UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

# UCI Anti-Doping Tribunal

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## Judgment

## case ADT 03.2016

## UCI v. Ms. Blaža Klemenčič

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**Single Judge:**

**Mr. Andreas Zagklis (Greece)**

**Aigle, 20 May 2016**

**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 ADT-Rules") and in relation to an alleged anti-doping rule violation committed by Ms. Blaža Klemenčič (hereinafter referred to as "the Rider").

## I. FACTUAL BACKGROUND

2. The Rider is a 36-year-old Slovenian mountain bike cyclist affiliated with the Slovenian Cycling Federation. She turned professional in the year 2006. She participated in the 2008 and 2012 Olympic Games. She has continuously been a License-Holder within the meaning of the UCI Anti-Doping Rules (hereinafter referred to as "the UCI ADR") throughout the period relevant for these proceedings. In 2012, the Rider was under contract with the team Felt Oetztal X-Bionic.

3. On 27 March 2012 in Selca, Slovenia, the Rider was tested out-of-competition. The doping control was carried out by a Doping Control Officer on behalf of the UCI. The Rider confirmed on the Doping Control Form that the urine sample had been taken in accordance with the applicable regulations and that the only medication she had taken over the seven days preceding the control was a contraception tablet.

4. The urine sample provided by the Rider was then analyzed in the WADA-accredited Laboratory in Cologne, Germany (hereinafter referred to as the "Laboratory"). The analysis was conducted – among other procedures – in accordance with the WADA Technical Document on the analysis and reporting of Erythropoietin (hereinafter referred to as "EPO") in force at the time (TD2009EPO). The Laboratory did not report the presence of EPO or of any other prohibited substance in the Rider's A-sample.

5. On 1 September 2014 the TD2009EPO was replaced by TD2014EPO in order to reflect recent developments in the detection of EPO.

6. By letter dated 3 August 2015, the Cycling Anti-Doping foundation (hereinafter referred to as "CADF"), acting on behalf of the UCI, informed the Rider that the sample collected from her on 27 March 2012 would be subject to further analysis. As there was insufficient urine remaining in the A-sample, the Laboratory would be required to open, split and reseal the B-sample. The CADF invited the Rider to attend such procedure.

7. On 10 August 2015, Mr. Robert Pintaric (the Rider's coach and life partner) wrote to the CADF on behalf of the Rider that neither she nor any of her representatives would attend the opening and splitting procedure of her B-sample, adding that "*We believe Koln laboratories ha[ve] enough high knowledge experts – so they don't need Blaza's presence on B sample opening. We have trust in their work.*"

8. On 19/20 August 2015, the Laboratory opened the Rider's B-sample, transferred an aliquot of about 15ml of urine into a new laboratory vessel and then resealed the B-sample in the presence of an independent witness appointed by the Laboratory. For the purposes of this judgment and in order to avoid confusion, the two bottles containing urine from the B-sample (namely the new vessel and the remainder of the B-sample) will be hereinafter referred to as the "First Bottle" and the "Second Bottle" respectively, despite the fact that the Parties referred to them

in the contemporaneous correspondence as A-sample and B-sample, most likely due to the use of UCI's template forms.

9. During the last part of August, the Laboratory performed the analysis of the urine in the First Bottle according to TD2014EPO, as requested by the UCI.

10. By letter dated 2 September 2015, the Laboratory informed the CADF that the analysis of the First Bottle showed the presence of recombinant EPO, which is a non-specified substance prohibited at all times (In- and Out-of-competition) under class S.2 of the 2012 and the 2015 WADA Prohibited Lists adopted by the UCI.

11. By registered letter of 18 September 2015, UCI informed the Rider of the analysis results. In the same communication, UCI informed the Rider of her rights to request the opening and analysis of the Second Bottle, as well as to attend such procedure. By the same letter, UCI imposed a provisional suspension on the Rider with immediate effect.

12. On 25 September 2015, the Rider requested the analysis of the Second Bottle and a copy of the respective documentation package.

13. On 13 October 2015 the UCI sent to the Rider the A-sample Laboratory Documentation Package, which contained information on the A-sample analysis performed in 2012 as well as on the First Bottle analysis performed in August 2015.

14. Following various communications between the UCI and the Rider's representatives, the analysis of the urine in the Second Bottle took place between 24 and 26 November 2015. The Rider had appointed a representative, Prof. Dr. Vladka Čurin Šerbec (hereinafter referred to as "Prof. Čurin") who was present at the Laboratory during that time.

15. On 30 November 2015, the Laboratory informed the UCI through ADAMS that the analysis of the Second Bottle confirmed the presence of EPO in the Rider's sample.

16. By registered letter of 1 December 2015, UCI informed the Rider of the Second Bottle analysis results. UCI was asserting that the Rider had committed an anti-doping rule violation (hereinafter referred to as "ADRV") and requested the Rider to provide her explanations.

17. On the same day, the Rider requested a copy of the B-sample Laboratory Documentation Package.

18. On 14 December 2015, the Rider's counsel filed the Rider's preliminary explanations as well as an expert report by Prof. Čurin. He also announced that the Rider's explanations would be supplemented after receiving the requested B-sample documentation package.

19. On 15 December, the UCI sent to the Rider the B-sample Laboratory Documentation Package, which contained information on the Second Bottle analysis performed in November 2015.

20. On 30 December 2015, the Rider's counsel filed the Rider's supplementary explanations as well as additional observations by Prof. Čurin.

21. On 8 March 2016, UCI informed the Rider that it considered that the ADRV had been established. As a result, UCI offered the Rider a so-called "Acceptance of Consequences" form pursuant to Article 8.4 of the UCI ADR 2015. The Rider was also advised of the consequences in case she would not agree with the proposed Acceptance of Consequences.

22. On 17 March 2016, the Rider informed the UCI that she did not want to enter into the Acceptance of Consequences.

## II. PROCEDURE BEFORE THE TRIBUNAL

23. On 7 April 2016, UCI initiated these proceedings by filing a petition together with exhibits (hereinafter referred to as "the Petition") before the Tribunal. In its Petition, UCI requests the Tribunal to issue an award:

    *(a) Declaring that Ms. Klemencic has committed an Anti-Doping Rule Violation.*

    *(b) Imposing on Ms. Klemencic a period of ineligibility of two years.*

    *(c) Disqualifying all results obtained by Ms. Klemencic from 27 March 2012 until the day she was provisionally suspended.*

    *(d) Ordering Ms. Klemencic to pay a fine of* [redacted].

    *(e) Ordering Ms. Klemencic to pay the costs of results management incurred by the UCI (2,500.- CHF) and the costs incurred for Out-of-Competition Testing (1'500.- CHF)*

    *(f) Ordering Ms. Klemencic to reimburse the costs of the B-sample analyses (2'100.- EUR) and the two documentation packages (1'900.- EUR).*

24. On 8 April 2016, the Secretariat of the Tribunal (hereinafter referred to as "the ADT Secretariat") informed the Rider that UCI had filed the Petition, that Mr. Andreas Zagklis had been appointed to act as Single Judge (hereinafter referred to as "the Single Judge" or "the Tribunal") in the present proceedings in application of Article 14 (1) of the ADT-Rules and that the Single Judge had confirmed his independence and impartiality in relation to the matter at hand.

25. In the same communication, *inter alia*, the Parties were informed that:

    a. a deadline until 25 April 2016 had been granted to the Rider to submit her answer to the Petition in conformity with Article 16 (1) and 18 of the ADT-Rules;

    b. UCI had requested to deal with the present matter in an expedited manner in application of Article 24 of the ADT-Rules and that a deadline until 13 April 2016 had been granted to the Rider to inform the Tribunal whether she agreed with the implementation of such expedited procedure; and

    c. a deadline until 13 April 2016 had been granted to the Parties to inform the Tribunal whether they wished a hearing to be held in the present matter.

26. By letter dated 18 April 2016, the ADT Secretariat noted that the Rider did not provide the Tribunal with the requested comments and information within the deadline of 13 April 2016 and that she was being granted a final deadline until 20 April 2016 at noon CET to submit a response.

27. By email dated 20 April 2016, the Rider's counsel submitted the Rider's answer together with exhibits (hereinafter referred to as "the Answer"), informing the Tribunal that the Rider had no

objection against the expedited procedure and that she waived her right to a hearing. In its Answer, the Rider requests the Tribunal

> *"[…] to hear the evidence and dismiss the charges from [the Petition], and find the [Rider] as not guilty of commit[ting] an Anti-Doping Rule violation"*

28. By letter dated 29 April 2016, UCI's counsel requested the Single Judge's authorization to submit a Response to the Rider's Answer together with a Report from the Laboratory, in accordance with Article 17 (1) ADT-Rules.

29. By letter dated 2 May 2016, the ADT Secretariat informed the Parties that
    a. in accordance with Article 17 (1) of the ADT-Rules, the UCI's request to respond to the Rider's Answer was not granted.
    b. in accordance with Article 17 (2) of the ADT-Rules, the Single Judge allowed the UCI to supplement its submission on a specific issue, namely paragraph 75 of the Rider's Answer which raised "a question of conflict of interests", by no later than 4 May 2016. In the same communication, the Rider was invited, upon receipt of the UCI's supplementary submission, to file her comments by no later than 9 May 2016.

30. On 4 May 2016, the ADT Secretariat received the UCI's supplementary submission (hereinafter referred to as "Reply" and, jointly with the Petition, the "UCI Submissions") and notified the Rider accordingly.

31. On 9 May 2016, the ADT Secretariat received the Rider's comments on UCI's supplementary submission (hereinafter referred to as the "Rejoinder" and, jointly with the Answer, the "Rider's Submissions").

32. By letter dated 10 May 2016, the ADT Secretariat informed the Parties that the proceedings were closed and that the Single Judge would render his Judgment on the basis of the Parties' written submissions.

33. Therefore, the jurisdiction of the Tribunal follows from Article 8.2 UCI ADR 2015 and Article 3 (1) ADT-Rules according to which "*the Tribunal shall have jurisdiction over all matters in which an anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 ADR*".

34. In compliance with Article 13 (1) ADT-Rules the UCI has initiated proceedings before this Tribunal through the filing of a petition to the Secretariat on 7 April 2016. Before referring the case to the Tribunal, the UCI has tried to settle the dispute by offering the Rider an Acceptance of Consequences within the meaning of Article 8.4 ADR and Article 2 ADT-Rules. The Offer of Acceptance was rejected by the Rider on 17 March 2016.

## III. JURISDICTION

35. Article 25 of the UCI ADR 2015 provides the following:

> *"25.1 These Anti-Doping Rules shall apply in full as of 1 January 2015 (the "Effective Date").*
>
> *25.2 The retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall*

*only be applied retroactively if the statute of limitation period has not already expired by the Effective Date.*

*Otherwise, with respect to 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, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case." (emphasis added)*

36. Considering that the Rider's sample was collected in March 2012, i.e prior to the Effective Date, but has been brought forward by the UCI as an alleged ADRV on 1 December 2015, i.e. after such Effective Date, this case shall be governed by
    a. the procedural rules of the UCI ADR 2015; and
    b. the substantive anti-doping rules in effect at the time of the alleged ADRV occurred, namely the UCI ADR 2012, unless the principle of "lex mitior" applies.

37. Regarding jurisdiction, Articles 7 and 8 of the UCI ADR 2015 provide in relevant part as follows:

*"7.1 Responsibility for Results Management and Investigations*
*Except as provided for in Articles 7.1.1 and 7.1.2 below, for violation of these rules, results management and hearing shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection (and if no Sample collection is involved, the Anti-Doping Organization which first provides notice to the Rider or other Person of an asserted anti-doping rule violation and then diligently pursues that anti-doing rule violation).*

*[…]*

*8.1 UCI Anti-Doping Tribunal*
*The UCI shall establish an UCI Anti-Doping Tribunal to hear anti-doping rule violation asserted after 1st January 2015 under these Anti-Doping Rules.*

*[…]*

*8.2 Jurisdiction of the UCI Anti-Doping Tribunal*[1]
*The UCI Anti-Doping Tribunal shall have jurisdiction over all matters in which*
*• An anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7 […]" (emphasis added)*

38. As evidenced on the Doping Control Form, the out-of-competition doping control of 27 March 2012 was authorized by the UCI and carried out by a Doping Control Officer on its behalf. UCI, either directly or through the CADF, has been the sole results management authority in this case. Also, UCI asserted the alleged ADRV on 1 December 2015, after the Tribunal was established. It follows that the requirements for the Tribunal's jurisdiction are met.

39. Furthermore, Article 3 (2) of the ADT-Rules provides the following:

*"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."*

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1 Article 3 (1) of the ADT-Rules replicates the wording of Article 8.2 of the UCI ADR 2015.

40. Neither of the Parties raised any objection to the jurisdiction of the Tribunal within said time-limit.

41. Therefore, the Tribunal has jurisdiction to decide on the Petition.

## IV. APPLICABLES RULES

42. As previously noted (see para. 36 above), these proceedings are subject to the UCI ADR 2015 but the Tribunal shall apply the substantive rules of UCI ADR 2012. This point has remained undisputed and none of the Parties argued the presence of a "lex mitior" rule.

43. However, the Parties are in dispute regarding which provisions qualify as "substantive rules" and are thus applicable to the present case.

44. This issue requires separate analysis and will be dealt with in the Tribunal's findings below.

## V. THE FINDINGS OF THE TRIBUNAL

### A. General

45. In its prayers for relief the UCI requests the Tribunal to find that the Rider committed an ADRV. The UCI Submissions specify the relief by stating that the Rider has allegedly violated Article 21.1 (Presence of a Prohibited Substance in a Rider's bodily Specimen, hereinafter "Presence") and Article 21.2 (Use of a Prohibited Substance, hereinafter "Use") of the UCI ADR 2012.

46. The Single Judge notes that his task is described in Article 26 of the ADT-Rules (Title V – Judgment) as follows:

> *"The Single Judge shall determine the type and extent of the sanction(s) and consequences to be imposed according to the circumstances of the case, in accordance with the ADR.*
>
> *The Single Judge is not bound by the Parties' prayers for relief."*

47. The Parties' submissions do not differentiate the sanctions or other consequences that could be imposed on the Rider based on the type of ADRV (Use or Presence) or based on the possibility that the Rider's behavior violated simultaneously both provisions. In the eyes of the Single Judge, the UCI has "two shots" to achieve the same goal, whereby being successful on one (Use or Presence) would render the review of the other redundant; while the Rider has to defend herself successfully against both counts in order to avoid any consequences.

### B. Presence

48. Article 21.1.2 of the UCI ADR 2012 reads as follows:

> *"Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample."*

49. Article 2.1.2 of the UCI ADR 2015 reads as follows:

> *"Sufficient proof of an anti-doping rule violation under Article 2.1 is established by <u>any</u> of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample; <u>or, where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.</u>" (emphasis added)*

50. The difference between the two provisions is the above-underlined sentence. Obviously, the reanalysis procedure followed for the Rider's sample in the case at hand falls squarely within the scope of this new sentence.

51. For UCI to be able to establish Presence, it needs to show as a first step that
    - <u>either</u> Article 2.1.2 of the UCI ADR 2015 applies,
    - <u>or</u> the results of the analyses of the First and Second Bottle can lead to an ADRV for Presence under Article 21.1.2 of the UCI ADR 2012.

52. The question of retroactivity is regulated in the transitory provision of Article 25 of the UCI ADR 2015 quoted above in para. 35. The Single Judge has been unable to find a definition or list of "substantive rules", despite the fact that the definitions contained in the UCI ADR 2012 and 2015, or in the respective lists of the World Anti-Doping Code (hereinafter referred to as "WADC") 2009 or 2015 for that matter, are particularly long. The distinction between substantive and non-substantive – i.e. procedural – rules varies in doctrine and jurisprudence, while different legal systems may adopt different approaches especially as regards evidentiary rules. Article 25 only refers to the time-periods of Articles 10.7.5 (multiple violations) and 17 (statute of limitation) as procedural rules. So far CAS Panels have dealt with the issue of burden and standard of proof (CAS 2011/A/2384 & 2386, *UCI & WADA v. Contador & RFEC*, para. 245; CAS 2013/A/3256, *Fenerbahçe v. UEFA*, para. 274), or with guidelines for decision limits in threshold substances (CAS 2014/A/3488 *World Anti-Doping Agency v. Mr Juha Lallukka*, para. 110 *et seq*.). The nature of Article 2.1.2 appears to be a rather novel issue since the new sentence was introduced less than 18 months ago. The UCI did not provide any case law either, with the exception of an IOC disciplinary case that can be of limited use, since the athlete admitted the ADRV and did not challenge the reanalysis of her sample as the basis of Presence.

53. It is therefore required to use other tools of rule interpretation in order to determine if the 2015 version of Article 2.1.2 applies. The Single Judge finds that the wording of the provision could be of relevance ("Sufficient proof … is established") and suggests that the rule is of evidentiary nature. However, the systematic position of the rule in the heart of a substantive provision which defines the types of ADRVs, namely Article 2 (as opposed to Article 3), makes it extremely difficult to disassociate the categories of "sufficient proof" from the violation itself.

54. In addition, the wording "by either of the following" in Article 21.1.2 suggests inclusiveness in the way that the <u>two</u> alternative forms of the Presence are described rather than an indicative list of possible scenarios leading to the same ADRV (Presence).

55. UCI's reference to the Pechstein case (CAS 20019/A/1912-1913) in conjunction with the fact that the UCI ADR 2012 already permitted retesting for purposes of establishing Presence (Articles 120 and 200) must fail: the Panel in the Pechstein case characterized longitudinal profiling as "a

mere evidentiary method" and "one of the available means for finding doping offences" as part of the ISU's attempt to establish an ADRV of Use – not Presence – committed by the athlete.

56. Thus, the Single Judge finds that Article 21.1.2 is so intrinsically connected to the substantive nature of Article 21.1 that cannot be overridden by a newer provision, which expands the objective elements of Presence.

57. The next question is whether Article 21.1.2 itself allows UCI to bring forward a Presence allegation against the Rider in the case at hand.

58. In this respect, the Comments to Article 2.2 and 3.2 of the WADC 2009 respectively (hereinafter referred to as "the Comments") provide useful guidance:

> *"[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 (Methods of Establishing Facts and Presumptions), 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 Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy **all the requirements** to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]*
>
> *[…]*
>
> *[Comment to Article 3.2: For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) based on the Athlete'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 Athlete's blood or urine Samples.]" (emphasis added)*

59. Mindful of the fact that the Comments are not mandatory and their objective is to primarily assist in the interpretation of the WADC, the Single Judge finds the reference to "requirements" as quite telling. The WADC opens the door to an ADRV of Use in cases where the analytical information is reliable but "does not otherwise satisfy all the requirements to establish" Presence. The fact that the only analytical "requirements" found in Article 2.1 of the WADC 2009 (=21.1 of the UCI ADR 2012) are the ones set forth in Article 2.1.2 of the WADC 2009 (=21.1.2 of the UCI ADR 2012), leads the Single Judge to the conclusion that the evidence at hand – even if the Rider's technical challenges against the reanalysis were to be rejected – do not constitute sufficient proof to establish Presence.

60. The same approach seems to be followed by a leading author in evidentiary issues in doping. Despite the fact that retesting of a B-sample alone was provided for already under Article 6.5 of the WADC 2009, said author believes that the WADC 2015 introduced a novelty by allowing to exploit such retesting results for the purposes of Presence:

> *"The B Sample has received an additional purpose under the 2015 WADC: the new regime allows for a split of the B Sample in case of reanalysis after long-term storage […] in a way that makes a dual analysis possible and thus allows for prosecution of a violation under Article 2.1 without having to use the remainder of the already opened*

*A Sample (Article 2.1.2 of the WADC). This new possibility represents a significant extension of the evidentiary significance of the B-sample […]" (emphasis added)*[2]

61. Following the above, the Single Judge finds that Article 21.1.2 of the UCI ADR 2012 is applicable to the case at hand and, as such, this provision does not allow for a reanalyzed B-sample alone (whether split into two bottles or not) to form the basis of an ADRV for Presence.

62. As a result, UCI's contention that the Rider violated Article 21.1 of the UCI ADR (Presence) lacks legal foundation and shall be rejected.

**C. Use**

63. Article 21.2 of the UCI ADR 2012 reproduces Article 2.2 of the WADC 2009 and reads in relevant part as follows:

> *"21.2. Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method.*
>
> *21.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. 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.*
>
> *21.2.2 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed."*

64. Articles 23 to 28 of the UCI ADR 2012 reproduce Article 3.2 of the WADC 2009 and read in relevant part as follows:

> *"23. Facts related to anti-doping rule violations may be established by any reliable means, including admissions.*
>
> *24. WADA - accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder 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 License-Holder 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 or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*
>
> *25. Departures from any other International Standard, these Anti-Doping Rules, the Technical Documents set by the UCI or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."*

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2 Marjolaine Viret, Evidence in Anti-Doping at the Intersection of Science & Law, p. 392.

65. The Comments quoted in paragraph 59 above are again of significance and their content worth to be repeated in relevant part as follows:

> *"[Comment to Article 2.2: […] Use or Attempted Use may also be established by other reliable means such as […] analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]*
>
> *[…]*
>
> *[Comment to Article 3.2: For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 […] based on […] reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2 […]" (emphasis added)*

66. Articles 23.2.2 and 24.2 of the WADC 2009 provide as follows:

> *"23.2.2 The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change […]*
>
> *• Article 2 (Anti-Doping Rule Violations)*
> *• Article 3 (Proof of Doping)*
>
> *[…]*
>
> *24.2 The comments annotating various provisions of the Code shall be used to interpret the Code."*

67. Article 369 of the UCI ADR 2012 is entitled "Interpretation of Anti-Doping Rules" and reads as follows:

> *"These Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. However, these Anti-Doping Rules having been adopted pursuant to the applicable provisions of the Code they shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules." (emphasis added)*

68. Article 24 of the UCI ADR 2015 is also entitled "Interpretation of Anti-Doping Rules" and reads in relevant part as follows:

> *"24.2 The comments annotating various provisions of these Anti-Doping Rules shall be used to interpret these Anti-Doping Rules."*

69. It has remained undisputed that the UCI has the burden of proving that an ADRV has occurred, regardless of the version (2012 or 2015) of the UCI ADR.

70. In view of the fact that the legal framework ("any reliable means") *prima facie* allows UCI to try to factually establish an ADRV for Use based on retesting of a B-sample, the Single Judge will now turn to the Parties' submissions[3] on the merits.

### *i. The position of the Parties*

71. UCI submits in essence the following:
- The analysis by the Laboratory of the First Bottle showed the presence of EPO;
- The analysis by the Laboratory of the Second Bottle also showed the presence of EPO;
- The reanalysis of the Rider's samples has been conducted by the Cologne Laboratory, one of the most respected laboratories in anti-doping;
- The Laboratory is a WADA and ISO/IEC 17025:2005 accredited laboratory. The detection of EPO in urine samples is included in the scope of the Laboratory's accreditation;
- The Laboratory has (re)verified the findings concerning the Rider's samples following her suggestions that there were departures from the relevant regulations;
- The WADA-accredited Lausanne Laboratory (hereinafter referred to as "the Lausanne Laboratory") has provided an independent opinion on the analysis conducted by the Laboratory, concluding that the "*samples complied with the positive criteria as described in the TD2014EPO*".
- EPO could not have been detected in the Rider's urine without her having utilized, applied, ingested, injected or consumed that substance.

72. The Rider submits in essence the following:
- Article 21.2 of the UCI ADR 2012 is applicable to this case. The Comment to Article 2.2 of the UCI ADR 2015 cannot apply to this case retroactively because it was added only in 2015.
- If one could take "reliable analytical data" that was found inadequate to declare someone guilty for Presence and simply use them successfully when proving an ADRV under Article 21.2 (Use), this would "via redundancy lead to the extinction of the provision of" Article 21.1 (Presence). Such extension of the "ratio" of Article 21.2 by means of a Comment is not appropriate nor well founded because it is not proportional to the legitimate goal of the legislator in 2015. The sense, ratio and applicability of Article 21.2 is to be found in situations where the evidence consists of witnesses, surveillance, admission or confession, and not by the laboratory results that were capable to satisfy all the requirements for Presence.
- The results of the Laboratory tests are to be treated – and are in fact – a "false positive", which implies that the Rider has not used the prohibited substance since it had not entered her body. The Rider refers to the expert opinion of Prof. Čurin and the arguments mentioned therein.

### *ii. The position of the Tribunal*

73. The Rider has gone at significant lengths in her attempt to show that the sole basis of the prosecution under Article 21.2 is the Comment and that such Comment is not applicable to the case at hand. The Single Judge disagrees with the Rider's argument.

74. From a factual point of view, the Rider's position is based on the premise that the "*Comment to Article 2.2 did not exist in 2012; it became valid in 2015 and is therefore not applicable to the*

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[3] The Single Judge has reviewed all legal and factual arguments of the Parties, whether expressly mentioned in the Judgment or not.

*present case*". The Single Judge notes that this contention is wrong. Both Comments existed under Articles 2.2 and 3.2 respectively of the WADC 2009 and they were repeated *verbatim* under the same Articles in the WADC 2015. At the level of UCI ADR, the UCI being a Signatory to the WADC, it was obliged to include a reference to the Comments in its rules and it did so by virtue of Article 369 of the UCI ADR 2012 whereby the Comments may be used for the purposes of interpretation. In the UCI ADR 2015 version, the UCI decided to incorporate the Comments into the text, without this bringing any change to their legal status as interpretation tools by virtue of Article 24.2 of the UCI ADR 2015. Thus, the Comments have had the same legal use under both the UCI ADR 2012 and 2015. For the sake of good order, the Single Judge finds that Article 369 of the UCI ADR 2012 is applicable.

75. From a legal perspective, the Single Judge notes that the term "any reliable means" is not supposed to be limited in any way through the examples contained in the Comments and there is no indication whatsoever that these "means" should exclude analytical data. The Single Judge does not share the opinion that the ratio of Article 21.1 and 21.2 does not permit UCI to use evidence that could (but are insufficient to) prove Presence in order to prove Use. These are two different ADRVs and the task of any anti-doping organization like the UCI is to test the evidence in its possession against the objective and – where required, subjective – requirements of each ADRV definition contained in the WADC and the UCI ADR. The fact that neither Presence nor Use requires the proof of intent or fault on the part of the Rider does not convert these ADRVs into identical violations so that, when Presence is not proven, Use should be also automatically excluded. This is all the more true for substances prohibited out-of-competition, like EPO: the rules are designed to give UCI (and any other anti-doping organization) the flexibility to prove that a Rider has used EPO even in cases where the analytical data is insufficient to support that EPO is present in the Rider's body. Such is the example of longitudinal data, as mentioned above in the Pechstein case, or other data that could convince a hearing panel to its comfortable satisfaction that an athlete used a prohibited substance or method.

76. Therefore, the Rider's argument regarding the absence of legal basis for the Use is dismissed.

77. The main question is, thus, whether the evidence presented by the UCI is reliable and can prove to the comfortable satisfaction of the Tribunal that the Rider used EPO.

78. Articles 120 and 200 of the UCI ADR read as follows:

> *"120. Samples may be collected and analyzed under these Anti-Doping Rules:*
> *1) To detect the Presence <u>and/or Use</u> of a Prohibited Substance or Prohibited Method; and; 2) For profiling relevant parameters in a Rider's urine, blood or other matrix, including DNA or genome profiling, for anti-doping purposes ("athlete passport"), including as a means for establishing the Use of a Prohibited Substance or Prohibited Method; and;*
> *3) To detect substances as may be directed by WADA pursuant to the Monitoring Program described in article 4.5 of the Code; and;*
> *4) For screening purposes.*
> *No Sample collected under these Anti-Doping Rules may be used for any other purpose without the Rider's written consent*
>
> *[…]*
>
> *200. <u>Any Sample may be reanalyzed</u> for the purpose described in article 120 at any time exclusively at the direction of UCI or WADA." (emphasis added)*

79. The relevant provisions of the WADA International Standard for Laboratories ("ISL") 2012 and 2015 provide as follows:

Article 5.2.2.12.1.2 of the ISL 2012

> *"Cases in which no urine remains of "A" Sample for possible re-testing.*
> *The opportunity shall be offered to the Athlete, or to the representative of the Athlete to be present at the opening of the sealed "B" bottle. If the Athlete declines to be present or the Athlete's representative does not respond to the invitation or if the Athlete or the Athlete's representative continuously claim not to be available on the date of the opening, despite reasonable attempts by the Laboratory and Testing Authority to accommodate their dates, the Laboratory shall appoint an independent witness to verify the opening of the sealed "B" Sample. At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to IST provision 6.3.4) in the presence of the Athlete or the Athlete's representative(s) or an independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The Athlete or the Athlete's representative will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, a confirmation shall be undertaken, if requested by the Athlete or his/her representative, using the second sealed bottle."*

Article 5.2.2.12.10 of the ISL 2015

> *"Further Analysis on long-term stored Samples shall proceed as follows:*
> *• At the discretion of the Testing Authority, the "A" Sample may not be used or it may be used for initial testing (as described in Article 5.2.4.2) only, or for both initial testing and confirmation (as described in Article 5.2.4.3.1). Where confirmation is not completed in the A Sample the Laboratory, at the direction of the Testing Authority shall appoint an independent witness to verify the opening and splitting of the sealed "B" Sample (which shall occur without requirement that the Athlete be notified or present) and then proceed to analysis based on the "B" Sample which has been split into 2 bottles.*
> *• At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to ISTI provision 6.3.4) in the presence of the independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The independent witness will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, the Testing Authority shall use reasonable efforts to notify the Athlete as provided in Article 7.3 of the Code. A confirmation shall be undertaken, using the second sealed bottle, if requested by the Athlete or his/her representative, or if the Testing Authority's reasonable efforts to notify the Athlete have not been successful or at the Testing Authority's election. If the Athlete or his/her representative is not present for the confirmation, then the Laboratory shall appoint an independent witness to observe the opening of the second sealed bottle."*

80. There is no dispute among the parties regarding the applicable edition of the ISL and indeed no discrepancy between the two documents has been brought to the attention of the Single Judge as relevant in this dispute. It suffices to note, thus, that both editions of the ISL contain specific instructions on how laboratories shall perform reanalysis on a B-sample when there is not sufficient urine left in the A-sample.

81. UCI submits that the results of the First Bottle and Second Bottle analyses are reliable and that no departures from the ISL or other applicable anti-doping rule or policy have occurred, at least not any departures that could have reasonably caused the adverse analytical finding.

82. The Rider alleges that the Laboratory committed departures from the applicable rules, International Standards and Technical Documents which could have reasonably caused the adverse analytical finding. More specifically, the Rider makes reference to the expert reports produced by Prof. Čurin and states in essence the following:

a) *[…] sample B was already pipetted from the flask and used before my arrival for the first B-sample analysis at the end of August 2015. […] a precipitate was on the bottom of the flask which disabled a proper homogenisation of the urine and consequently the preparation of adequate samples for the analyses. The proper analysis was not possible, since EPO could also have been in precipitates, not only in soluble states, which was a prerequisite for the analysis;*

b) *B-sample was thawn more times than necessary […]. It is known that freezing/thawing cycles influence the quality of the sample and consequently the immune reaction and the final results of the analyses. Controls were not treated under the same conditions;*

c) *The antibodies bind endogenous EPO as well as rEPO. It is important how this binding occurs and which antibodies are used. […] The personnel was not able to tell me which antibodies were used (monoclonal, polyclonal) and their properties, since this was "producer's business secret";*

d) *After blotting of the proteins to the membrane, DTT (reducing agent) was used and they were not able to explain to me why (this is not a usual step in blotting procedures). DTT denatures proteins and thus changes the epitopes to which antibodies bind. Consequently, the results of immunodetection can be influenced significantly (see also the paragraph above);*

e) *The same expert is developing software and giving second opinion, which is a prerequisite to report AAF according to TD2014EPO (Dr. C. Reichel, to whom I should address my questions regarding GASepo). Raises a question of conflict of interests. GASepo was used in all the analysis (see Documentation packages A and B). Besides, the discussion with both experts during B-sample analysis in the laboratory in Cologne was about GASepo only, they did not mention "the second, independent software". According to these facts, GASepo was the unique software used;*

f) *The results must be interpreted under the same conditions, unprocessed. The technique obviously does not allow the analyses and the interpretation of the results on the basis of raw data;*

g) *The processing of the results (which are the basis for the interpretation of results and consequently AAF) significantly changed the original picture.*

83. Based on a first report provided by the Laboratory and on a second report provided by the Lausanne Antidoping Laboratory ("LAD") as an independent report, the UCI answered as follows:

- *The opening of the B-sample which Prof. Čurin is referring to was part of the sample splitting procedure conducted on 24.11.2015;*

- *From the Documentation package, only one thaw-freeze cycle was applied to B-sample. The B sample was thawed and refrozen once in august 2015 during the re-*

*analysis procedure. This is one extra thawing process compared to a B analysis without a sample splitting procedure;*

- *All details about the rEPO procedure is reported in scientific publication and is not the role of technicians to explain procedure to athlete's expert;*

- *It is stipulated in the TD2014EPO that a second opinion from a WADA recognized expert in EPO analysis field must give its opinion before reporting AAF result;*

- *Dr. Günter Gmeiner of the Seibersdorf laboratory has confirmed that the Cologne laboratory in fact uses two different software programs in EPO testing. Thus, when a second opinion is given on an AAF issued by the Cologne laboratory, it is based on images obtained both from the GASepo software and the second, independent software. Given that the Rider's very objection is based on the assumption of GASepo being the unique software used, it is clearly without merit;*

- *The mere participation – with multiple other experts – in the development of software is manifestly insufficient to give rise to a conflict of interests;*

- *The GASepo software merely produces images in the best format to be interpreted by the WADA laboratory experts. The GASepo software does not interpret the data nor contain an algorithm upon which an AAF could be generated – rather, in order to assert an AAF expert interpretation is required.*

- *The "final picture" is obtained from one exposition time. A difference in background results only from contrast differences between lanes of the same tiff-file (raw data). Gel picture presented in documentation package is only from one exposition time because GasEPO analysis is performed.*

84. In addition to the above, Prof. Čurin submitted that 11 "other violations" of the ISO 17025 have occurred, as follows:

- *"ISO 17025 4.1.5: <u>The laboratory shall have</u> arrangements to ensure that its management and personnel are free from any undue internal and external commercial, financial and other pressures and influences that may adversely affect the quality of the work. (Comments of prof. Schänzer to the results, WADA and TD2014EPO.)*
- *ISO 17025 4.6.1: <u>The laboratory shall have</u> a policy and procedure(s) for the selection and purchasing of services and supplies it uses that affect the quality and of the tests and/or calibrations, (The personnel did not know the composition of the crucial material; they claimed that this was a "business secret" of the producer - it was thus impossible for them to judge the quality.)*
- *ISO 17025 4.6.2: <u>The laboratory shall ensure</u> that purchased supplies and reagents and consumable materials that affect the quality of tests and/or calibrations are not used until they have been inspected... (How can laboratory fulfill this standard if they do not know the composition and thus they do not know what to inspect?)*
- *ISO 17025 5.2.1: <u>The laboratory management shall ensure</u> the competence of all who operate specific equipment, perform tests and/or calibrations, evaluate results, and sign test reports and calibration certificates. … (The personnel was not able to respond to my questions.)*

- *ISO 17025 5.3.5: Measures shall be taken to ensure good housekeeping in the laboratory. (The laboratory was not maintained according to the good practice, they explained to me that they will soon move into a new building opposite to the institute.)*
- *ISO 17025 5.4.4: Non-standard methods: … The method developed shall have been validated appropriately before use. f) Reference standards and reference materials required. (How can the laboratory assure reference standards if the volume of urine, which is used for the negative control as well as a diluent for the positive controls, is limited and changes from person to person.)*
- *ISO 17025 5.4.5.2: The laboratory shall validate non-standard methods, laboratory-designed/developed methods,.... Inter-laboratory comparisons. (How, if every laboratory has different methods and even labs in Köln and Siebersdorf have differences in SAR-PAGE according to P. Rheinen.)*
- *ISO 17025 5.7.3: The laboratory shall have procedures for recording relevant data and operations relating to sampling that forms part of the testing or calibration that is undertaken. These records shall include sampling procedure used,…,environmental conditions. … (Data is missing for the transportation and storage of the sample.)*
- *ISO 17025 5.8.3: Upon receipt of the test or calibration item, abnormalities or departures from normal or specified conditions, as described in the test or calibration method, shall be reported. (There was no data about the transportation conditions.)*
- *ISO 17025 5.10.3.2: e) details of any environmental conditions during sampling that may affect the interpretation of the test results. (Again, no data available.)"*

85. As stated in paragraph 65 above, since the Laboratory is WADA-accredited, the Rider has the burden of showing on a balance of probabilities that
    - there was a departure from the ISL or any other International Standard or anti-doping rule or policy; and
    - such departure could have reasonably caused the adverse analytical finding.

86. In this respect, the CAS Panel in CAS 2013/A/3112 (WADA v. Lada Chernova & RUSADA) noted that

> *"[…] a mere reference to a departure from the ISL [is] 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."*

87. This view is further corroborated by and specified in relevant doctrine:

> *"The requirements applied by CAS panels for demonstrating the existence of a procedural departure by the laboratory are stringent, perhaps even more so than for the Testing segment.*
>
> · *As with the Testing segment of the process, the Athlete must adduce evidence of one or more specific departure(s) from the ISL, not just allege a potential or hypothetical error within the analysis process, or claim that 'something could potentially be wrong'. Athletes cannot limit themselves to general assertions whereby the analysis relies on a very complex method.*

- *The departure must constitute a breach of mandatory requirements. Each provision of the ISL must be assessed to determine its legal status: some provisions are of a mandatory nature, while others are mere recommendations. When a task may, based on the language of the ISL, be satisfied in a number of ways and the rules leave discretion to individual laboratories to fashion their compliance, it is not sufficient to demonstrate that there may be a better standard than the one used in the particular case to proof breach of adherence to the ISL."* [4]

88. Against this background, the Single Judge will now turn to the alleged departures as brought forward by the Rider.

89. First, the Single Judge notes that the alleged departures from the ISO 17025 are *ab initio* insufficient to rebut the presumption afforded to the Laboratory by virtue of Article 24 of the UCI ADR 2012. Although ISO 17025 is expressly referenced in Article 5.0 of the ISL 2012, the allegations at hand are general ("measures shall be taken…", "the laboratory shall have a policy and procedures" etc.). Such general remarks would be very important in the framework of reviewing whether the analytical data is reliable enough to support an ADRV for Use, if the Laboratory were neither WADA- nor ISO-accredited. However, the evidence on file clearly establishes that the Laboratory is in possession of both accreditations. Thus, if at all, these alleged departures are an issue for WADA to address with the Laboratory in respect of its WADA-accreditation. To the extent that Prof. Čurin tried to connect her general remarks with specific alleged actions or omissions of the Laboratory, she repeated observations that are already listed in points (a) to (g) above, and which will be dealt with in the paragraphs below. Thus, the ISO-related arguments presented by the Rider shall be dismissed.

90. Second, the Single Judge notes that the Rider and her expert have not made any specific reference to a provision of the ISL or other International Standard, anti-doping rule or policy that has been allegedly violated (or: "departed from") by the Laboratory. This presents a problem of legal foundation for the Rider's arguments. Although the principle of *iura novit curia* applies, the arguments under points (c), (d) and (f) above manifestly lack legal basis. Indeed, there is no rule – and none was pointed to by the Rider – obliging the Laboratory personnel to explain their procedures to the Rider's expert or mandating their scientific validity. This is precisely the *raison d'être* of the presumption that WADA-accredited laboratories benefit from: their procedures do not need to be certified every time an athlete challenges an adverse analytical finding. Therefore, the fact that Prof. Čurin did not receive any or satisfactory answers to her questions or may not be convinced about the scientific validity of methods and techniques implemented by the Laboratory does not constitute a departure from any applicable standards and, as such, the related arguments of the Rider under (c), (d) and (f) above must fail.

91. Third, the Single Judge notes that Prof. Čurin confirmed in writing that the Second Bottle was correctly closed and sealed before the analyses of 24 November 2015 (cf. Documentation Package sample B 2692211, page 5, produced by the UCI as Exhibit 31.1). The allegation regarding the fact that the Second Bottle was opened before the arrival of the Rider's appointed expert must be dismissed since Prof. Čurin was referring to the opening of the Rider's B-sample for the purpose of the splitting procedure which took place on 19/20 August 2015 and to which the Rider was invited but chose not to appear (para. 7 above). As regards the question of the "precipitate", the Single Judge notes that it does not constitute a departure from the applicable standards and, in any event, the Rider failed to prove on a balance of

[4] M. Viret, op.cit., p.276 with references to numerous CAS awards.

probability that the precipitate could have reasonably caused the AAF. Consequently, the Rider's allegation under (a) above must fail entirely.

92. Fourth, concerning the allegation that the Second Bottle has been *"thawn and frozen a few times"* under (b) above, the Single Judge notes that the content of the Second Bottle has been frozen only twice: once in March 2012 and a second time after the splitting of the B-sample in August 2015 (cf. Documentation Package sample B 2692211, page 14, produced by the UCI as Exhibit 31.1). This was inevitable due to the splitting procedure of the Rider's B-sample and does not constitute a departure from the applicable standards since samples must be retained frozen (Article 5.2.2.7 of the ISL2012 and 2015). The Rider's allegation that *"freezing and thawing may influence the quality of the sample"* is not *per se* a departure from the ISL or other applicable rules and the Rider failed to submit any scientific evidence showing that freezing a sample twice can reasonably cause the Laboratory to falsely declare a sample as positive to EPO.

93. Fifth, concerning the alleged conflict of interests under (e) above, the Single Judge notes that the Rider's allegation is purely hypothetical and the Rider failed to explain how such alleged conflict of interests could have caused the presence of EPO in the Rider's sample. In addition, the argument that a person involved in the development of a scientific method is somehow not allowed to be (ever) involved in the implementation of such method or in the review of how his peers implement it, is not convincing and has no legal or scientific basis. In any event, the Single Judge finds comfort in the fact that no less than three (3) WADA-accredited laboratories have reviewed the documentation and found it consistent with a valid adverse analytical finding for EPO. This fact alone eliminates the risks that a hypothetical conflict of interest could have brought into play in the matter at hand.

94. Sixth, as regards the processing of the results under (g) above, the Rider's claim that the final results may have been *"arranged"* is merely speculative and does not rely on scientific evidence which could prove that a departure from the applicable standards during the processing of the results took place or that it could have reasonably caused the AAF. Indeed, the evidence before the Tribunal suggests that the software used does not interpret the data but merely produces data that the laboratory experts need to evaluate. Thus, the Single Judge cannot follow the Rider's argument that some kind of alteration, manipulation or "arrangement" of the results took place in this case.

95. Finally, the Rider claims that *"the set of circumstances […] create a situation in which the final laboratory result is probably false, but obviously at least doubtful and should therefore be proclaimed as inadmissible due to all faults and irregularities presented"*. In other words, the Rider claims that the accumulation of the alleged deviation may have caused "false positive" results. This argument must be rejected as the alleged deviations cannot be examined collectively and may not be combined unless they are interconnected and reach "*[…] a level which may call into question the entire doping control process*" (CAS 2001/A/337 B. / FINA, award of 22 March 2002, para. 68), which is not the case as explained above. Lastly, as mentioned at the beginning of the section on alleged Laboratory departures, the fact that an expert finds the results "at least doubtful" is not a valid defence under the applicable legal framework.

96. Therefore, the Rider's arguments in relation to the credibility of the Laboratory's procedures and results are rejected.

97. Moreover, the Single Judge observes that the Rider did not provide any other explanation whatsoever for the analytical results and only focused on discarding them by challenging their

credibility. Besides the "false positive" defence, which has been dismissed, there was no other or alternative argument in the direction of justifying the Laboratory findings of EPO in her body.

98. In view of the solid factual basis of the allegation based on the Laboratory's findings, and faced with the lack of any plausible explanation by the Rider with respect to the detection of EPO in her sample, the Single Judge is comfortably satisfied that the analytical results are compatible with the use of EPO by the Rider.

99. Consequently, the Single Judge holds that the Rider has violated Article 21.2 of the UCI ADR 2012 by using EPO.

## B. Consequences of the ADRV

### a. Period of Ineligibility

100. Article 293 of the UCI ADR 2012 provides as follows :

> *"The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method} or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be*
>
> *2 (two) years' Ineligibility*
>
> *unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met." (emphasis added)*

101. The Single Judge notes that under both the 2012 and the 2015 WADA Prohibited Lists EPO is a non-specified substance and that the Rider has not made any submissions in relation to a possible reduction of the otherwise applicable 2-year period of ineligibility.

102. Therefore, a period of ineligibility of 2 years shall be imposed on the Rider.

### b. Commencement of Period of Ineligibility

103. Regarding the commencement of said period of ineligibility, Articles 314 to 319 of the UCI ADR 2012 provide in relevant part as follows:

> *"Commencement of Ineligibility Period*
>
> *314. Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing panel decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*
>
> *Delays not attributable to the License-Holder*
>
> *315. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.*
>
> *[…]*

*Credit for Provisional Suspension*

*317. If a Provisional Suspension or a provisional measure pursuant to articles 235 to 245 is imposed and respected by the License-Holder, then the License-Holder shall receive a credit for such period of Provisional Suspension or provisional measure against any period of Ineligibility which may ultimately be imposed."*

104. UCI submits that the Rider should receive credit for the period of provisional suspension and thus requests that the starting date shall be 18 September 2015. On the other hand, the Rider requests that the sanction be back-dated so as to start as early as sample collection, i.e. 27 March 2012, considering that the retesting took more than 3 years later and this time-window should qualify as a "substantial delay not attributable" to her. The UCI disagrees and submits that the start date ought to be "no earlier than the date the athlete was advised that her sample would be reanalyzed".

105. The Single Judge finds that deviations from the principle of Article 314 shall be interpreted in a narrow manner, in order to guarantee a fair and harmonious application of the UCI ADR across all disciplines and events of the UCI.

106. The delays in the hearing process, which are not significant given the complexity of the matter, have already been taken into account since UCI agrees to commence the period of ineligibility on 18 September 2015.

107. The situation as regards the delay in other aspects of Doping Control is somewhat exceptional in this case because the Rider's sample was retested. The period that elapsed between sample collection (March 2012) and provisional suspension (September 2015) is very long and it is affected by parameters beyond the Rider's control, such as the change in the Technical Document for EPO on 1 September 2014 and UCI's subsequent decision to have the Rider's sample retested in the summer of 2015. However, the Single Judge notes that the Rider was not adversely affected since she continued to compete and earn financial returns for her performance. Thus, the Single Judge does not agree with the Rider's request that the period of ineligibility start in March 2012. In the absence of any other relevant delay, the Single Judge holds that the period of ineligibility shall commence on 18 September 2015 and expire on 17 September 2017.

**c. Disqualification**

108. The doping control which gave rise to the results management process and – after retesting – provided the evidence supporting the ADRV for Use, was out-of-competition. Therefore, Articles 288 to 292 of the UCI ADR 2012 relating to ADRVs committed in-competition or in connection with an event, do not apply to this case.

109. Article 313 of the UCI ADR 2012 provides as follows:

*"Disqualification of Results in Competitions subsequent to Anti-Doping Rule Violation*
*In addition to the automatic Disqualification of the results in the Competition pursuant to article 288 and except as provided in articles 289 to 292, all other competitive results 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.*

*Comment:*

*1) it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation.*
*2) an Anti-Doping Rule Violation under article 21.4 shall be deemed to have occurred on the date of the third Whereabouts Failure."*

110. UCI requests that all results of the Rider between 27 March 2012 and 18 September 2015 be disqualified. The Rider objects by stating that such a long disqualification period would even exceed the 2-year period of ineligibility.

111. The Single Judge understands that disqualifying the results of the Rider between March 2012 and September 2015, combined with a 2-year period of ineligibility starting in September 2015 (as decided above) would effectively amount into the Rider having no sporting results for a 5.5-year period. Such decision cannot be taken lightly and the Single Judge needs to review whether the element of "fairness", as embedded in Article 313 of the UCI ADR 2012, can have an effect favourable to the Rider.

112. The comment to Article 313 provides guidance: "*it may be considered as unfair to disqualify the results which were not likely to have been affected*" by the ADRV. CAS jurisprudence also points to the severity of the ADRV and its impact on the subsequent results (CAS 2013/A/3274, para.88) as part of the considerations of fairness by the hearing panel. The Single Judge considers as relevant, in this respect, also the 11-month period that elapsed between the publication of TD2014EPO and the retesting of the sample, and the fact that the Rider was tested no less than 18 times in the period 10 June 2012 – 6 August 2015 (Rider's supplementary explanations, UCI Exhibit 32, page 10) without any sample giving rise to an ADRV.

113. Considering all the circumstances of this case and exercising his discretion under Article 313 of the UCI ADR 2012, the Single Judge finds that the Athlete's results from 27 March 2012 until 31 December 2012 shall be disqualified. The Rider's results in the years 2013, 2014, and between 1 January to 17 September 2015, shall stand.

**d. Mandatory Fine and Costs**

114. Article 326 of the UCI ADR 2012 provides as follows:

*"In addition to the sanctions provided for under articles 293 to 313 anti-doping violations shall be sanctioned with a fine as follows.*
*1. The fine is obligatory for a License-Holder exercising a professional activity in cycling and in any event for members of a team registered with the UCI.*
*a) Where a period of Ineligibility of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the License-Holder normally was entitled to for the whole year in which the anti-doping violation occurred. The amount of this income shall be as assessed by the UCI, provid¬ed that the net income shall be assessed at 70 (seventy) % of the corresponding gross income. The License-Holder concerned shall have the burden of proof to the contrary. For the purpose of the implementation of this article the UCI shall have the right to receive a copy of the complete contracts of the License-Holder from the LicenseHolder or any person or organization maintaining the contracts, for example the auditor appointed by the UCI and National Federation. If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half. Comment: 1. income from cycling will include for example the income from image rights; 2. suspension of part of a period of Ineligibility of two years or more has no influence on the application of the clause above.*

*[…]*

*2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.*
*3. In other cases than those under paragraphs 1 and 2 the imposition of a fine is optional.*
*4. In observance of paragraphs 1 and 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned.*
*5. Except where paragraph 1a) is applied, no fine may exceed CHF 1,500,000.*

*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.''*

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

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

*10.10.1.1 A fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an 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 or entity maintaining such contracts.*

*[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]."*

*(emphasis added)*

116. The Single Judge notes that Article 10.10 of the UCI ADR 2015 shall be applicable as *lex mitior* because it allows the Tribunal greater flexibility than Article 326 of the UCI ADR 2012 when it comes to the possibility of reducing the fine.

117. In the present matter, were the UCI ADR 2015 to be applicable in their entirety, the ADRV would be "intentional" under Article 10.2.1 UCI ADR 2015 because it involves a non-specified prohibited substance and the Rider did not even attempt to explain her lack of (significant) fault or negligence.

118. As a consequence and in accordance with Article 10.10.1.1 UCI ADR 2015, the ADRV shall be sanctioned with a fine.

119. With respect to the calculation of the fine, the Single Judge notes the Rider's argument that the amount requested by the UCI ( , i.e. 70% of the Rider's alleged annual gross income in 2012 which equals ) has been *"wrongly calculated"* because in 2012 the Rider *"received in total less than "*.

120. However, the Single Judge notes that Article 10.10.1.1 UCI ADR 2015 defines the fine as an amount 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. As such, regardless of the fact that the Rider may have received a different amount, the Rider's 2012 relevant annual income shall be the contractually agreed upon income that the Rider was entitled to receive from her team Felt Oetztal X-Bionic.

121. Nevertheless, the Single Judge notes the particular circumstances of this case, as explained above (para. 107), and also that the Rider's annual income has been significantly reduced in the 3.5 years that elapsed since the sample was collected and thus her financial situation has deteriorated. Indeed, for the year 2016, the Rider is entitled to an annual gross income of which represents a difference of almost 40% from the Rider's 2012 annual income. At the same time, the Single Judge is of the opinion that impact of such financial development for the Rider may not be too significant on the calculation of the fine, because the rule primarily links the monetary sanction to the income generated at the time the ADRV was committed.

122. Considering these factors and in accordance with Article 10.10.1.1 (2) and (3) UCI ADR 2015, the Single Judge holds that the fine shall be equal to 50 % of the Rider's 2012 relevant annual income, i.e .

123. Furthermore, Article 10.10.2 UCI ADR 2015 provides as follows:

*"10.10.2 Liability for Costs of the Procedures*

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

1. *The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*
2. *The cost of the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the UCI Anti-Doping Tribunal.*
3. *The cost of the B Sample analysis, where applicable.*

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

*The National Federation of the Rider or other Person shall be jointly and severally liable for its payment to the UCI."*

124. The Single Judge notes, for the sake of completeness, that Article 275 of the UCI ADR 2012 is virtually identical with Article 10.10.2 of the UCI ADR 2015.

125. In the circumstances of this case, the Single Judge finds that the Rider shall reimburse UCI the amounts of:
    - CHF 2,500 for costs of the results management (Article 10.10.2 (2));
    - CHF 1,500 for costs of the Out-of-Competition Testing (Article 10.10.2 (4));
    - EUR 2,100 for costs of the Second Bottle analysis, which she requested (UCI Exhibit 41);
    - EUR 1,900 for the costs of the two documentation packages, which she requested (UCI Exhibit 42.1 and 42.2).

## VI. COSTS OF THE PROCEEDINGS

126. Article 28 of the 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 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."*

127. Although the Rider advanced a multitude of scientific and other arguments which mostly failed, she collaborated closely in these expedited proceedings and waived her right to a hearing thus limiting the Tribunal's costs. Therefore, the Single Judge finds no reason to deviate from the principle in Article 28 (2) of the ADT-Rules and the present Judgment is rendered without costs.

128. Regarding the (legal) fees and expenses of the prevailing party, the UCI requested a contribution for its expenses in connection with expert evidence as well as legal costs.

129. The Single Judge notes that the UCI managed this case almost entirely with in-house counsel and the involvement of an external counsel was limited towards the end of these proceedings. Also, no hearing took place in this matter. With respect to other expenses, UCI indeed sought recourse to the expertise of the Lausanne laboratory in order to review the Rider's technical

arguments and the responses of the Laboratory, but no invoices or other proof of related expenses has been filed with the Tribunal.

130. Therefore, the Single Judge decides that each party shall bear its own costs in connection with these proceedings.

## VII. RULING

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

**1. Ms. Blaža Klemenčič has committed an Anti-Doping Rule Violation (Article 21.2 UCI ADR 2012).**

**2. A period of ineligibility of two (2) years, commencing on 18 September 2015, is imposed on Ms. Blaža Klemenčič.**

**3. The results obtained by Ms. Blaža Klemenčič from 27 March 2012 until 31 December 2012 are disqualified.**

**4. Ms. Blaža Klemenčič is ordered to pay to the UCI the amount of [redacted] as monetary fine.**

**5. Ms. Blaža Klemenčič is ordered to pay to the UCI:**
- **a) the amount of CHF 2,500 for costs of the results management;**
- **b) the amount of CHF 1,500 for costs of the Out-of-Competition Testing;**
- **c) the amount of EUR 2,100 for costs of the Second Bottle analysis; and**
- **d) the amount of EUR 1,900 for costs of the two documentation packages.**

**6. All other and/or further reaching requests are dismissed.**

**7. This Judgment is final and will be notified to:**
- **a) Ms. Blaža Klemenčič;**
- **b) the Slovenian National Anti-Doping Agency;**
- **c) UCI; and**
- **d) WADA.**

132. This Judgment may be appealed before the CAS pursuant to Article 30 (2) of the 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 of the UCI ADR.

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**Andreas Zagklis**
**Single Judge**