Arbitration CAS 98/212 Union Cycliste Internationale (UCI) / M. & Federazione Ciclistica Italiana (FCI), award of 24 February 1999

Panel: Mr. Stephan Netzle (Switzerland), President; Mr. Olivier Carrard (Switzerland); Mr. Luc Argand (Switzerland)

Cycling
Doping (nandrolone)
Determination of the competent appeals tribunal
Endogenous substance
"Effective" sanction
Probation

1. **Quantities up to 2 ng/ml are not considered to constitute a doping offence. The laboratories do normally not report concentrations below 2 ng/ml to the Federation. There is uncertainty among experts as to the maximum concentration of Nandrolone produced by a human body. Consequently, the mere finding of Nandrolone in a concentration between 2 and 5 ng/ml may constitute a doping offence, but requires further investigations in order to confirm the result of the analysis. However, within the "grey zone" the likelihood that Nandrolone is produced endogenously, is decreasing exponentially. The probability of an endogenous production of Nandrolone in quantities beyond 5 ng/ml was held to be very unlikely. Therefore quantities beyond 5 ng/ml are very likely to be confirmed by further investigations and may be regarded as sufficient evidence to constitute a doping offence.**

2. **Pursuant to the UCI Rules, a sanction, in order to be effective, must be served during the period of normal activity. As a consequence, a suspension falling to a considerable extent within a "dead period", which means a period where the athlete does usually not compete, cannot be regarded as an effective sanction.**

In April 1998 M. participated in the "Settimana Bergamasca", an international cycling event on the UCI's International Calendar for elite riders. After the stage of 12 April, M. was required to submit to a doping test pursuant to the rules of the UCI's Antidoping Examination Regulations (AER). Upon analysis of the A-sample, the "Laboratorio Antidoping" of the "Federazione Medico Sportiva Italiana" in Rome reported to the UCI Antidoping Commission in Lausanne on 29 April 1998, that the sample was found to contain Norandrosterone, in a concentration evaluated about 6 ng/ml.

On 5 May 1998, the UCI Antidoping Commission, acting in accordance with Article 59 AER, notified the FCI that M. was tested positive. The UCI further stated:

"*Should M. not wish to avail himself of this right, you will have to initiate the procedure provided for in the Articles 60 to 65 of the same Regulations. We would remind you that, under the said Articles, you have to keep us informed of all steps you take by sending us copies. Moreover, we draw your attention to the fact that - according to Article 82 para. 3 - if there is no final decision within the deadlines (see Article 82 para. 1), the defendant shall be automatically suspended until the date of the decision, unless an extension of the period is granted by the Antidoping Commission*".

M. requested a counter-analysis. The analysis of the B-sample took place on 18 June 1998 at the "Laboratorio Antidoping" of the "Federazione Medico Sportiva Italiana" in Rome. The result of the counter-analysis was positive. On 19 June 1998, the "Laboratorio Antidoping" notified the UCI that the result of the analysis of the B-sample confirmed the result of the A-sample. The B-sample was found to contain both, Norandrosterone and Noretiocholanolone. Norandrosterone was identified in a concentration of 5 ng/ml.

On 22 June 1998, the UCI Antidoping Commission informed the FCI about the result of the counter-analysis and asked the FCI to proceed according to Art. 69 ff. AER.

Subsequently M.'s case was brought before the competent body of the FCI, the "Commissione Disciplinare" of the "Lega Ciclismo Professionistico", which rendered its verdict on 31 August 1998. On 3 September 1998, the FCI sent the verdict to the UCI. The "Commissione Disciplinare" sentenced M. to a suspension of six months and to a fine of CHF 2'000.--. However, the "Commissione Disciplinare" did not specify the starting or ending of the suspension. On 10 September 1998, the verdict was published in the official journal of the FCI, called "Tutto Ciclismo".

On 16 September 1998, M. appealed against the decision of the "Commissione Disciplinare" to the "Commissione d'Appello Federale della Federazione Ciclistica Italiana" (CAF). On 24 September 1998, M. appealed against the same decision to the Court of Arbitration of Sport (CAS). In either case M. asked "to reform and annul the FCI's decision" and "to absolve" him from any challenge.

On 2 October 1998, the UCI appealed against the decision of the "Commissione Disciplinare" to the CAS. In its Statement of Appeal, the UCI pleaded that the sanction was not adequate. Consequently, the UCI requested the CAS to impose a more decisive sanction both with regard to the suspension and to the fine. The UCI's statement of appeal was forwarded to M. and to the FCI on 7 October 1998.

On 5 October 1998, M. withdrew his own appeal to the CAS, dated 24 September 1998.

On 12 October 1998, the UCI substantiated its statement of appeal. This brief was forwarded to M. and to the FCI on 13 October 1998. The UCI requested an effective suspension of M. for at least six months. The UCI further pleaded for an increase of the fine and required to hold M. liable for costs. Finally, the UCI asked the CAS to declare the appeal before the CAF inadmissible.

On 2 November 1998, M. delivered his Statement of Defence. At the same time, M. "cross-appealed" both against the decision taken by the "Commissione Disciplinare" on 31 August 1998,

and against the interlocutory order taken by the CAF. M. asked the CAS "to reject and to declare inadmissible the UCI's appeal". In the alternative, M. requested "to reform the order of the CAF", "to reform the decision taken by the FCI", "to absolve him from any challenge", "to reduce the suspension and to grant probation". The costs, finally, were to be paid either by the UCI or the FCI.

On 30 November 1998, the UCI submitted its "Answer to Cross Appeal". The UCI basically contested the admissibility of a "cross appeal" and, in the alternative, maintained that the "cross appeal" was unfounded. Moreover, the UCI pleaded for the disqualification of M. from the "Settimana Bergamasca".

During the hearing, the Panel gave the parties the opportunity to complete the facts. On behalf of the UCI, there were no further comments with regard to the facts. M.'s legal counsel, however, took the opportunity to submit documents indicating that the proceedings before the CAF were still pending and thus concluded that the appeal to the CAS was inadmissible. In the alternative, M.'s counsel clarified that the correct starting date for any suspension should be 19 June 1998, i.e. the day after the result of the analysis of the B-sample was established.

Summarizing the hearing, the UCI sustained that any finding of Norandrosterone in a concentration higher than 2 ng/ml constituted a doping offence. M., on the other hand, brought forward that there was still uncertainty among experts as to the maximum concentration of Nandrolone produced by the human body. M. therefore concluded that a doping offence was not established.

At the end of the hearing the Panel decided in application of Rule R44.3 of the Code of Sports-related Arbitration ("the Code"), that it was essential and indispensable to hear an expert witness on the issue of what minimum concentration of nandrolone metabolites may be considered as sufficient evidence for assuming a doping offence. The Panel thus adjourned its decision.

On 8 January 1999, the CAS informed the parties that it intended to invite Dr. Laurent Rivier to testify as an expert witness and requested the parties to bring forward any statement of objection before 12 January 1999. On 13 January 1999, M.'s legal counsel raised doubts about Dr. Rivier's independence and suggested to appoint Prof. Wilhelm Schänzer. On 18 January 1999, the CAS confirmed that the Panel had decided to accept the expert testimony of Dr. Rivier.

On 21 January 1999, the Panel and the parties examined Dr. Rivier as expert witness.

At the beginning of the hearing the President of the Panel confirmed the appointment of Dr. Rivier and stated that the Panel was thoroughly convinced of the expert's competence and independence. After the hearing the parties were granted the opportunity to comment on the result of the examination of the expert.

LAW

1. M. denies the competence of the CAS. Relying on Rule R47 of the Code, M. argues that he had not exhausted the legal remedies available to him according to the statutes and regulations of the FCI. The UCI, on the other hand, regards the appeal proceedings with the CAF inadmissible. The CAS decides only on its own competence and answers the issue in the affirmative. The competence of the CAS is provided for in Article 81 AER. Moreover, the parties confirmed the competence of the CAS by signing the Order of Procedure.

2. According to Article 1 of the Preliminary Provisions of the CR, the UCI rules shall be applicable to all cycling races. National Federations may only provide special Regulations applicable to races of their National Calendar (Article 1 para. 2). Article 5 of the Preliminary Provisions further stipulates that participation in a cycling race implies acceptance of all provisions of the regulations applying thereto.

3. According to Article 1.1.001 of the CR, the licence shall be an identity document confirming the commitment of its holder to respecting the statutes and regulations that authorize him to participate in cycling events (likewise, Article 1.1.004 as well as Article 1.1.023). Part XIV of the CR provides for Antidoping Examination Regulations.

4. M. is a cyclist of the elite category, licensed by the FCI in accordance with the CR. Consequently, by applying for a licence and by participating in races belonging to the International Calendar, M. agreed to comply with and to be bound by all provisions of the Regulations applying thereto, i.e. the UCI rules including the AER.

5. Article 81 para. 1 AER states:

   "*The decision, once taken by the competent body of the national Federation of the rider or the license-holder concerned, may not be appealed before any other body (appeal or higher court) within the same Federation unless the legislation of the country in question so requires*."

   In the present case, the mentioned provision requires the Panel to consider Italian law in order to establish whether Italian law requires imperatively to grant the opportunity to appeal within the same Federation.

6. The Panel established the content of the applicable foreign law in co-operation with the parties. The Panel considered numerous documents submitted by the parties (such as provisions of the relevant Italian laws, rules and laws of the CONI, decisions of Italian courts and articles of Italian authors). Moreover, the Panel undertook further research on its own motion.

7. The Panel concludes: According to Article 21 of the rules of the Comitato Olimpico Nazionale Italiano (CONI) national federations are obliged to provide for a first and a second instance ("Doppio grado di Giurisdizione"). Article 19 of the CONI rules establishes the "Principi di Giustizia Federale". Its 2nd paragraph states: "*Deve essere garantito il diritto di difesa,*

la possibilità di ricusazione del Giudice - nei casi di legittima suspecione - ovvero la possibilità di revisione del giudizio nei soli casi di sopravenienza di fatti nuovi, no prevedibili al momento del giudicato di seconda instanza." However, there is no indication that Italian law requires a second instance within the same Federation. Neither does Italian law prevent the second instance from being an arbitral tribunal having its seat outside Italy. The CONI rules merely establish minimal procedural guarantees in favour of the athlete. All these procedural guarantees are safeguarded in appeal proceedings before the CAS.

8. Moreover, Article 81 para. 2 AER establishes:

"*If, in the latter case, it should not be possible for the UCI to appear as appellant before that appeal body, it shall be entitled immediately to enter its appeal directly with the CAS*."

In the present case, it has to be considered that the UCI is not allowed to appear before the CAF. Therefore the UCI was perfectly entitled to enter its appeal directly with the CAS. Moreover, the appeal of the UCI did not interfere with Rule R47 of the Code because the UCI had exhausted its remedies.

9. Finally, the Panel noticed that the parties signed the Order of Procedure. The Panel further observed that M. signed the procedural order of the CAS after the CAF confirmed its own jurisdiction. M.'s signature of the Order of Procedure may therefore be interpreted as a waiver of any right to appeal against the FCI's decision to any other body than the CAS (see likewise Article 81 para. 3 AER).

10. The UCI's appeal has been lodged and registered within the time period and in conformity with the provisions of the AER (Articles 84 and 86 AER). It is therefore admissible with regard to the form.

11. Pursuant to Article 84 AER, both the UCI and M. have the right to enter an appeal against the decision of the National Federation by taking the matter to arbitration before the CAS.

12. According to Article 86 AER, the statement of appeal must be lodged with the CAS within one month from reception of the decision. The UCI received notice of the verdict on 3 September 1998. The UCI's Statement of Appeal dated 2 October 1998. Accordingly, the time limit set forth in Article 86 was kept.

13. The UCI's Statement of Case dated 12 October 1998 was received within the 10-day period set out in Rule R51 of the Code. M.'s Statement of Defence and "Cross Appeal" dated 2 November 1998, and was thus lodged within the time limit provided in Rule R55 of the Code.

14. In its "Answer to Cross Appeal" the UCI contests the admissibility of a "cross appeal".

By signing the Order of Procedure, the parties agreed to the application of the Code. Rule R57 of the Code provides that the Panel shall have full power to review the facts and the law. Similarly, Article 88 AER states that the CAS has full power to review the case: "the CAS shall take cognizance of the case in its entirety (...)".

Since the CAS has full power to review, the Panel may hear the case in its entirety, regardless whether the applicable rules do provide for a "cross appeal". The issue of the admissibility of a "cross appeal" – which is not provided neither in the UCI regulations nor in the Code – is therefore redundant for the assessment of the present case.

15. Pursuant to Article 2 AER, the use of the pharmaceutical categories of substances and of doping methods stated on the UCI's list of doping agents and methods shall be prohibited. M. was tested positive for the use of substances, which are enlisted in the UCI's actual List of Categories of Doping Substances and Methods (List Nr. 1/98; entry into effect: 1 April 1998).

16. Regarding the doping tests submitted during the "Settimana Bergamasca", the Panel notices that the analysis of the A-sample taken on 12 April 1998 revealed the existence of Norandrosterone, which is a Nandrolone metabolite. In fact, the sample was found to contain Norandrosterone in a concentration higher than 2 ng/ml which is the threshold raising the issue of a doping offence (see the IOC Medical Commission's guidelines on "Analytical criteria for reporting low concentrations of anabolic steroids"). The Panel further takes into consideration that the "Laboratorio Antidoping" of the "Federazione Medico Sportiva Italiana" evaluated the concentration being about 6 ng/ml.

17. M. asked to counter-analyse the mentioned A-sample. The result of the testing of the B-sample was reported to the UCI on 19 June 1998. The B-sample confirmed the result of the A-sample in so far as the sample was held to contain both Norandrosterone and Noretiocholanolone, the former in a concentration of 5 ng/ml.

18. A sample is deemed positive by the laboratory if it is found to contain Norandrosterone in a concentration higher than 2 ng/ml. The "Laboratorio Antidoping della Federazione Medico Sportiva Italiana" thus recommended the samples exceeding the threshold of 2 ng/ml to be declared positive for the application of endogenous steroids.

19. In course of the hearing the Panel asked the expert witness, Dr. Rivier, to summaries the scientific debate on the issue of the maximum concentration of Nandrolone produced by the human body. According to the expert witness, one has to distinguish between three categories of findings.

    Quantities up to 2 ng/ml are not considered to constitute a doping offence. The laboratories do normally not report concentrations below 2 ng/ml to the Federation. The threshold of 2 ng/ml was introduced by an IOC Medical Commission guidelines (guidelines on "Analytical criteria for reporting low concentrations of anabolic steroids"). The guidelines do not state any reason for the threshold.

    Quantities between 2 and 5 ng/ml, however, need to be interpreted cautiously. Findings between 2 and 5 ng/ml do fall in a so-called "grey zone". In fact, there is uncertainty among experts as to the maximum concentration of Nandrolone produced by a human body. Consequently, there is high scepticism among scientists whether the mere finding of

Nandrolone in a concentration between 2 and 5 ng/ml may be sufficient evidence to assume a doping offence. In other words, the finding may constitute a doping offence, but requires further investigations in order to confirm the result of the analysis. However, within the "grey zone" the likelihood that Nandrolone is produced endogenously, is decreasing exponentially.

The probability of an endogenous production of Nandrolone in quantities beyond 5 ng/ml was held to be very unlikely. Therefore quantities beyond 5 ng/ml are very likely to be confirmed by further investigations and may be regarded as sufficient evidence to constitute a doping offence.

The expert witness was further able to explain clearly the differences between the results of the analysis of the A- and B-sample. Dr. Rivier pointed to the fact, that the analysis of the B-sample took place more than one month later than the analysis of the A-sample and that it was, due to evaporation, absolutely normal that the result of the B-sample showed a slightly lower concentration. The expert further stated that considering the circumstances the Panel might safely rely on the result of the analysis of the A-sample. After all, Dr. Rivier, by explaining in detail the Laboratory Reports to the Panel, removed the doubts of the Panel concerning the accuracy of the finding. He further declared that the finding of a concentration of 6 ng/ml could not be explained by the absorption of meat.

20. On the other hand, M. was not able to give any reasonable explanation for the origin of the prohibited substances. He further failed to submit any evidence in order to support the motion that in his particular case the endogenous production of Nandrolone could reach or even exceed the threshold of 5 ng/ml. The Panel therefore held that the analysis of the A-sample, confirmed by the analysis of the B-sample, revealed the presence of prohibited substances in a concentration not only higher than 2 ng/ml but also beyond the unofficial "grey zone" and as such established an infringement of the AER.

21. With regard to the sanction, the Panel only partially agrees and therefore modifies the decision of the FCI.

22. The UCI – relying on Article 94 para. 2 AER – asks in its Statement of Appeal for an effective sanction. Article 94 para. 2 states:

"*The suspension shall be effective in all matters sporting. It shall be served during the period of normal activity of the person concerned. For that purpose, the suspension may be spread over various periods of the year.*"

Article 94 para. 2 AER thus explicitly establishes that a sanction, in order to be effective, must be served during the period of normal activity. As a consequence, a suspension falling to a considerable extent within a "dead period", which means a period where the athlete does usually not compete, cannot be regarded as an effective sanction.

23. In the present case, M. denies the existence of a "dead period". He established that several races are taking place during the winter period. Among others, M. mentioned the Asian Games and the "Tour de Chine". He further asserted the Panel that he could also participate in cycle-cross races and indoor competition. However, M. failed to convince the Panel that he

has ever participated or intended to participate in races between November and February. Therefore the Panel decides that the mere possibility to participate in races does not hinder the assumption of the existence of a "dead period" for an individual athlete. Furthermore, the Panel holds that the suspension imposed by the FCI did only partially fall into M.'s period of normal activity.

Regarding the fact that M. was suspended by the FCI for the minimum duration of six months, and that the suspension – starting, as requested on behalf of M., on 19 July 1998 and ending on 18 January 1999 – was falling to a considerable extent into the "dead period", the sanction appears to be inadequate. The FCI further renounced to split the suspension, as provided for in the last sentence of Article 94 para. 2 AER.

Considering the circumstances of the case, the Panel concludes that the suspension was effective only for three and a half months, which is less than the minimum sanction provided by the AER. Bearing in mind the necessity of fighting effectively against doping, it is fundamental that the sanctions are effective. Consequently, a suspension falling to a considerable extent into a "dead period" cannot be considered to constitute an effective sanction.

The Panel notices, however, that the discussion about the "dead period" is a consequence of the particular sanction system of the UCI, which provides for a minimal duration of suspension of less than one year. The discussion could be avoided if the UCI would harmonies its sanctions with other sport federations and provide for minimum suspensions of at least twelve months.

24. With regard to the starting date of the suspension, M. claims that the suspension incurred – in accordance with Article 82 para. 1 and 3 AER – automatically, on 19 July 1998.

The Panel basically agrees. However, the Panel even decides to set the starting date of the suspension on 14 July 1998. On 5 May 1998, the UCI informed the FCI about the positive result of the testing. The FCI received the communication on 10 May 1998. The one-month period provided in Article 82 para. 2 AER thus started on 10 May 1998. M. failed to specify the day when he requested the counter-analysis. However, the counter-analysis took place on, 18 June 1998. The results of the counter-analysis were communicated to the UCI on 19 June 1998.

According to Article 82 para. 2 AER the one-month period shall be extended by the amount of time that elapses between the date of the request and the issue of the results of the counter-analysis. In the present case the date of the request is unclear. However, the Panel decides to assume an interruption of the one-month period between May 15 and June 18, 1998. Applying Article 82 para. 3 AER, the foregoing leads to the conclusion that the one-month period restarted on 19 June 1998 and ended on 14 July 1998. The suspension thus incurred automatically on 14 July 1998.

25. M. asks for probation according to Article 95 AER. Pursuant to Article 95 para. 2 the CAS may grant probation. The decision is to the discretion of the Panel.

In the present case, the Panel takes into account that M., who is still a very young athlete, committed his first doping offence. The Panel further considers that the granting of probation does not impair the effectiveness of a sanction. To the contrary, Article 95 para. 1 last sentence AER states:

"*The beneficiary of a probation shall undergo the suspended sanction if he is sanctioned for another offence committed within three years from the former offence and in addition to the sanction for that other offence*."

Consequently, the granting of probation allows to give a young athlete a second chance, without leaving any doubts about the fact that it will be his last.

26. With regard to the fine, the Panel decides to confirm the verdict of the FCI.

27. For all these reasons the Panel holds that a disqualification from the "Settimana Bergamasca", a suspension for nine months from 14 July 1998, to 13 April 1999, the granting of probation for the last two months and 20 days, which means from 25 January to 13 April 1999, and a fine of CHF 2'000.-- are adequate sanctions in this particular case.

The Court of Arbitration for Sport hereby rules:

1. The appeal by the UCI is partially upheld.

2. The decision of the Federazione Ciclistica Italiana (FCI) dated 31 August 1998 is partially modified:

The rider M. is sanctioned as follows:

- disqualification from the "Settimana Bergamasca" 1998;
- suspension for nine months from 14 July 1998 to 13 April 1999; the suspension is lifted by 21 January 1999 and M. is granted probation for the remaining period of suspension, i.e. two months and three weeks (according to Art. 95 UCI AER);
- fine of CHF 2'000.-- (two thousand Swiss francs).

(...)