated by other factors than altitude. Further, the athlete provides no explanation as to why Hb remains stable in samples 13 and 15 collected on the 4th and 11th days of racing, respectively, which is in direct contrast to well-known phenomenon of hemodilution that is observed during stage racing (16).*

*Lastly, the results of the private tests do not explain the decrease in HB and large increases in reticulocyte% observed in November 2019.”*

31. The Expert Panel concluded as follows:

*"[...] The athlete does not provide any valid explanations for the abnormalities highlighted in our joint expert opinion.*

*Based on the data available at this stage, we therefore conclude that the arguments provided by the athlete do not explain the abnormalities in his profile. We maintain our previous assessment that the likelihood of the profile considering normal physiological regulation and altitude exposure is low, whereas its likelihood considering the use of a prohibited substance or method, namely an erythropoietic stimulant, is high."*

32. On 6 February 2023, the Rider was informed of the Expert Panel's conclusion and was provided with a copy of the Expert Panels Second Opinion. In the same communication the Rider was notified by the UCI that an anti-doping rule violation of Article 2.2 UCI ADR was asserted against him and that he was therefore provisionally suspended. The Rider was also offered an Acceptance of Consequences pursuant to Article 8.2 UCI ADR 2021 and Article 2 UCI ADT Rules.
33. The Rider was given a deadline until 20 February 2023 to either accept or refuse the Acceptance of Consequences proposed to him.
34. On 16 February 2023, the UCI reminded the set deadline to the Rider to confirm his intention with respect to the UCI's proposal
35. On 16 February 2023, the Rider reiterated his innocence and argued that his explanations were not taken into account. In the same communication, the Rider requested for any future communication to be sent in his language. Finally, the Rider informed the UCI that he had retired from cycling and asked to be removed from any database.
36. On 20 February 2023, the UCI asked the Rider to confirm clearly by the same evening whether he accepted or not the Acceptance of Consequences proposed to him and informed him that, in the absence of any reply, his case would be referred to the Tribunal for consideration and decision. In the same correspondence, the UCI reminded the Rider that the two official languages of the UCI were French and English and that any upcoming exchange would be conducted in one of these languages. Finally, the UCI provided the Rider with a retirement form for completion and informed him of the fact that he remained responsible for any violations committed while holding a license.
37. The Rider did not reply to the UCI's communication from 20 February 2023.
38. In view of the Rider's explanation, the Expert Panel's Second Opinion and noting that no further elements were received by the UCI which could interfere with the assertion of the ADRV at this stage, the UCI referred the Rider's case to the Tribunal to rule on the asserted ADRV and determine the sanction and consequences to be applied to same

### **III. PROCEDURE BEFORE THE TRIBUNAL**

39. In accordance with Article 13.1 UCI ADT Rules, the UCI initiated proceedings before this Tribunal through the filing of a petition to the Secretariat on 27 March 2023.
40. In the UCI Petition the UCI requested the following relief:
- *Declaring that the Rider has committed an Anti-Doping Rule Violation;*
  - *Imposing on the Rider a Period of Ineligibility of (eight) 8 years starting on the date of notification of the Tribunal's decision;*



- *Holding that the period of provisional suspension served by the Rider since 6 February 2023 shall be credited against the period of ineligibility imposed by the Tribunal;*
  - *Disqualifying all the results obtained by the Rider from the date of collection of Sample 6 (i.e. 12 July 2017 until the day he was provisionally suspended (i.e. 6 February 2023));*
  - *Ordering the Rider to pay a fine of [REDACTED]; and*
  - *Ordering the Rider to pay the costs of results management by the UCI (CHF 2'500.-), and the costs incurred for the documentation packages of the blood samples analysed for the Biological Passport (EUR 5'170.-).*
41. On 19 April 2023, the President of the Tribunal appointed Ms. Helle Qvortrup Bachmann to act as Single Judge in the present proceedings in application of Article 14.1 UCI ADT Rules.
42. On 20 April 2023, in application of Article 14.4 UCI ADT Rules, the Tribunal informed the Rider, that disciplinary proceedings had been initiated against him before the Tribunal and that Ms. Helle Qvortrup Bachmann had been appointed as Single Judge of the Tribunal. Furthermore, the Rider was informed that any challenge to the appointment of the Single Judge and any objection to the jurisdiction of the Tribunal should be brought to the Secretariat within 7 days of the receipt of the correspondence, and he was granted a deadline of 4 May 2023 to submit his answer in conformity with Articles 16.1 and 18 of the UCI ADT Rules.
43. The Rider did not submit an Answer to the Petition within the stated deadline, nor respond in any way to the Tribunals communication of 20 April 2023.
44. On 9 May 2023, in light of the Rider's failure to submit an Answer, the Single Judge exceptionally granted the Rider additional time to submit an Answer by setting a new deadline on 22 May 2023 for the Rider to submit his Answer. In the same communication, the Rider was informed that if the Rider should fail to submit his Answer, the Single Judge would render her judgment based on the documents on file.
45. The Rider, again, did not submit an Answer, nor respond to the communication.
46. On 24 May 2023, the Single Judge declared the proceedings closed and confirmed that she would render her judgment based on the documents on file in accordance with Article 16.2 UCI ADT Rules.

#### **IV. JURISDICTION OF THE TRIBUNAL**

47. As per Articles 8.3.1 and 8.3.2 of the UCI ADR 2021, the Tribunal has jurisdiction over all matters in which an ADRV is asserted by the UCI based on a results management or investigation process under Article 7 of the UCI ADR 2021. Such jurisdiction is confirmed in Article 3 of the ADT Rules.
48. The UCI ADR applies, inter alia, to any license-holder of the UCI member federations (Introduction, let. C, of the UCI ADR 2021). Anyone who receives a license is required to respect the UCI Constitution and Regulations and participate in cycling events in a sporting and fair manner.
49. In particular, each license-holder undertakes to submit to doping control tests and accepts the jurisdiction of the Court of Arbitration for Sport (CAS) as the final instance in doping matters (Articles 1.1.001, 1.1.004 and 1.1.023 of the UCI Cycling Regulations).
50. The case at hand concerns an ADRV committed by the Rider between 12 July 2017 (date of collection of sample 6) and 3 August 2021 (date of collection of sample 26) and asserted by the UCI on 6 February 2023 based on a results management process under Article 7 of the UCI ADR 2021.

51. The Rider stated on 16 February 2023 that he retired from cycling. While the Tribunal takes note of such retirement it is highlighted that as a holder of a UCI cycling license at the time of the relevant offence(s) the Rider was bound by the UCI ADR and remains responsible for any violations committed when he was a license-holder.
52. Furthermore, and in accordance with Article 7.6 of the UCI ADR 2021, the UCI retains authority to complete its Results Management process if a rider retires while said process is underway.
53. Consequently, the Rider's retirement is irrelevant for the purpose of the present proceedings and the Tribunal has jurisdiction to rule on the Rider's ADRV.
54. Article 3.2 UCI ADT Rules provides that *"Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction"*.
55. In this case, the UCI asserted the anti-doping rule violation following a results management/investigation process under Article 7 UCI ADR; the Rider was a holder of a UCI cycling license at the time of the relevant alleged offence(s) within the meaning of the UCI ADR and is bound by the UCI ADR; the UCI retains authority to complete its Results Management process if a rider retires while said process is underway; and neither of the Parties raised any objection to the jurisdiction of the Tribunal within said deadline.
56. Therefore it follows that the Tribunal has jurisdiction to decide on this matter.

## **V. APPLICABLE RULES**

57. Article 26 UCI ADT Rules provides that *"the Single Judge shall apply the [UCI] ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law"*.
58. The relevant samples of the Rider's ABP were collected between 2017 and 2021.
59. Article 27 of the UCI ADR 2021 provides for general "transitional provisions" with respect to the application of the respective versions of the UCI ADR. Specifically, Article 27.1 of the UCI ADR 2021 provides that:

*"These Anti-Doping Rules shall apply in full as of 1 January 2021 (the "Effective Date")."*

60. Article 27.2 of the UCI ADR 2021 then goes on to clarify that:

*"Any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive anti-doping rules set out in these Anti-Doping Rules or the Code, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case. For these purposes, the retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.9.4 and the statute of limitations set forth in Article 17 are procedural rules, not substantive rules, and should be applied retroactively along with all of the other procedural rules in these Anti-Doping Rules or the Code (provided, however, that Article 17 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date)."*

61. Article 36 of the ADT Rules in force in 2021 reads as follows:

*“These Rules come into force on 4 February 2021 and apply to all procedures initiated by the Tribunal on or after such date.”*

62. The case at hand concerns an alleged ADRV established on the basis of an ABP with abnormal features detected under two different set of rules, i.e. under the UCI ADR 2015 for the abnormal features identified from 2017 to 2020, and under the UCI ADR 2021 for the abnormal features identified in 2021.

63. The Court of Arbitration for Sports (CAS)’ case law states the following:

*“The Sole Arbitrator notes that the matter concerning rules applicable to ABP cases has been addressed in CAS case law. According to the prevailing doctrine, the rules in force at the time of the first sample taken shall be applied (see e.g. TAS 2010/A/2178 and, in particular, CAS 2016/O/4464, in which the relevant facts were similar to those of the matter at hand).*

*The applicability of the rules in force at the time of the first relevant sample taken has also been confirmed in legal literature in the following manner: “[i]n general, the legal principle of tempus regit actum applies, i.e. the Panel shall apply the regulations in force at the moment that the violation occurred. In a case related to the ABP (since the ABP is based on the longitudinal profiling of the athlete’s sample) [sic] should coincide with the first sample taken” (MAVROMATI D., The Athlete’s Biological Passport (ABP) Program, Bulletin TAS – CAS Bulletin, 2/2011 p. 39.)”<sup>1</sup>*

64. With the above in mind and taking into account the Second Expert Opinion according to which *“the first abnormality of the profile highlighted (...) is the stimulation/suppression pattern in samples 6/8 taken in 2017”*, the Single Judge finds that since samples 6 and 8 were taken in 2017, then the substantive rules applicable at that time, i.e. the UCI ADR 2015, are applicable to the matter at hand, subject to the possible application of the principle of *lex mitior*.

### **A. Anti-doping rule violation**

65. Article 2.2 of the UCI ADR 2015 defines the relevant anti-doping rule violation as follows:

#### ***“2.2 Use or Attempted Use by a Rider of a Prohibited Substance or Prohibited Method***

*2.2.1 It is each Rider’s personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider’s part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

*2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.*

*[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part*

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<sup>1</sup> CAS 2017/O/4980 IAAF v. RUSAF & Svetlana Vasilyeva, para. 50 and 51; also CAS 2016/O/4464 IAAF v. ARAF & Ekaterina Sharmina.

*of the Rider Biological Passport, or other analytical which does not otherwise satisfy all the requirements to establish 'Presence' of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.] [...]"*

## **B. Burdens and Standards of proof**

66. As to the burden and standard of proof, Article 3.1 of the UCI ADR 2015 reads as follows:

*"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.[...]"*

67. As to the methods of establishing facts and presumptions, Article 3.2 of the UCI ADR 2015 provides:

*"Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

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

*[...]*

3.2.2 *WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*

*If the Rider or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

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

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

*violation, then the UCI shall have the burden to establish that such departure did not cause 11 the Adverse Analytical Finding or the factual basis for the anti-doping rule violation. [...]”*

68. For the purposes of these proceedings, it is relevant to note that this provision reads as follows under de UCI ADR 2021:

*3.2.4 Departures from any other rules set forth in these Anti-Doping Rules, UCI Regulations, any International Standard or other anti-doping rule or policy set forth in the Code shall not invalidate analytical results or other evidence of an anti-doping rule violation, and shall not constitute a defense to an anti-doping rule violation; provided, however, if the Rider or other Person establishes that a departure from one of the specific UCI Regulations or International Standard provisions listed below could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding, an Adverse Passport Finding or whereabouts failure, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the whereabouts failure:*

*(i) a departure from the UCI Testing & Investigation Regulations or International Standard for Testing and Investigations related to Sample collection or Sample handling which could reasonably have caused an antidoping rule violation based on an Adverse Analytical Finding or an Adverse Passport Finding, in which case the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding;*

*(ii) a departure from the UCI Results Management Regulations, UCI Testing & Investigations Regulations, International Standard for Results Management or International Standard for Testing and Investigations related to an Adverse Passport Finding which could reasonably have caused an anti-doping rule violation, in which case the UCI shall have the burden to establish that such departure did not cause the anti-doping rule violation;*

*(iii) a departure from the UCI Results Management Regulations or International Standard for Results Management related to the requirement to provide notice to the Rider of the B Sample opening which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding, in which case the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding;*

*[Comment to Article 3.2.4 (iii): The UCI would meet its burden to establish that such departure did not cause the Adverse Analytical Finding by showing that, for example, the B Sample opening and analysis were observed by an independent witness and no irregularities were observed.]*

*(iv) a departure from the UCI Results Management Regulations or International Standard for Results Management related to Rider notification which could reasonably have caused an anti-doping rule violation based on a whereabouts failure, in which case the UCI shall have the burden to establish that such departure did not cause the whereabouts failure.*

*[Comment to Article 3.2.4: Departures from an International Standard or other rule unrelated to Sample collection or handling, Adverse Passport Finding, or Rider notification relating to whereabouts failure or B Sample opening – e.g., the International Standards for Education, Data Privacy or TUEs – may result in compliance proceedings by WADA but are not a defense in an anti-doping rule violation proceeding and are not relevant on the issue of whether the Rider committed an anti-doping rule violation. Similarly, the UCI’s violation of the document referenced in Article 20.7.7 of the Code shall not constitute a defense to an antidoping rule violation.]*

## C. Sanctions and Consequences

### 1. Period of Ineligibility

69. As for the standard period of Ineligibility Article 10.2 of the UCI ADR 2015 provides as follows:

**“10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

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

10.2.1 *The period of Ineligibility shall be four years where:*

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

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

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

10.2.3 *As used in Articles 10.2 and 10.3, the term ‘intentional’ is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or 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 only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”*

70. As for the possibilities to reduce the aforementioned periods of Ineligibility based on fault, Articles 10.4 and 10.5 of the UCI ADR 2015 state as follows:

**“10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence**

*If a Rider or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.  
[...]*

**10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence  
[...]**

10.5.2 *Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1*

*If a Rider or other Person establishes in an individual case where Article 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Rider or other Person’s degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years. [...]*”

71. Article 10.7.1 of the UCI ADR 2015 deals with the situation where a rider faces a second ADRV and provides as follows:

*“10.7.1 For a Rider or other Person’s second anti-doping rule violation, the period of Ineligibility shall be the greater of:*

*a) six months;*

*b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or*

*c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6.*

*The period of Ineligibility established above may then be further reduced by the application of Article 10.6. [...]”*

72. Article 10.7.4 of the UCI ADR 2015 provides further information on when an ADRV is considered as a second violation. It reads as follows:

***“10.7.4 Additional Rules for Certain Potential Multiple Violations***

*10.7.4.1 For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the UCI can establish that the Rider or other Person committed the second antidoping rule violation after the Rider or other Person received notice pursuant to Article 7, or after the UCI made reasonable efforts to give notice of the first anti-doping rule violation. If the UCI cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction. [...]*

73. Article 10.7.5 of the UCI ADR 2015 provides for a statute of limitations to declare a second ADRV. It reads as follows:

***“10.7.5 Multiple Anti-Doping Rule Violations during Ten-Year Period***

*For purposes of Article 10.7, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations.”*

74. In relation to the Disqualification of results in competitions subsequent to sample collection or commission of an anti-doping rule violation Article 10.8 of the UCI ADR 2015 provides as follows:

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

75. In relation to the commencement of the period of Ineligibility Article 10.11 of the UCI ADR 2015 provides as follows:

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

*10.11.3.1 If a Provisional Suspension is imposed and respected by the Rider or other Person, then the Rider or other Person shall receive a credit for such period of*

*Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Rider or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal. [...]"*

76. In relation to credit for provisional suspension Articles 10.11.3.1 to 10.11.3.3 of the UCI ADR 2015 provide for credit for provisional suspensions (whether imposed or voluntary).

## **2. Mandatory fine and costs**

77. In relation to the Financial Consequences, Article 10.10.1 of the UCI ADR 2015 provides as follows:

*"In addition to the Consequences provided for in Article 10.1-10.9, violation under these Anti-Doping Rules shall be sanctioned with a fine as follows.*

*10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3.*

*[Comments: 1. A member of a Team registered with the UCI shall be considered as exercising a professional activity in cycling. 2: Suspension of part of a period of Ineligibility has no influence on the application of this Article].*

*The amount of the fine shall be equal to the net annual income from cycling that the Rider or other Person was entitled to for the whole year in which the anti-doping violation occurred. In the Event that the anti-doping violation relates to more than one year, the amount of the fine shall be equal to the average of the net annual income from cycling that the Rider or other Person was entitled to during each year covered by the anti-doping rule violation.*

*[Comment: Income from cycling includes the earnings from all the contracts with the Team and the income from image rights, amongst others.]*

*The net income shall be deemed to be 70 (seventy) % of the corresponding gross income. The Rider or other Person shall have the burden of proof to establish that the applicable national income tax legislation provides otherwise. Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:*

- 1. Nature of anti-doping rule violation and circumstances giving rise to it;*
- 2. Timing of the commission of the anti-doping rule violation;*
- 3. Rider or other Person's financial situation;*
- 4. Cost of living in the Rider or other Person's place of residence;*
- 5. Rider or other Person's Cooperation during the proceedings and/or Substantial Assistance as per article 10.6.1.*

*In all cases, no fine may exceed CHF 1,500,000.*

*For the purpose of this article, the UCI shall have the right to receive a copy of the full contracts and other related documents from the Rider or other Person, the auditor or relevant National Federation.*

*[Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules]."*



78. As for the liability for costs of the procedures, Article 10.10.2 of the UCI ADR 2015 provides as follows:

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

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

79. On the same topic, Article 29 UCI ADT Rules provides as follows:

- “1. The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2 para. 1 UCI ADR.*
- 2. As a matter of principle the Judgment is rendered without costs.*
- 3. Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution toward the costs of the Tribunal. Whenever the hearing is held by videoconference, the maximum participation is CHF 7’500.*
- 4. The Tribunal may also order the unsuccessful Party to pay a contribution toward the prevailing Party’s costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.”*

## **VI. THE FINDINGS OF THE TRIBUNAL**

80. The case at hand presents the following main issues:

- A. Does the Rider’s non-participation in those proceedings pose a problem?
- B. Has the UCI successfully established that the Rider committed an anti-doping rule violation?
- C. If so, what are the consequences of such anti-doping rule violation?

### **A. Does the Rider’s non-participation in these proceedings pose a problem?**

81. The Rider did not respond, communicate directly, nor make any submissions to the Tribunal during the current proceeding. The UCI submitted that the Rider had stopped any communication regarding this case after 16 February 2023 where the Rider informed the UCI that he had retired from cycling and asked to be removed from any database.

82. The UCI ADT Rules do not require a response from a Rider in order to issue a decision. According to Article 16.2 UCI ADT Rules, the Tribunal may proceed with the case and render a Judgment if a Defendant fails to submit an Answer. Thus, the Rider’s failure to participate in the proceedings before the Tribunal does not prevent the Single Judge from resolving this case, so long as the proceedings were conducted in a way which ensures due process, and in particular the Rider’s right to be heard (Article 10.1 UCI ADT Rules).

83. The UCI ADR also do not require a response from the Rider in order to pursue an anti-doping rule violation. Instead, it provides specific rules to ensure proper notification. According to Article 14.1.1 UCI ADR, the UCI may provide notice inter alia to the Rider by “*registered or ordinary mail by post*” or by “*electronic mail*”. In addition, Article 6.3 UCI ADT Rules provides that “*notifications and communications shall be sent to the email address indicated by the Parties*” and Article 9.4 UCI ADT Rules further provides that “*Notice shall be deemed to have occurred when sent by email to the addressee. The burden of proof that the addressee was, without his fault, not in a position to have knowledge of such notice shall be on the addressee.*” The Tribunal respected these specific rules throughout the course of the proceedings by sending the communication to the Rider by electronic mail.
84. While proper notification need not necessarily comprise actual knowledge<sup>2</sup> the Rider did have actual knowledge of the proceedings during the UCI’s results management process. Indeed, the Rider corresponded to the UCI via e-mail in the period between 9 November 2022 to 16 February 2023.
85. After 16 February 2023 the Rider however ceased all communication with the UCI and the Rider did not make any submissions to the Tribunal.
86. The UCI and the Tribunal also gave the Rider ample opportunity to respond. The UCI also allowed the Rider to submit his explanations following each of the Expert Panel’s reports.
87. During the hearing phase, the Tribunal also granted the Rider additional time to submit his Answer.
88. Thus, in view of the above and the evidence before her, the Single Judge concludes that the Rider’s procedural rights were not breached, including the right to be heard. The Rider had knowledge of the proceedings before the Tribunal, and the Rider corresponded with the UCI during the UCI’s results management process. Furthermore, the Rider has been enabled by both the UCI and the Tribunal to defend himself and his legal interests, including the chance to express his views on all relevant facts, to submit written explanations to the Tribunal and to present his own evidence. Instead, the Single Judge considers that the Rider voluntarily waived his right to present his position regarding the alleged anti-doping rule violations and its consequences.
89. The Single Judge remains obliged to ensure that the Judgment is both factually and legally well-founded. In doing so, the Single Judge will limit herself to the case file, having in mind that she is not in any case bound by the Parties’ prayers for relief.

## **B. Did the Rider commit an anti-doping rule violation?**

90. The UCI submits that the Rider committed an anti-doping rule violation within the meaning of Article 2.2. UCI ADR, which conclusion the UCI derives from the analytical data in the Rider’s ABP as well as the evaluation of said data by the Expert Panel.
91. During the results management process, the Rider objected to this conclusion and submitted various explanations to explain the abnormalities in his profile (see para 26-28 above).
92. During the hearing procedure before the Tribunal, as stated above, the Rider did not submit any Answer or respond in any way to the UCI’s petition.
93. It follows from Article 3.1 UCI ADR that the UCI bears the burden of proof to establish that the Rider committed a violation of Article 2.2 UCI ADR. The standard of proof is “*comfortable*

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<sup>2</sup> Article 14.1.1 UCI ADR, see also for a confirmation of this a recent CAS award, CAS 2017/A/4996, IAAF v. Guerfi, Award of 20 October 2017, para. 14, which (like the UCI ADR) considered that notification is properly given once it enters the “sphere of control” of the recipient, giving the recipient possibility to become aware of the contents of the notice.

satisfaction, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt”.

### 1. The ABP as reliable evidence

94. The Single Judge finds that the ABP constitutes a reliable means of evidence for the purpose of establishing the use of a prohibited substance or prohibited method within the meaning of Article 2.2 ADR. That the ABP constitutes a reliable means of evidence has been confirmed by numerous CAS decisions<sup>3</sup> and by this Tribunal,<sup>4</sup> and it also follows from the comment to Article 3.2 UCI ADR that *“the UCI may establish an anti-doping rule violation under Article 2.2 based on the conclusions drawn from the profile of a series of the Rider’s blood or urine Samples, such as data from the Athlete Biological Passport”*.
95. The UCI bases its allegation of an anti-doping rule violation pursuant to Article 2.2. UCI ADR based on the abnormalities detected in the Rider’s haematological profile resulting from his ABP and the evaluations and reports from the Expert Panel.
- a) The Rider’s explanation submitted to the UCI
96. On 9 November 2022 the Rider submitted a first explanation regarding the ADRV.
97. In substance, as already mentioned, the Rider:
- i. explained having always kept an eye on his ABP profile and having timely raised on ADAMS several inconsistencies between the data he obtained from local independent laboratories and the values recorded on ADAMS regarding Samples 20, 21 and 22;
  - ii. complained about having never received any replies to his comments on the above samples which *“in itself demonstrates the complete lack of rigor in the treatment of this entire process”* and provided screenshots of the relevant comments in Portuguese language;
  - iii. claimed that the inconsistencies between the data he obtained from private laboratories and the data reported on ADAMS may be due to the *“form of transport”* of the relevant samples;
  - iv. complained about the fact that Sample 22 was declared invalid without any justifying reasons and that his own analyses showed similar results;
  - v. argued that the values recorded *“in the winter season - preparation period”* may be related to the *“type of training adopted, starting with the high volume of training, thus leading to a load relief in the spring period and successive ones”*;
  - vi. claimed that the values recorded during the period of use of the hypoxic tent may have been influenced by its improper configuration as a result of his lack of knowledge on its use;

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<sup>3</sup> See e.g. CAS 2015/A/4006, para. 103; CAS 2016/O/4481, para. 133; CAS 2016/O/4464, para 148; CAS 2010/A/2174, para 9.8; CAS 2010/A/2176; CAS 2010/A/2235.

<sup>4</sup> UCI ADT 03.2017, *UCI v. Isabella Moreira Lacerda*, para 60, UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para 54, UCI ADT 02.2018, *UCI v. Jaime Roson Garcia*, para 55, UCI ADT 03.2018, *UCI v. Juan José Cobo Acebo*, para 78, UCI ADT 04.2019, *UCI v. Roberto Pinheiro*, para 64, UCI ADT 01.2020, *UCI v. Raul Alarcon Garcia*, para 86 and UCI ADT 01.2021, *UCI v. Edgar Miguel Lemos Pinto*, para 66.

- vii. provided regular clinical analyses performed from 2017 to 2022 *“demonstrating that [the analyses of] the local laboratories for many years coincided with the records of [WADA-accredited laboratories] – so the disparity in these records is strange (...)”*;
  - viii. submitted graphical images of what his profile should look like if the values recorded by the local laboratories were displayed for Samples 20 to 22.
98. On 2 December 2022 the Rider submitted supplementary explanations and evidence which included:
- i. English translations of his comments submitted into ADAMS;
  - ii. explanations regarding the incorrect *“form of transport”*. The Rider particularly emphasized that his allegations concerned Samples 20 and 21 and are merely a hypothesis since the *“form of transport”* differed from previous sample collections and from the one related to Sample 22, which he considered to have been wrongfully declared invalid. Furthermore, the Rider submitted that Samples 20 and 21 were *“placed in a simple suitcase, which even contained the team’s belongings of analysis (glasses, flasks, ...)”* while Sample 22 was stored in *“a bag suitable for the purpose, duly equipped with a visible thermometer”*;
  - iii. claims that he acquired a hypoxic tent online from the website [www.highaltitude-training.com](http://www.highaltitude-training.com) between the end of 2015 and the beginning of 2016 and submitted that the data of his profile may be related to a possible malfunction of the hypoxic tent. He also argued having never received any support in the configuration of the hypoxic tent and not possessing any photographs or element proving the use during the relevant periods;
  - iv. two training plans in Portuguese language from December 2018 and March 2020 which were allegedly similar each year. He further stated being unable to recover other data due to the time having passed and indicated not wishing to contact any former team or structure to obtain them in order to avoid any suspicion or leak of information on his case which would have a ruinous effect on his career.
99. The Single Judge understands the Riders submissions also to be a challenge of Article 3.2.2 and/or Article 3.2.3 of the UCI ADR 2015.

b) The position of the UCI

1) *The Rider’s claims regarding “the form of transport”*

100. The UCI claims, that the Rider did not establish a departure from any relevant and applicable rule that could reasonably have caused the abnormalities in the Rider’s ABP.
101. In this case, the Rider merely raised the hypothesis that the abnormalities in Samples 20 and 21 may be due to *“the form of transport”* and, in particular, the fact that they were stored *“in a simple suitcase, which even contained the team’s belongings of analysis (glasses, flasks, ...)”*. The Rider did, however, neither substantiate his allegation nor refer to any Article from the ISL or other relevant regulations, which would support his position. Also, as mentioned by the Expert Panel in their Second Opinion:

*“[...] However, we disagree that the results of blood sample 20 and 21 were affected by suboptimal transportation conditions. Firstly, the temperature monitor logs show optimal transport conditions to the laboratory for analysis. Secondly, a typical sign of suboptimal storage is an elevated mean corpuscular volume (MCV), which will be evident within 24-hours during storage at room temperature (11). The MCV in these samples was perfectly normal and in line with other values from the athlete.”*

102. The UCI refers to the submission from the Rider, where the Rider criticized the invalidation of Sample 22 by the Expert Panel by claiming that the “*form of transport*” of this sample was appropriate as it was stored in “*a bag suitable for the purpose, duly equipped with a visible thermometer*” and that it showed similar results than those obtained privately by the Rider through other laboratories.
103. The UCI refers to the Expert Panel’s First Opinion, where the Expert Panel explained that sample 22 was invalidated based on the fact that it did not meet certain clear requirements from the ABP Guidelines:

*“[...] Sample 22 has a Collection to analysis time (CAT) of 115 h and therefore should be invalidated.”*

104. The UCI refers to the fact that the Expert Panel reconfirmed this in the Second Opinion:

*“[...] in reference to the validity of the samples in question, as stated in our report, Sample 22 has a Collection to analysis time (CAT) of 115 h and therefore cannot be considered valid.”*

## 2) *The alleged ADRV*

105. In general the UCI submits, that the Rider has provided no explanation and produced no reliable evidence which could interfere with the Expert Panel’s conclusion that it is highly likely that the Rider used a Prohibited Substance or Prohibited Method, and that it is unlikely to find the Passport abnormal assuming any other cause.
106. The Expert Panel’s conclusion is supported not only by the quantitative assessment of the Rider’s ABP but also in the context of a qualitative assessment.
107. The Rider submitted that i) the values recorded in the ABP “*in the winter season - preparation period - (...) may only be related to the type of training adopted, starting with the high volume of training, thus leading to a load relief in the spring period and successive ones*”, and that ii) the values recorded during the period of use of the hypoxic tent may be due to its improper configuration as a result of a lack of knowledge on its use or to “*a possible malfunction*”.
108. The UCI argues that the Rider’s claims were not accompanied by any evidence, apart from two training plans in Portuguese language from December 2018 and March 2020, which were allegedly similar each year.
109. The Expert Panel has considered (and dismissed) these explanations from the Rider and has maintained its opinion that the more likely scenario in this case is the use of a Prohibited Substance or Method.
110. Concerning the training load, the Expert Panel noted that the arguments put forward by the Rider do not explain the increased RET% values in the sample collected during the winter period:

*“[...] The athlete offers changes in training load as an explanation for the low values recorded in the winter season. He refers to this period as the preparation period, in which high volumes of training are adopted, leading to a “load relief” in the spring and successive months. Indeed it has been well documented that plasma volume dependent markers in the ABP re affected by environmental temperature changes due to seasonal changes. Usually the Hct and Hb are lower in Summer than Winter due to an increase in plasma volume in the Summer months (12,14). Further, changes an increase in Hb during the off season or periods of detraining (13, 14) has been documented previously. Thus, the athlete is proposing competing stimuli (increased training load due resulting in increased plasma volume vs plasma volume contraction in winter) as an explanation for the decreased values of Hb at*

*the end of 2019. However, such a hypothesis does not explain the increased reticulocyte values in these samples which are typical of a compensatory response to blood withdrawal.”*

111. As to the improper configuration of the hypoxic tent or its malfunction, the Expert Panel highlights that the Rider does not explain how the use of the hypoxic tent may have caused the relevant abnormalities:

*“[...] While outlining his use of artificial hypoxic exposure in 2015 and 2016, the athlete does not provide any explanation on how these interventions might have caused the abnormalities highlighted in our joint expert opinion.”*

112. The UCI submitted that the use of a Prohibited Substance or Method is most certainly a “plausible explanation” for the values in the Rider’s ABP. Indeed, as noted in the Expert Panel’s First Opinion, the Rider’s ABP revealed a number of highly abnormal patterns, in particular in relation to Samples 6-8, 12-16, 20-21 and 25-26 and particularly points out the presence of a high OFF score which is pathognomonic for the use of an erythropoiesis stimulating agent (ESA) or the application of blood transfusion:

*“[...] Specifically, sample 6, 7 (invalid) and 8 were collected around the 2017 Tour of Portugal, with reticulocyte suppression evident in sample 8 at the end of the tour, resulting in an increasing off score. Samples 12-15 were collected around the same race in 2018. Sample 12 was collected 2 days prior to the start, with samples 13 and 15 collected on the 4th and 11th days respectively. Hb remains stable, despite expected hemodilution. Progressive reticulocyte suppression is evident during this period with the off score also increasing. Sample 16 was collected 8 days after the conclusion of the tour and 2 days after another competition. Hb and OFF score are the highest of the entire profile.*

*A high OFF score is typically observed when the red cell mass of the organism has been supraphysiologically increased (high hemoglobin) and the body’s own red cell production was reduced (low reticulocytes) as a consequence to downregulate the excess in red blood cells. This constellation is pathognomonic for the use and recent discontinuation of an erythropoiesis stimulating agent (ESA) or the application of a blood transfusion (2,3).*

*A clear withdrawal pattern is evident in samples 20 and 21 during the off season in 2019 (4, 5), with no blood loss declared. The athlete declares sleeping in an altitude tent at the same time period, however the large retic response contrasts the altitude dose and previous uses. Finally, samples 25 and 26, collected in competition during the 2020 Vuelta and before the Tour of Portugal in 2021, respectively, have elevated reticulocytes that are not consistent with the time course of declared hypoxic use [...].”*

113. In its Second Opinion, the Expert Panel further confirmed that the Rider’s arguments do not explain the stimulation/suppression pattern and that the Rider’s values are compatible with an exogenous erythropoietic stimulation:

*“[...] When evaluating the profile and the explanations of the athlete in view of the above, several inconsistencies appear:*

*The first abnormality of the profile highlighted in our joint expert report is the stimulation/suppression pattern in samples 6-8 taken in 2017 prior to the Volta a Portugal. We refer to our report for the physiological details. The athlete does not provide any explanation for this abnormality.*

*The second abnormality, the stimulation/ suppression picture in samples 12-15, again leading into the Volta a Portugal, is also not consistent with the physiological effect of simulated altitude. In general, the expected haematological response to sleeping in an*

*altitude tent is the same as sleeping at natural altitude, except that the time course required for erythropoiesis is often longer since the daily hypoxic dose is less (see above). Importantly, the expected reticulocyte suppression upon removal of the stimulus should remain present.*

*In sample 12, reticulocyte% remain stimulated despite the sample being taken 3 days after the last night in the hypoxic tent. Similarly sample 25 also has elevated reticulocytes, 7 days after the last exposure, and indicates an exogenous form of erythropoietic stimulation. Following the normal physiological altitude regulation timeline explained above, the reticulocyte% at this point (9 days after the last night of hypoxic exposure) should have been low and not high. It is therefore highly likely that the erythropoietic system of the athlete at this stage was still stimulated by other factors than altitude. Further, the athlete provides no explanation as to why Hb remains stable in samples 13 and 15 collected on the 4th and 11th days of racing, respectively, which is in direct contrast to well-known phenomenon of hemodilution that is observed during stage racing (16).*

*Lastly, the results of the private tests do not explain the decrease in HB and large increases in reticulocyte% observed in November 2019 [...].”*

114. Moreover, the fact that the Rider’s alternative explanations have been considered and ruled out by the Expert Panel adds greater force to the Expert Panel’s conclusion.
115. Also, as noted by the Expert Panel, the timing of the ADRV(s) coincides in particular with the Volta a Portugal in 2017, 2018, 2020 and 2021, where the Rider finished 7th, 6th and 5th, respectively, and which is one of the most important races for his former team (UCI CTM Radio Popular Boavista) as it is based in Portugal:

*“[...] In our view, the data of the athlete bears several features compatible with blood manipulation, with a suppression pattern in 2017 and a stimulation/suppression pattern in 2018, both coinciding with the Tour of Portugal of the respective years and clear pattern of blood loss during the off season in Nov 2019. [...]*

*Finally, samples 25 and 26, collected in competition during the 2020 Vuelta and before the Tour of Portugal in 2021, respectively, have elevated reticulocytes that are not consistent with the time course of declared hypoxic use [...].”*

116. Considering the above, in conjunction with the fact that “[b]lood manipulation is – unfortunately – a frequently encountered phenomenon in endurance sports such as cycling” the UCI submits that doping is a – more than – plausible explanation for the values in the Rider’s ABP.
117. The UCI states that it has been established that the Rider has committed an ADRV pursuant to Article 2.2 of the UCI ADR 2015 and that the Single Judge can be comfortably satisfied that this is the case.

### *3) Period of ineligibility*

118. With respect to the Period of Ineligibility, the UCI argues that an ineligibility period of eight (8) years, which is the standard sanction set out in Article 10.2.1.1 in combination with Article 10.7.1 lit. c) of the UCI ADR 2015, applies to the case at hand.
119. In determining the relevant sanction, the Single Judge must take into account that the Rider has already been found guilty of a first intentional ADRV from 20 July 2010 and that the present case constitutes the Rider’s second ADRV within the same ten-year period of time (in accordance with Articles 10.7.4.1 and 10.7.5 of the UCI ADR 2015). The UCI argues that the Rider’s period of ineligibility shall be determined pursuant to Article 10.7.1 of the UCI ADR 2015.

#### 4) Disqualification

120. The UCI argues that all results obtained by the Rider since the date of collection of Sample 6 (i.e. on 12 July 2017) until the day he was provisionally suspended (i.e. 6 February 2023) shall be disqualified.

#### 5) Mandatory fine and costs

121. The UCI argues that pursuant to Article 10.10.1 of the UCI ADR 2015, a financial sanction shall be imposed on a rider exercising a professional activity in cycling when the rider is found to have committed an intentional ADRV within the meaning of Article 10.2.3 of the UCI ADR 2015.
122. As provided for under Article 10.10.1.1 of the UCI ADR 2015, the fine shall be equal to the net annual income from cycling that the rider was entitled to for the whole year in which the ADRV occurred. The net income is deemed to be 70% of the corresponding gross income. In the event that the ADRV relates to more than one year, the amount of the fine shall be equal to the average of the net annual income from cycling that the rider was entitled to during each year covered by the ADRV.
123. According to the Expert Panel, the ADRV in this case occurred between 12 July 2017 (date of collection of Sample 6) and 3 August 2021 (date of collection of Sample 26). For the purposes of the mandatory fine to be applied, the UCI argues that the ADRV relates to 2017, 2018, 2019, 2020 and 2021, and that the Rider was racing for a team registered with the UCI during these years and, based on his employment contracts, he was entitled to an average annual gross income from cycling of [REDACTED] (i.e. [REDACTED] in 2017/2018; [REDACTED] in 2019; [REDACTED] in 2020 and [REDACTED] in 2021). Therefore, according to the UCI, a mandatory fine of [REDACTED] (i.e. 70% of [REDACTED]) should be imposed.
124. According to Article 10.10.2 of the UCI ADR 2015, the Rider shall bear the following costs in this case:
- (i) the costs of the results management by the UCI (CHF 2'500.-); and
  - (ii) the costs of the documentation packages of the blood samples analysed for the Biological Passport (EUR 5'170.-).
- c) The position of the Single Judge

#### *The Rider's claims regarding "the form of transport"*

125. The starting point of the analysis is Article 3.2.2 of the UCI ADR 2015 According thereto *"WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories."* The Laboratories, which conducted the analysis of the Rider's blood samples are WADA-accredited. Thus, the presumption contained in Article 3.2.2 of the UCI ADR 2015 applies.
126. Article 3.2.2 of the UCI ADR 2015 provides explicit guidance on how a Rider may rebut a presumption of procedural validity and thereby (potentially) invalidate the results of the analysis of a WADA-accredited Laboratory based on a procedural error (or departure) from the International Standard for Laboratories: i) The Rider must establish by a balance of probability *"that a departure from the International Standard for Laboratories occurred, ii) which could reasonably have caused the Adverse Analytical Finding"*. If the Rider establishes this, the burden shifts to the UCI to prove that the departure did not cause the Adverse Analytical Finding.



127. As regards paragraph 2 of Article 3.2.3 of the UCI ADR 2015 it follows that i) if the Rider establishes a departure from any other rule set forth in the Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in the Anti-Doping Rules ii) which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.
128. As previously set forth by this Tribunal, CAS case law has further clarified the above prerequisites as follows:<sup>5</sup>

*“Therefore, the Panel deems a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis. Further, the Panel remarks that such athlete’s rebuttal functions only to shift the burden of proof to the anti-doping organization, which may then show, to the Panel’s comfortable satisfaction, that the departure did not cause a misreading of the analysis.”*

129. Based on all the facts, allegations, arguments and evidence before her, the Single Judge concludes that the Rider did not establish a departure from the International Standard for Laboratories, the International Standard for Testing and Investigations or any other rule set forth in the Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in the Anti-Doping Rules, let alone a departure that *“could reasonably have caused the Adverse Analytical Finding”*; nor did the Rider set forth any other potential legal basis on which his arguments may rely.
130. The Rider’s arguments are dismissed and the analytical data of the Rider’s Samples 20 and 21 must stand. As regards Sample 22, the Single Judge finds that Sample 22 was rightfully invalidated by the Expert Panel.

## **2. Requirements of the ABP data**

131. As set forth by the UCI in the Petition, the fundamental requirement of establishing an anti-doping rule violation on the basis of a longitudinal profile is that:

*“[...] all experts – independent from each other – come to the conclusion that doping is a plausible and likely explanation for the abnormal variation and that there is no other plausible cause ascertained with a significant degree of probability”.*<sup>6</sup>

132. As previously emphasised by this Tribunal<sup>7</sup> in quoting CAS:<sup>8</sup>

*“a pitfall to be avoided [in the context of the ABP] is the fallacy that if the probability of observing values that assume a normal or pathological condition is low, then the probability of doping is automatically high”. Concretely this has been said in legal literature to mean that “if the ADO is not able to produce a ‘doping scenario’ with a minimum degree of credibility (‘density’), the abnormality is simply unexplained, the burden of proof enters into*

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<sup>5</sup> UCI ADT 05.2016, *UCI v. Jure Kocjan*, para 64 and UCI ADT 09.2017, *UCI v. Nicola Ruffoni*, para 53 quoting CAS 2013/A/3112, *WADA v. Lada Chernova & RUSADA*, para 85.

<sup>6</sup> CAS 2010/A/2174, *Francesco De Bonis v. CONI & UCI*, para 4.4.2 (b).

<sup>7</sup> UCI ADT 03.2017, *UCI v. Isabella Moreira Lacerde*, para 64 and UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para 82.

<sup>8</sup> CAS 2016/O/4464, *IAAF v. ARAF & Ekaterina Sharmina*, para 150.

*play and the ADO's case must be dismissed since there is no evidence pleading in favour of the hypothesis of 'doping' any more than for another cause.*"<sup>9</sup>

133. It has further been stated by this Tribunal, that since the mere fact that the Rider's haematological values are abnormal is no proof of doping, the UCI must both demonstrate that doping is a plausible source for the abnormal ABP values, as well as "*establish – in principle – that all other alternative explanations for these values can be excluded. This puts the UCI in a difficult evidentiary position*".<sup>10</sup> As previously emphasized by this Tribunal,<sup>11</sup> this position has been described, and solved, by a CAS Panel as follows (CAS 2011/A/2384 & 2386, *UCI & WADA v. Alberto Contador Velasco & RFEC*, para. 252 et seq.):

*"The exceptions concern cases in which a party is faced with a serious difficulty in discharging its burden of proof ("état de nécessité en matière de preuve", "Beweisnotstand"). A cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf. ATF 117 Ib 197, 208 et seq.). Another reason may be that, by its] very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove 'negative facts'. According to the Swiss Federal Tribunal, in such cases of "Beweisnotstand", principles of procedural fairness demand that the contesting party must substantiate and explain in detail why it deems the facts submitted by the other party to be wrong (ATF 106 II 29, 31 E. 2; 95 II 231, 234; 81 II 50, 54 E 3; FT 5P.1/2007 E. 3.1; KuKo-ZGB/Marro, 2012, Art. 8, no 14; CPC-Haldy, 2011, Art. 55, no 6). The Swiss Federal Tribunal has described in the following manner (ATF 119 II 305, 306 E 1b) this obligation of the (contesting) party to cooperate in elucidating the facts of the case:*

*"Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l'art. 8 CC s'applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31, consid. 2 et les arrêts cités). L'obligation, faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral – singulièrement de l'art. 8 CC –, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celui-ci. C'est dans le cadre de l'appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la preuve."*

134. As previously stated by this Tribunal "*it follows from the above that difficulties in proving 'negative facts' result in a duty for the party not bearing the onus of proof to cooperate in establishing the facts. That party – i.e. the Rider – must cooperate in the investigation and clarification of the facts of the case. It is up to him to submit and substantiate other plausible sources for the abnormal values. It will then be up to the UCI to contest those other alternatives and, ultimately, for the Single Judge to evaluate the evidence before him in relation to the various scenarios. Nonetheless, the burden of proof, i.e. the risk that a certain scenario cannot be established or discarded, remains with the UCI.*"<sup>12</sup> This means, as stated in the Diniz-case cited above, that the standard of proof on the Rider's part is that the Rider shall "*submit and substantiate other plausible sources for the abnormal values*". Then, "*It will be up to the UCI to contest those other alternatives and,*

<sup>9</sup> Id. quoting Marjolaine Viret (2016), *Evidence in Anti-Doping in the Intersection of Science and Law*, T.M.C Asser Press, The Hague, p. 774.

<sup>10</sup> UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para 68.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, para 68-69.

ultimately, for the Single Judge to evaluate the evidence before him in relation to the various scenarios.”<sup>13</sup> At the end of the day, it is for the Single Judge to decide, if the UCI has fulfilled its burden of proving, to the comfortable satisfaction of the Single Judge, that the Rider has committed a violation of the anti-doping rules.

### **3. Were the abnormalities in the Rider’s ABP established?**

135. The ABP in the case at hand is based on the Expert Panel’s evaluation of 22 valid samples, the documentation of which was included as evidence in the UCI’s submissions.
136. As reported by the Expert Panel the Rider’s profile contained several abnormal features in the samples collected around the 2017, 2018, 2020 and 2021 Volta a Portugal and in the off-season 2019. The Expert Panel particularly noted the following: “[...] *In our view, the data of the athlete bears several features compatible with blood manipulation, with a suppression pattern in 2017 and a stimulation/suppression pattern in 2018, both coinciding with the Tour of Portugal of the respective years and clear pattern of blood loss during the off season in Nov 2019. [...]*”
137. The Rider’s ABP was flagged with abnormalities at 99.0% specificity for Haemoglobin concentration (Hb) in samples 16 (upper limit) 20 and 21 (lower limit), OFF score in samples 15 and 16 (upper limit) and 11, 20 and 21 (lower limit) as well as for RET% in samples 11, 20, 21, 25 and 26 (upper limit) and samples 8 and 15 (lower limit).
138. The Expert Panel in Expert Opinion #1 also stated that: *the profile bears several features of blood manipulation during the preparation for competition. We therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause.*

This opinion was confirmed by the Expert Panel in the second Expert Opinion after having examined the Rider’s submissions: “[...] *The athlete does not provide any valid explanations for the abnormalities highlighted in our joint expert opinion. Based on the data available at this stage, we therefore conclude that the arguments provided by the athlete do not explain the abnormalities in his profile. We maintain our previous assessment that the likelihood of the profile considering normal physiological regulation and altitude exposure is low, whereas its likelihood considering the use of a prohibited substance or method, namely an erythropoietic stimulant, is high.*”

139. In light of the above, and after examining the documentation in the case at hand, the Single Judge finds the Expert Panel’s opinions to be well-founded, logical and compelling, thus the Single Judge concludes that important abnormalities did exist in the Rider’s haematological profile.

### **4. Were the abnormalities in the Rider’s ABP caused by the Use of a Prohibited Substance or Prohibited Method?**

140. As stated above, it is not enough to establish that abnormalities exist in the Rider’s haematological profile. The UCI must also establish that the abnormalities were caused by the Use of a Prohibited Substance or Prohibited Method, and not by any other cause.
141. The UCI has submitted (based on the Expert Panel’s opinions) that the abnormal values in the Rider’s haematological profile can be explained with the use of a prohibited substance or prohibited method.

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<sup>13</sup> *Ibid.*, para 69.

142. As already stated above, the Rider objected to this conclusion during the results management process, and submitted various explanations to explain the abnormalities in his profile (see para 26-28 above).
143. The Expert Panel, however, addressed all the arguments raised by the Rider and came to the conclusion that these arguments did not offer any suitable explanation to the abnormalities.

#### *Training load and hypoxic tent*

144. The Rider submitted during the results management process that i) the values recorded in the ABP *“in the winter season - preparation period - (...) may only be related to the type of training adopted, starting with the high volume of training, thus leading to a load relief in the spring period and successive ones”*, and that ii) the values recorded during the period of use of the hypoxic tent may be due to its improper configuration as a result of a lack of knowledge on its use or to *“a possible malfunction”*.
145. The Expert Panel considered (and dismissed) these explanations from the Rider and maintained its opinion that the more likely scenario in this case is the use of a Prohibited Substance or Method.
146. Concerning the training load, the Expert Panel noted that the arguments put forward by the Rider do not explain the increased RET% values in the sample collected during the winter period:

*“[...] The athlete offers changes in training load as an explanation for the low values recorded in the winter season. He refers to this period as the preparation period, in which high volumes of training are adopted, leading to a “load relief” in the spring and successive months. Indeed it has been well documented that plasma volume dependent markers in the ABP re affected by environmental temperature changes due to seasonal changes. Usually the Hct and Hb are lower in Summer than Winter due to an increase in plasma volume in the Summer months (12,14). Further, changes an increase in Hb during the off season or periods of detraining (13, 14) has been documented previously. Thus, the athlete is proposing competing stimuli (increased training load due resulting in increased plasma volume vs plasma volume contraction in winter) as an explanation for the decreased values of Hb at the end of 2019. However, such a hypothesis does not explain the increased reticulocyte values in these samples which are typical of a compensatory response to blood withdrawal.”*

147. As to the improper configuration of the hypoxic tent or its malfunction, the Expert Panel highlights that the Rider does not explain how the use of the hypoxic tent may have caused the relevant abnormalities:

*“[...] While outlining his use of artificial hypoxic exposure in 2015 and 2016, the athlete does not provide any explanation on how these interventions might have caused the abnormalities highlighted in our joint expert opinion.”*

148. The Rider did not submit any further evidence to support his allegations. The Single Judge finds that the Rider has not explained the abnormalities in his ABP by his submissions.
149. The Single Judge finds that it was perfectly demonstrated in the logical and compelling Expert Reports that it is very likely that the abnormalities in the Rider’s ABP were caused by the use of a Prohibited Substance and/or Prohibited Method.
150. Regarding the private tests done by the Rider, the Single Judge refers to the evaluation by the Expert Panel in its Second Opinion:

*“[...] It is obvious that such private blood tests should be examined with caution for several reasons. Firstly, there is no preanalytical or analytical standardisation or documentation for private samples (e.g., same type of analyser, 10 min seated wait time prior to collection, no exercise in the previous 2 hours before collection) which is strictly necessary to reduce variation in accordance with WADA’s ABP guidelines. There is also no comparability with the*

*other ABP tests of the profile. Such comparability is usually confirmed by the independent external quality control (Centre Suisse de Controle de Qualité (CSCQ)) which compares all laboratories which are part of the network analysing ABP samples. Further, it cannot even be determined if such samples in fact belong to the athlete. Lastly, it is always unclear if the athlete presents all available private results or just a selection that suits their case. For all these reasons, previous decisions in ABP cases have supported the practise of not admitting private blood tests as part of ABP blood profiles.”*

151. The Single Judge agrees that private tests shall not be taken into account in the assessment of the Rider’s ABP.
152. In conclusion, the Single Judge is of the opinion that there is no evidence in the case at hand that renders the doping scenario implausible.
153. Therefore it follows, that the final question to resolve is, if the UCI has proven to the comfortable satisfaction of the Single Judge that the Rider engaged in doping within the meaning of Article 2.2 UCI ADR.

## **5. Conclusion**

154. In evaluating the Rider’s explanations put forward during the UCI’s results management process, the UCI’s petition and all the facts, allegations, arguments and evidence before her, and applying said standard of proof in the context of the assessment of the evidence before her, the Single Judge is comfortably satisfied that the Rider committed an anti-doping rule violation of Article 2.2 UCI ADR in the form of Use of a Prohibited Substance or Prohibited Method.

### **C. Consequences of the anti-doping rule violation**

155. Comfortably satisfied that the Rider committed an anti-doping rule violation, the Tribunal must decide upon the consequences of the violation.

#### **1. Period of Ineligibility**

156. The UCI submitted that the Tribunal must impose an eight-year period of Ineligibility on the Rider.
157. The Rider failed to submit an Answer in this proceeding, thus the Tribunal does not know what the Rider’s position is with regard to the period of ineligibility.
158. The Single Judge must take into account that the Rider has already been found guilty of a first intentional ADRV from 20 July 2010 and that the present case constitutes the Rider’s second ADRV within the same ten-year period of time (in accordance with Articles 10.7.4.1 and 10.7.5 of the UCI ADR). Thus, the Rider’s period of ineligibility shall be determined pursuant to Article 10.7.1 of the UCI ADR 2015.
159. According to Articles 10.2, 10.6 and 10.7 of the UCI ADR 2015, and because this is the Rider’s second ADRV, a) the standard sanction under Article 10.2 of the UCI ADR must first be established prior to b) considering the applicable sanction for multiple violations.

#### *Determination of the standard sanction*

160. As per Article 10.2.1.1 of the UCI ADR 2015 there are two limbs to address in determining the base sanction: whether the offence involved a Specified Substance; and whether the offence was intentional. Furthermore, and as per Articles 10.4, 10.5 and 10.6 of the UCI ADR 2015, the UCI must also consider whether any grounds exist to justify a reduction of the base sanction.

161. According to the Expert Panel, the abnormalities shown in the Rider's Profile are highly likely due to blood manipulation by the use of a Prohibited Substance or Prohibited Method, namely blood manipulation by using erythropoiesis stimulating agents or blood transfusions.
162. None of these Prohibited Substances and Prohibited Methods are specified substances under the Prohibited List. Therefore, the first limb of Article 10.2.1.1 UCI ADR 2015 is fulfilled, i.e. the substance or method in question is a Prohibited, non-Specified Substance or Method.
163. As per the second limb of Article 10.2.1.1 of the UCI ADR 2015, the Rider bears the burden of proof of establishing that the ADRV was not intentional. The standard of proof is by a balance of probabilities (Article 3.1. of the UCI ADR 2015). According to the first sentence of Article 10.2.3 of the UCI ADR, the term "intentional" is meant to identify those riders who cheat:

*"The term therefore requires that the Rider or other Person engaged in a conduct which he or 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. [...]"*

164. Aside from the explanations that have been dismissed by the Expert Panel, the Rider has not provided any indication as to how his ADRV may have occurred. In addition, he has not put forward – nor do there appear to exist – any exceptional circumstances that could somehow establish a lack of intent without first proving the source of the substance or the method used.
165. It follows from the above and in view of the nature of the Prohibited Substance and/or Method used, that the Rider has failed to meet his burden of proof to establish that his ADRV was not intentional.
166. Therefore, a standard ineligibility period of four years is applicable under Article 10.2.1.1 of the UCI ADR 2015.
167. In light of the absence of any (acceptable) explanation as to how his ADRV occurred and taking into account that the Rider has not provided any "substantial assistance", no mitigation provision, as set forth under Articles 10.4, 10.5 and 10.6 of the UCI ADR 2015 (respectively "No Fault or Negligence"; "No Significant Fault of Negligence" or "Substantial Assistance") can be applied to reduce the standard four-year sanction in the case at hand. .

#### *Application of the provisions on multiple violations*

168. The Rider committed a first ADRV on 20 July 2010 for presence of Darbepoietin Alpha in a sample collected out-of-competition. The ADoP imposed a period of Ineligibility of three years.
169. As per Article 10.7.5 of the UCI ADR 2015, both ADRVs occurred within the same ten-year period. Furthermore, the Rider received notice of the first ADRV before the second one (Article 10.7.4.1 of the UCI ADR 2015). Thus, the Rider's ADRVs are to be considered multiple violations under Article 10.7.1 of the UCI ADR.
170. According to Article 10.7.1 of the UCI ADR 2015, the Rider's period of Ineligibility must be the greater of:
  - a) six months
  - b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or
  - c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation.

171. Accordingly, given that the Rider was sanctioned with a three years period of ineligibility for his first intentional ADRV, Article 10.7.1 of the UCI ADR 2015, sub-paragraph c) is applicable in the case at hand.
172. Therefore, a period of ineligibility of eight years applies to the case a hand.
173. The Single Judge has considered if the principle of *lex mitior* appropriately applies under the circumstances of the case.
174. In this regard the Single Judge pays attention to Article 10.9 of the UCI ADR 2021:

*Article 10.9 Multiple Violations*

*10.9.1 Second or Third Anti-Doping Rule Violation*

*10.9.1.1 For a Rider or other Person's second anti-doping rule violation, the period of Ineligibility shall be the greater of:*

*(a) A six (6) month period of Ineligibility; or*

*(b) A period of Ineligibility in the range between:*

*(i) the sum of the period of Ineligibility imposed for the first anti-doping rule violation plus the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, and*

*(ii) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation.*

*The period of Ineligibility within this range shall be determined based on the entirety of the circumstances and the Rider or other Person's degree of Fault with respect to the second violation.*

*[...]*

*The period of Ineligibility established in Articles 10.9.1.1 and 10.9.1.2 may then be further reduced by the application of Article 10.7.*

175. The sanctioning regime under the UCI ADR 2021 is somewhat different to that of the UCI ADR 2015. However, on the basis of the Rider's submissions to the UCI during the results management process, the Single Judge does not find any basis upon which the UCI ADR 2021 provisions could be considered to be more favourable to his case (and should thus be applied in view of the principle of *lex mitior*).
176. The period of ineligibility must according to Article 10.9.1.1, sub-paragraph b) of the UCI ADR 2021 be determined based on the entirety of the circumstances on the Rider's degree of fault with respect to the second ADRV.
177. As concluded above, the Single Judge is comfortably satisfied, that the abnormalities in the Rider's haematological profile resulted from blood manipulation by the Use of a prohibited Substance or Prohibited Method.
178. Based on the above, the Single Judge finds no basis for determining the period of ineligibility in accordance with Article 10.9.1.1, sub-paragraph b), litra i) of the UCI ADR 2021. The Single Judge finds that if the UCI ADR 2021 were applicable in the case at hand, then the period of ineligibility should be determined in accordance with Article 10.9.1.1, sub-paragraph b), litra ii) of the UCI ADR 2021.
179. It follows, that the new regulation in UCI ADR 2021 Article 10.9 is not more lenient in the case at hand. On this basis *lex mitior* - even if applicable - has no impact on the case at hand.
180. In conclusion, the Single Judge finds that a period of Ineligibility of eight years shall be imposed on the Rider.

## 2. Commencement of the period of Ineligibility

181. A period of Ineligibility of eight years is imposed on the Rider. The Tribunal has to determine the commencement of the period of Ineligibility.
182. Article 10.11 UCI ADR 2015 provides that the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility and that if a Provisional Suspension has been imposed and respected by the Rider, then the Rider shall receive a credit for such period of Provisional Suspension.
183. It is undisputed between the Parties that the Rider respected the Provisional Suspension. Therefore, the Rider shall receive a credit for the period of the Provisional Suspension pursuant to Article 10.11.3.1 UCI ADR 2015.
184. Therefore, the period of Ineligibility shall commence on the date of the decision, i.e. 20 July 2023. The Provisional Suspension already served by the Rider, starting from 6 February 2023 until the date of the present Judgement, shall be credited against the four-year period of Ineligibility.

## 3. Disqualification

185. The UCI in its Petition requests the Tribunal to disqualify all the results obtained by the Rider from the date of collection of Sample 6 (i.e. on 12 July 2017), until the day he was provisionally suspended (i.e. 6 February 2023)
186. The Single Judge takes note of the request in the UCI's Petition, but also acknowledges that according to Article 27.2 UCI ADT Rules "[t]he Single Judge is not bound by the Parties' prayers for relief".
187. As regards determining the date from when the Rider's results shall be Disqualified, the Single Judge concurs with the view expressed by this Tribunal, according to which:

*"... art. 10(8) UCI ADR provides an unfortunate lack of clarity in the situation involving a violation based on an ABP. The Single Judge has been unable to find a definition of a "positive Sample" in the UCI ADR; the term appears to be used exclusively in connection with art. 10(8) UCI ADR. The Single Judge sees fit to understand the reference to a "positive Sample" in the phrase "the date a positive Sample was collected" (as opposed to a more precise defined term such as "Adverse Analytical Finding") here as a means to create a rule that distinguishes between violations based on collected Samples from other types of violations, such as art. 2(4) UCI ADR (Whereabouts Failure) or art. 2(10) UCI ADR (Prohibited Association), or even violations of art. 2(2) UCI ADR that are based on non-analytical evidence. As a consequence, for violations that arise based on collected Samples, such as those based on an ABP, the Disqualification period would start on the date of Sample collection. The Single Judge feels comforted in this view by the consistent line of CAS case law that, in the context of the Disqualification for ABP violations, links the timing of the violation to the timing of the relevant Sample collection."<sup>14</sup>*

188. Accordingly, the Single Judge finds, that the starting point is, that the Disqualification shall start on the date of the collection of sample number 6 since this was the first sample in the Rider's ABP to display abnormalities.

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<sup>14</sup> See e.g. CAS 2010/A/2235, *UCI v. Valjavec*, para. 117; CAS 2014/A/3469, *IAAF v. Alhamdah*, para. 44; CAS 2014/A/3614, *IAAF v. Dominguez*, para. 404; CAS 2016/O/4463, *IAAF v. Ugarova*, para. 133; UCI ADT 03.2017, *UCI v. Isabella Moreira Lacerde*, para 132, UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para 104, UCI ADT 02.2018, *UCI v. Jaime Roson Garcia*, para 158 and UCI ADT 07.2019, *UCI v. Mehdi Sohrabi*, para 77.



189. Since the sample in question was collected on 12 July 2017, the starting point is, that the period of Disqualification shall start as from this date.
190. Article 10.8 UCI ADR 2015 requires Disqualification of all results following this date up to the date the Provisional Suspension was imposed, unless “*fairness requires otherwise*”.
191. The Single Judge takes into account the UCI ADT Judgment in case 06.2017, *UCI v. Mr. Alex Correia Diniz*, para 108, where the Single Judge in that case and in line with CAS case law (CAS 2015/A/4006, *IAAF v. ARAF, Yuliya Zaripova & RUSADA*) conducted an overall evaluation of the elements in the case at hand in determining if “*fairness require[d] otherwise*” than disqualifying all results in the period between the sample collection and the Provisional Suspension.
192. In CAS 2015/A/4006, *IAAF v. ARAF, Yuliya Zaripova & RUSADA*, para 102 the Panel held:
- “As a preliminary matter, the Panel notes that ‘fairness’ is a broad concept (CAS 2013/A/3274, para. 85), covering a number of elements that the deciding body can take into account in its decision not to disqualify some results. The CAS precedents (in general terms, inter alia, CAS 2007/A/1283, para. 53; CAS 2013/A/3274, para. 85-88) took into account a number of factors, such as the nature and severity of the infringement (CAS 2010/A/2083, para. 81), the length of time between the anti-doping rule violation, the result to be disqualified and the disciplinary decision, the presence of negative tests between the anti-doping rule violation and the competition at which the result to be disqualified was achieved, and the effect of the infringement on the result at stake (CAS 2008/A/1744, para. 76; CAS 2007/A/1362&1393, para 7.22). The Panel underlines that no single element is decisive alone: an overall evaluation of them is necessary.”*
193. The Single Judge has considered that the disqualification of results from 12 July 2017 and until the provisional suspension on 6 February 2023 is a long period of time. The Single Judge has considered “*if fairness requires otherwise*” when taken this period of time into account.
194. In light of the above and considering the nature of the ADRV (blood manipulation over several years) the Single Judge concludes that there is no reason to depart from the principle enshrined in Article 10.8 UCI ADR 2015.
195. Therefore, all competitive results obtained by the Rider from 12 July 2017 until the date of the Provisional Suspension (i.e. 6 February 2023) shall be disqualified.

#### **4. Mandatory Fine and Costs**

##### **a) Application of the mandatory fine**

196. According to Article 10.10.1.1 UCI ADR 2015, a fine shall be imposed in case a Rider exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3 *idem*. This prerequisite is fulfilled in the case at hand.
197. With respect to the calculation of the fine, the UCI submits that according to the Expert Panel, the ADRV in this case occurred between 12 July 2017 (date of collection of Sample 6) and 3 August 2021 (date of collection of Sample 26). For the purposes of the mandatory fine to be applied, the UCI argues that the ADRV relates to 2017, 2018, 2019, 2020 and 2021. The Rider was racing for a team registered with the UCI during these years and, based on his employment contracts, he was entitled to an average annual gross income from cycling of ██████████ (i.e. ██████████ in 2017/2018; ██████████ in 2019; ██████████ in 2020 and ██████████ in 2021).

198. The UCI argues that a mandatory fine of [REDACTED] should be imposed, unless the Rider can establish that a reduction of the quantum of the fine would be justified by one or more of the criteria set out in Article 10.10.1.1 of the UCI ADR 2015.
199. The Rider has not contested the above figures and not put forward any arguments for reduction of the fine.
200. The Single Judge finds that a monetary fine in the amount of [REDACTED] shall be payable by the Rider to the UCI.

b) Liability for Costs of the Procedures

201. In application of Article 10.10.2 UCI ADR 2015, the Single Judge holds that the Rider shall reimburse to the UCI the following amounts:
- CHF 2'500.- for the costs of the results management by the UCI (Article 10.10.2.2 of the UCI ADR 2015); and
  - EUR 5'170.- for costs of the documentation packages of the blood samples analysed for the ABP (Article 10.10.2.6 of the UCI ADR 2015).

## VII. COSTS OF THE PROCEEDINGS

202. In application of Article 29.2 UCI ADT Rules, the Tribunal decides that the present Judgment is rendered without costs.
203. Notwithstanding the above, the Tribunal may order the unsuccessful Party to pay a contribution toward the prevailing Party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts (Article 29.4 UCI ADT Rules). The provision states that if the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.
204. The Single Judge notes that the Rider did not submit an Answer to the Petition and furthermore no hearing was held in this case.
205. In light of the circumstances of this case, the Single Judge finds it appropriate to not order the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs.

## VIII. RULING

206. In light of the above, the Tribunal decides as follows:
- 1. Mr. Joao Ricardo Cardoso Benta has committed an Anti-Doping Rule Violation (Article 2.2 of the UCI ADR 2015).**
  - 2. Mr. Joao Ricardo Cardoso Benta is suspended for a period of ineligibility of eight (8) years. The period of ineligibility shall commence on the date of this decision, i.e. 20 July 2023. However, considering the credit for the period of provisional suspension already served by Mr. Joao Ricardo Cardoso Benta, starting from 6 February 2023, Mr. Joao Ricardo Cardoso's period of ineligibility effectively began on 6 February 2023, and shall end eight years from this date, i.e. 5 February 2031.**
  - 3. The results obtained by Mr. Joao Ricardo Cardoso Benta between 12 July 2017 and 6 February 2023 are disqualified.**

4. **Mr. Joao Ricardo Cardoso Benta is ordered to pay to the UCI the amount of [REDACTED] as monetary fine.**
  5. **Mr. Joao Ricardo Cardoso Benta is ordered to pay to the UCI:**
    - a) **the amount of CHF 2'500.- for the costs of the results management; and**
    - b) **the amount of EUR 5'170.- for costs of the documentation packages of the blood samples analysed for the Biological Passport.**
  6. **All other and/or further reaching requests are dismissed.**
  7. **This Judgment is final and will be notified to:**
    - a) **Mr. Joao Ricardo Cardoso Benta;**
    - b) **The Autoridade Antidopagem de Portugal;**
    - c) **UCI; and**
    - d) **WADA.**
207. This Judgment may be appealed before the CAS pursuant to Article 31.2 UCI ADT Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 UCI ADR.

**Helle Qvortrup Bachmann**  
**Single Judge**