



Arbitration CAS 2004/A/777 ARcycling AG v. Union Cycliste Internationale (UCI), award of 31 January 2005

Panel: Prof. Massimo Coccia (Italy), President; Mr Beat Hodler (Switzerland); Mr Bard Racin Meltvedt (Norway)

Cycling

UCI Pro Tour

Violations of procedural rights with a critical bearing on the outcome of the case

Annulment of the decision issued by the UCI Licence Commission

Denial of UCI Pro Tour licence unjustified

- 1. The fact not to respect one party's rights to be heard and to obtain a fair proceeding before the adoption of the negative Preliminary Opinion constitutes a breach of the fundamental due process rights. However, according to the constant jurisprudence of the CAS, a procedural violation is not enough in and by itself to set aside an appealed decision; it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body can be cured through the due process accorded by the CAS, and the appealed decision's ruling on the merits is the correct one, CAS panels has no hesitation in confirming the appealed decision.**
- 2. The procedural defects of the licensing procedure have however a critical bearing on the outcome of the same procedure if the involved party could for example have proven that it had organised its team in such a way as to combat doping effectively, thus avoiding the negative judgment on this issue before the Preliminary Opinion. The violations of one party's fundamental procedural rights yield a ruling that is materially ungrounded and evidently unjustified.**
- 3. The granting of a UCI ProTour Licence for a limited period of two years is proportionate taking into account the measures taken by the involved party to combat doping which will give the opportunity this party to demonstrate, as far as required, that there was in fact no connection between its riders' high blood values and adverse analytical findings and its internal organisation, and to confirm that the team can reach the level of excellence necessary for the UCI ProTour.**

In May 2004, Union Cycliste Internationale (UCI or the "Respondent") made public the information related to the application for a UCI ProTour licence.

ARcycling AG (the “Appellant”) sent its application for a UCI ProTour licence by letter of 28 May 2004, which was received by the Respondent on 1 June 2004.

On 30 June 2004, the UCI Licence Commission held a meeting during which it decided to accept the application of the Appellant and to grant provisionally a UCI ProTour licence (the “Provisional Licence”), in accordance with Article 2.15.018 of the UCI Cycling Regulations (the “Regulations”).

In April 2004, at the stage race “Tour de Romandie”, blood tests were carried out on the riders of the Phonak team (Swiss team) and produced some values (haematocrit and reticulocytes) which, albeit below the threshold levels established by the Regulations for deeming the riders unfit for participation in cycling races, were on the average higher than the average values of the other teams.

During the remaining months of the 2004 cycling season the whole Phonak team was blood-tested again at the start and during the *Tour de France* and at the start and during the *Vuelta a España* (“Vuelta”) and the average blood values were in line with those of the other teams (obviously leaving aside the findings concerning the riders Tyler Hamilton and Santiago Perez).

On 22 July 2004, the rider Oscar Camenzind, who was under contract with the Appellant, was tested and found positive for EPO. Mr Camenzind readily admitted his guilt and the contract was terminated.

In August 2004, at the Olympic Games in Athens, the rider Tyler Hamilton, who was also under contract with the Appellant, underwent an anti-doping control. The A blood sample, which was at first deemed negative, after a review by an expert panel was considered to indicate a homologous blood transfusion and thus to produce an “*adverse analytical finding*” (according to the definition set forth by the World Antidoping Code and accepted by UCI). As explained below, the adverse analytical finding was notified to the rider about one month later, on 18 September 2004.

On 11 September 2004, a blood sample was collected from Tyler Hamilton during the Vuelta. It was analysed by the IOC/WADA accredited laboratory “Laboratoire Suisse d’Analyse du Dopage” (the “Lausanne Laboratory”), which reported the presence of a mixed red blood cell population indicating in its opinion a case of homologous blood transfusion.

On 16 September 2004, Tyler Hamilton was notified of the adverse analytical finding produced by the anti-doping test conducted during the Vuelta. The rider claimed that it was “a false positive” and requested immediately a counter-analysis.

On 21 and 22 September 2004 in the Lausanne Laboratory, Tyler Hamilton attended with an accompanying haematologist from Italy the analysis of the B sample of the blood test carried out during the Vuelta. The results of the A sample were confirmed.

On 23 September 2004, the Appellant suspended Tyler Hamilton from the team.

On 23 September 2004, the IOC communicated to Mr Hamilton that the case regarding the adverse analytical finding of the A blood sample collected during the Olympic Games was closed, since the

result of the laboratory analysis of the B blood sample was “*considered as non conclusive because of lack of enough intact red blood cells*”. Therefore, the IOC did not pursue sanctions against Mr Hamilton and his Olympic gold medal was confirmed.

As to the tests conducted during the Vuelta, while Tyler Hamilton claimed his innocence, the Appellant and his representatives formally contested the validity of the test method.

On 5 October 2004, an out-of-competition blood test was performed on the rider Santiago Perez, who was also under contract with the Appellant. The rider’s A and B samples were considered as indicative of homologous blood transfusion and thus produced adverse analytical findings. Mr Perez was immediately suspended by the Appellant.

On 25 October 2004, the Respondent wrote a letter to the Appellant to express its concerns regarding the medical management of the latter and to encourage it to put in place a more effective internal control system.

On 27 October 2004, the Appellant completed the drafting of a “Medical Control Project of the Phonak Hearing Systems Team” (hereinafter the “Medical Concept”), intended to implement an effective internal control system and an improved medical support of its riders.

On 25 November 2004, the Appellant informed the President of the Licence Commission that the contracts with the riders Tyler Hamilton and Santiago Perez were being terminated.

Art. 2.15.116 of the UCI Cycling Regulations provides as follows:

“In addition to the employment contract, only an image contract may be concluded, subject to the following conditions: [...] the remuneration payable under the image contract shall not exceed 15% of the total remuneration paid to the rider”.

On 1 September 2004, the Respondent’s advisor on financial matters Ernst & Young SA (“E&Y”) mentioned to the representatives of the teams that art. 2.15.116 would not be applied to already existing contracts due to the legal principle prohibiting retroactivity.

On 15 November 2004, following the Licence Commission’s negative preliminary opinion of 12 November, the Appellant informed the Licence Commission that it would take immediate measures to amend the image contracts which had been recently extended beyond their original expiry of 31 December 2004.

On 12 November 2004, the Licence Commission issued its negative preliminary opinion on the definitive grant of a UCI ProTour Licence to the Appellant (the “Preliminary Opinion”).

At the hearing of 22 November 2004, the Appellant handed its recent Medical Concept and informed the Licence Commission that it had decided to terminate and not renew the contracts of the riders Hamilton and Perez. Then, the Appellant informed that it had amended the recently extended riders’ contracts in order to comply with the image rights 15% rule and, immediately after the hearing, handed the amended contracts.

In its final decision dated 22 November 2004, the Licence Commission rejected the Appellant's application for a UCI ProTour Licence.

The Appellant's appeal dated 15 December 2004 challenged the decision issued on 22 November 2004 by the UCI Licence Commission (the "Appealed Decision").

The Appellant's submissions may be summarized as follows:

- The accusations of doping cannot be linked to any proven organisational misbehaviour of the Appellant or of its team.
- The final decision rejecting the application for a UCI ProTour Licence was taken all of a sudden and without any warning. Therefore, the Appellant's right to be heard was breached.
- All the mistakes allegedly made have been corrected and the application fully complies with the expected conditions at least at the moment the hearing took place or the final decision was taken by the Licence Commission.
- Once caught positive in a doping test, Oscar Camenzind rapidly admitted the facts and withdrew from professional cycling. In November 2004, he was not a member of the team of the Appellant, which had no knowledge of the forbidden practices of the said rider.
- The doping cases of Tyler Hamilton and Santiago Perez are different from Camenzind's in many ways.
- Under those circumstances, it is legitimate and not unethical that someone who is confronted with an accusation of doping, questions the reliability of a new doping test and is at least shown within a reasonable time period how it works.
- Article 2.15.116 of the Regulations (regarding the remuneration under the image contract) is questionable and constitutes a breach of the Appellant's right of personality. Moreover, the adviser of the Respondent, Alain Siegrist, confirmed to the Appellant that the "15% rule" pursuant to art. 2.15.116 of the Regulations only applies to contracts that are newly concluded.
- Unlike other applicants, the Appellant was not given the opportunities by the Respondent to amend its application in order to meet the expectations of the Licence Commission. Therefore, the principle of equal treatment has not been respected.

On 10 January 2005, the Respondent filed its answer, requesting the Panel to confirm the contested decision and to condemn the Appellant to pay all costs, including a contribution towards the costs of the Respondent.

The Respondent's submissions may be summarized as follows:

- The Respondent always provided the Appellant with all the documents in its possession.

- The Appellant immediately cast doubt in public on a validated testing method. By doing so, the Appellant had an unethical behaviour, which is contrary to the Regulations in application of the specific conditions for granting a Licence under article 2.15.011.
- The fact that UCI did not take any measures against the riders Hamilton and Perez cannot suggest that it has doubts on the reliability of the test method.
- The Appellant has not demonstrated that it has organised itself in such a way as to combat doping effectively. Such a demonstration will need time.
- Pursuant to article 2.15.026, the documents handed by the Appellant after 12 November 2004 cannot be taken into account. At that date, several contracts entered into by the Appellant did not respect the 15% limit imposed by the Regulations.
- The letter dated 1 July 2004 is not a provisional decision creating trust that the Appellant would be granted a licence in November 2004.
- The right to be heard of the Appellant has been respected, since an oral meeting was organized after the latter received a negative prior opinion.
- The Appellant has been treated equally with those applicants which were in the same situation as the Appellant.
- The Appealed Decision cannot be considered as out of proportion for the sole reason that intermediate solutions are available. As already stated, the Appellant did not reach the requested level of excellence and does not provide guarantees in respect of sporting ethics as they apply to doping. For these reasons, the said decision is proportionate.

A hearing was held on 18 January 2005 at the CAS headquarters in Lausanne.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from arts. 2.15.226 to 2.15.242 of the Regulations and art. R47 of the Code of Sport-related Arbitration (the “Code”).
2. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable law

3. Art. 2.15.242 of the Regulations provides as follows: *“Unless otherwise specified in the present section, the Code of Sports-related Arbitration shall apply”*.

4. Art. R58 of the Code specifies that the Panel “*shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled*”.
5. It follows that the UCI Regulations and Swiss law are applicable to the present case.

Procedural motions

6. The Appellant filed several procedural motions.
7. In particular, the Appellant requested that the Respondent produce the whole file of the Licence Commission related to the Appellant’s case. As announced at the hearing of 18 January 2005, the Panel rejects the motion because the Appellant has in fact received the entire file, with the justified exception of a few documents which were already in possession of the Appellant.
8. Then, the Appellant requested that the Respondent produce all files of the Licence Commission concerning all the other applicants for a UCI ProTour Licence. At the hearing of 18 January 2005, the Appellant explained that the motion was justified in order to demonstrate that before the date when the Licence Commission gave its Preliminary Opinion, the Respondent informed other applicants of the inadequacy or incompleteness of their applications, thus giving them a chance to complete their files and correct their mistakes before the Licence Commission’s preliminary opinion. To support its motion, the Appellant exhibited the decisions of 22 November 2004 of the Licence Commission regarding the applications of Van der Schueren H.-Sportpromotie ASBL and EUSRL France Cyclisme. In the Panel’s view, the two Licence Commission’s decisions were enough evidence to confirm that, as a matter of fact, other applicants were advised of the inadequacy or incompleteness of their applications. As announced at the hearing, the Panel does not need further evidence as far as this point is concerned and, therefore, it rejects the motion.
9. The Panel dismisses the other procedural motions insofar as they are in connection with the above rejected motions or with rights reserved but thus far not exercised by the Appellant, or do not require any action from the Panel and are thus of no object.

Scope of review of the CAS

10. The UCI Regulations provide some special rules with regard to the appeal before the CAS against a Licence Commission’s final decision concerning a ProTour Licence. With respect to the scope of review of the CAS, art. 2.15.239 of the Regulations provides as follows:

“For the licence application procedures, including those for the transfer of a licence, the Panel will only examine the compliance of the challenged decision with the provisions of the present section. The Panel shall be bound by, and cannot review such points, considerations or decisions which are at the discretion of the Licence

Commission, unless such points, considerations or decisions are materially ungrounded or are evidently unjustified”.

11. The Panel notes, therefore, that art. 2.15.239 allows the review of the decisions issued by the Licence Commission on 22 November 2004 if it finds that it was adopted without proper regard for the applicable articles of section XV of the Regulations.
12. Furthermore, art. 2.15.239 obliges the Panel to defer to the discretionary appreciation of the Licence Commission but, at the same time, it allows the Panel to review the Appealed Decision if such appreciation is “*materially ungrounded*” or “*evidently unjustified*” and thus, *a fortiori*, if it is arbitrary. According to the Swiss Federal Court, a decision is arbitrary if it severely fails to consider established rules, a clear and undisputed legal principle or breaches a fundamental principle (ATF 124 IV 86; ATF 106 Ia 7). A decision is arbitrary if it harms in an inadmissible way the sense of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued. Not only the decision must be arbitrary in itself to be overruled, but its result must be arbitrary too (ATF 125 I 166 consid. 2a p. 168; 125 II 10 consid. 3a p. 15, 129 consid. 5b p. 134; 124 V 137 consid. 2b p. 139; 124 IV 86 consid. 2a p. 88).
13. In view of that, the Panel is of the opinion that it must review the Appealed Decision if it is “*materially ungrounded or evidently unjustified*”, including any case of breach of the fundamental rights of the applicants. Indeed, it would not be logical to consider that by applying for a UCI ProTour Licence an applicant would waive its fundamental rights.
14. Besides, it can be pointed out that the Respondent does not object to the above point of view. In its answer, the Respondent commented and disputed every alleged breach of fundamental rights put forward by the Appellant on the basis of Swiss law, without shielding itself behind art. 2.15.239 of the Regulations.
15. The Panel notes also that art. 2.15.240 of the Regulations provides as follows:
“The appeal is judged on basis of the documentation in the possession of the Licence Commission at the date when the Licence Commission gave its preliminary opinion. No additional documentation can be added. The documents, statements and written evidence which the appellant intends to raise before the CAS can only refer to the same elements as found in the Licence Commission’s file”.
16. A parallel must be drawn between art. 2.15.240 and art. 2.15.026 of the Regulations, which provides as follows:
“The Commission shall judge the request on the basis of the documentation in its possession at the date when it gives its preliminary opinion. There may be no subsequent additions to this documentation”.
17. The Panel thus notes that the Regulations set forth an obligation for the Licence Commission to take into account in its final decision only the documents which were in its file at the date of the Preliminary Opinion (12 November 2004) and, conversely, not to consider documents disclosed after such date. This Panel is allowed to consider the same documents as the Licence Commission; besides, the Panel is allowed to consider the “*documents, statements or*

written evidence” put before the CAS which make reference to the elements “*found in the Licence Commission’s file*” (art. 2.15.240). In addition, given that art. 2.15.232 of the Regulations allows the Appellant to “*indicate in his appeal document which witnesses and experts he wishes to appear at the hearing*”, the Panel is obviously allowed to take into account the oral evidence heard at the hearing of 18 January.

The UCI ProTour licensing procedure

18. The Panel notes that the Regulations set out a particular three-stage procedure for the granting of a UCI ProTour licence. The first stage involves the examination of the teams’ applications by the Licence Commission in order to “*grant [or deny] the licence provisionally*” (art. 2.15.018 of the Regulations). At the second stage, after the teams have completed their applications with all further documentation required, the Licence Commission examines the applicants’ submissions as well as the report from the UCI-appointed auditors and issues “*a preliminary opinion on the definitive grant of licence*” (art. 2.15.019). In case of a negative preliminary opinion, there is a third stage whereat, upon request from the rejected team, the Licence Commission holds a hearing after which the final decision is issued (arts. 2.15.020-2.15.025). However, as already mentioned, at the third stage the applicant is restricted to the previously submitted evidence, as the Licence Commission may only take into account the documentation already in its possession at the time of the preliminary opinion (art. 2.15.026).
19. It seems to the Panel that, given the above stringent restriction on the applicant’s right to submit evidence, the case is truly decided at the second stage, when the Licence Commission issues its preliminary opinion. The subsequent hearing, in front of the same body which has already issued a negative decision, and with no additional evidence permitted, can hardly be of any avail.
20. Therefore, given that the crucial moment is the second stage of the licensing procedure, the Panel is of the opinion that the process leading to the issuance of the preliminary opinion must be fair and transparent towards the applicants. In particular, the applicants should be allowed to present their case at such stage in an adversarial proceeding, i.e. having the right to know the allegations of the UCI representatives and of the UCI consultants, to examine in advance all the evidence submitted by the UCI to the Licence Commission and to question it or refute it with its own counter-evidence. Otherwise, the right to be heard and the right to a fair proceeding would be breached. It is undisputable that the said rights are fundamental and that the CAS has always endeavoured to protect them (see e.g. CAS 96/153, in *Digest of CAS Awards I*, 341; CAS 98/200, in *Digest of CAS Awards II*, 66; CAS 2000/C/267, in *Digest of CAS Awards II*, 741; TAS 2003/A/443).
21. The Panel notes that when the Licence Commission adopted the Preliminary Opinion, on 12 November 2004, the Appellant did not know all the allegations of the UCI representatives and of the UCI-appointed consultants. In particular, at least two important documents included in the file concerning the Appellant’s licence procedure were not communicated to the Appellant before the date of the Preliminary Opinion (12 November 2004): (i) the letter

- from the UCI physicians (Dr Schattenberg and Dr Zorzoli) to the Licence Commission of 2 November 2004 commenting the medical situation of the Appellant's team and attaching their letter to the Appellant of 25 October 2004; (ii) the E&Y report dated 9 November 2004; it is also unclear, as there is no conclusive evidence in the file, whether the E&Y report of 28 October was sent to the Appellant before or after 12 November 2004.
22. As a consequence of the above circumstances, the Appellant could not examine beforehand the said evidence and could not refute it by providing some counter-evidence or supplementing and correcting its application. In addition, after receiving the Provisional Licence, the Appellant never received from the Respondent any hint that there was a risk that its application could be eventually rejected. When the Respondent was informed of the rejection, it was too late under the Regulations to provide more evidence or to supplement its application with the appropriate documents.
 23. The Panel remarks that there is no provision in the Regulations preventing the Respondent from postponing for some days the adoption of the Licence Commission's preliminary opinion if, after the examination of the documentation, it appears that some applications are going to be rejected. It seems to the Panel that any potentially dismissed applicant should be informed of its exact situation and, before the issuance of a negative preliminary opinion, should be granted the opportunity to rebut or redress, if at all possible, the negative elements of its application. Arts. 2.15.017-2.15.019 of the Regulations would be perfectly compatible with a procedural framework such as the one just suggested.
 24. Indeed, the Panel notes that the above-described fair and transparent procedural setting corresponds exactly to what the Licence Commission did carry out in the licence procedures concerning the applicants "Van der Schueren H.-Sportpromotie ASBL" (for the team "Mr Bookmaker-Palmans") and "EUSRL France Cyclism" (for the team "AG2R Prévoyance"). It is undisputed that in both cases the Licence Commission, after having examined the applications at a first meeting (on 8 September 2004), notified to the applicants that it could not accept their files as submitted and announced that it would re-examine them at a subsequent meeting (on 6 October 2004), allowing the applicants to supplement their applications and submit new evidence. It is true, as the Respondent asserted in its written and oral pleadings, that this occurred with regard to applicants which were being denied the provisional licence rather than the definitive licence. However, the Panel finds it illogical that, while the applicants are granted a fair and transparent procedure in connection with the provisional licence, they are denied such a procedure in respect of the more important and consequential definitive licence.
 25. The Panel notes also that in situations when – as is the case of the Appellant – a team first obtains a provisional licence and then a negative preliminary opinion, it could even be argued that the latter negative determination might be considered tantamount to a withdrawal of an (albeit provisional) licence, thus causing the possible resort, by way of analogy, to art. 2.15.042 of the Regulations, which provides as follows: *"Before effectively withdrawing the licence, the Commission may, if it deems useful and appropriate, impose an additional deadline to the UCI ProTour Team in order to sort out its situation"*.

26. In conclusion, the Panel finds that the Regulations granted the possibility to conduct a fair and transparent procedure vis-à-vis the Appellant before the adoption of the Preliminary Opinion, but the Respondent did not avail itself of this opportunity. Accordingly, the Panel finds, and so holds, that the Appellant's fundamental due process rights were breached.

The merits of the Appealed Decision

27. Art. 2.15.012 of the Regulations provides that in order "*to refuse the award of a licence or to reduce its duration to less than 4 years*" the judging body should apply the criteria listed in art. 2.15.011.

28. Art. 2.15.011 of the Regulations sets out the following criteria:

- 1. Quality and rapidity in the fulfilment of the conditions for the granting of a licence;*
- 2. Assurances of financial soundness and stability for the four coming years;*
- 3. Quality of the riders, inter alia as regards their placing and results;*
- 4. Compliance with UCI regulations;*
- 5. Compliance with contractual obligations, including the provisions of the standard contract between the rider and the team under Article 2.15.139 and those of the Joint Agreement signed by the Associated Professional Cyclists (Cyclistes Professionnels Associés – CPA) and the International Association of Professional Cycling Teams (Association Internationale des Groupes Cyclistes Professionnels, AIGCP).*
- 6. Compliance with legal obligations;*
- 7. Compliance with sporting ethics, including matters of doping and health;*
- 8. Absence of other elements likely to bring the sport of cycling into disrepute".*

29. In the Appealed Decision, the Licence Commission mentioned as particularly relevant for its ruling the above criteria nos. 4, 7 and 8 of art. 2.15.011, and then rejected the Appellant's application making reference to three main issues, namely:

- the anomalies or positive results of anti-doping tests concerning some of the riders of the Appellant;
- the unethical attitude of the Appellant;
- the failure to respect the Regulations with respect to the riders' image contracts.

A. The anomalies or positive results of anti-doping tests concerning some of the Appellant's riders

30. In the Appealed Decision, one of the objections put forward with regard to the Phonak team is "*the existence of several cases of doping or suspected doping which have emerged at close intervals since August 2004*". In this respect, the major events occurred during the year 2004 have already been summarized.

31. It is a fact that three Appellant's riders had adverse analytical findings and were thus involved in anti-doping procedures between July and October 2004. One of them (Camenzind) admitted his guilt, while the disciplinary procedures regarding the other two riders (Hamilton and Perez) are still pending at the time of this arbitration.
32. Such cases are certainly regrettable and apt to raise suspicions. Indeed, the Panel wishes to make clear that it has considerable sympathy with the UCI's anti-doping stance and efforts. However, the Panel is of the opinion that, unless there is evidence of an intentional or negligent implication of a team representative, the team as such cannot be held liable for the individual actions of its riders. The Respondent did not point out any provision in its Regulations which might be construed as establishing a strict liability of the teams for wrongful behaviours of some of their riders. In the Panel's view, a strict liability regime must be expressly set out by the applicable rules and cannot be presumed (cf. CAS 2002/A/423, in *Digest of CAS Awards III*, 522; CAS 2004/A/593, in [2004] *I.S.L.R.*, SLR-62).
33. In the submitted documentation, the Panel could not find any evidence of the Appellant's direct implication in its riders' adverse analytical findings. On the contrary, there is evidence that the Appellant reacted in the right direction to its riders' anomalous values and adverse analytical findings.
34. First of all, after Dr Zorzoli's warning to the Appellant in May 2004 for its riders' high blood values, during the rest of the season the average blood values of the Appellant's team were in line with those of the other professional teams, with the exception of the riders Hamilton and Perez. Then, once Oscar Camenzind admitted his guilt and retired, the Appellant could not be expected to do anything more. Third, the Appellant suspended Tyler Hamilton and Santiago Perez immediately from all competitions, although they are still claiming their innocence and no disciplinary measure has yet been taken against them by any anti-doping organization (in fact, this Panel cannot take any position on this issue because the CAS might have to deal with those cases in the future). Fourth, even the UCI physicians in charge with doping and health matters – Dr Schattenberg and Dr Zorzoli – have been fairly hopeful in their letter of 2 November 2004 to the President of the Licence Commission, stating that they were hoping for good results with the Appellant, which had "*already made an important first step*" in inviting Dr Zorzoli to make a presentation to the whole team. Fifth, in his oral evidence Dr Zorzoli has expressed the view that the Medical Concept submitted by the Appellant is comparable to the endeavours of other teams admitted to the ProTour and that he is not even sure whether all the teams have adopted internal policies of that kind.
35. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision's reference to the cases of doping or of suspected doping in the Appellant's team as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

B. *The ethical attitude of the Appellant*

36. It is apparent to the Panel that the core rationale of the Appealed Decision is the negative evaluation of the Appellant's ethical attitude and, in particular, its reactions once the Hamilton's and Perez's adverse analytical findings emerged. The Licence Commission makes it very clear: *"More than the confirmation of the doping cases in which certain riders in the team are or have been suspected during these last months, it is the attitude of this team's management to these revelations which arouses serious reservations. Though it is not in itself contentious for a team to defend its riders when they are involved in a doping affair, at least while their guilt has not been established, the attitude of this team, which has tried to cast doubt on the validity of the tests which revealed the suspected doping in order to provide its defence, is quite another thing"*.
37. In its pleadings before this Panel, the Respondent has restated the Licence Commission's view that the Appellant, by casting doubts in public on a testing method which has been accepted by the WADA and the IOC, had an unethical behaviour.
38. The Panel observes that in the crucial Preliminary Opinion there is no reference at all to the Appellant's reaction to the Hamilton and Perez cases and no reference at all to any "unethical behaviour" of the Appellant. Furthermore, the Panel notes that in the file concerning the Appellant's licence procedure – produced by the Respondent with the assurance that it was *"a copy of the complete file"* (UCI letter of 3 December 2005) – there is not one single document, on or before 12 November 2004, mentioning in any manner whatsoever the Appellant's reactions and attitude after the Hamilton and Perez cases. The only reference in the licence file to the Appellant's doubts about the validity of the new anti-doping test is to be found in the minutes of the hearing of 22 November 2004.
39. As art. 2.15.026 of the Regulations requires the Licence Commission to judge the applications only *"on the basis of the documentation in its possession at the date when it gives its preliminary opinion"* (i.e. 12 November 2004), the Panel wonders how the Licence Commission was informed, and what kind of evidence it received, with regard to the Appellant's allegedly unethical behaviour. Perhaps, the Licence Commission took into account the information and documents provided by the parties at the hearing of 22 November 2004. In the Panel's view, this would amount to a violation of art. 2.15.026 of the Regulations.
40. Apart from the foregoing observations, the Panel notes that the homologous blood transfusion testing method was absolutely new. Under such circumstances, the Panel finds it legitimate that someone might cast doubts on the validity and reliability of the homologous blood transfusion test. Indeed, even in the recent past there have been CAS cases where the validity and reliability of anti-doping methods adopted by the IOC have been challenged, and nobody has contested the right of the athletes or of their organizations to bring forward such challenges (see, e.g., CAS 2002/A/370, in *Digest of CAS Awards III*, 273, in reference to the methodology of testing for darbepoetin; CAS 2002/A/374, in *Digest of CAS Awards III*, 286, in reference to the tests used to detect Aranesp and r-EPO). There might well be a CAS proceeding in the future where the validity and reliability of the homologous blood transfusion test is questioned. The Panel is mindful of the fact that the fight against doping

requires a tough stance against anybody who might try to undermine such fight. However, until a decision is rendered on the above matter by the CAS or another independent court, the Panel is of the view that under the given circumstances it is clearly not unethical to voice doubts.

41. Furthermore, the Licence Commission pointed out in the Appealed Decision that it *“has not been demonstrated that, since suspicions arose about the doping of its riders, the Phonak team has followed the example of other teams admitted to the UCI ProTour, and organised itself in such a way as to combat doping effectively. As a result this team does not provide guarantees in respect of sporting ethics as they apply to doping”*.
42. In this respect, it is undisputed that during the hearing of 22 November 2004 before the Licence Commission the Appellant’s representatives exhibited and handed to Dr Zorzoli a document dated 27 October 2004 and entitled *“Medical Control Project of the Phonak Hearing Systems Team”* (the so-called Medical Concept). In his testimony, Dr Zorzoli declared that the Medical Concept is an acceptable way of treating the medical issues and of organizing the team in order to prevent doping; Dr Zorzoli specified also this is comparable to what has been done by other ProTour teams.
43. It seems to the Panel that this circumstance demonstrates that, had the Respondent respected the Appellant’s rights to be heard and to obtain a fair proceeding before the adoption of the negative Preliminary Opinion, the Appellant could have proven that it had organised its team in such a way as to combat doping effectively, thus avoiding the negative judgment on this issue.
44. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision’s reference to the allegedly unethical behaviour of the Appellant as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

C. The failure to comply with the Regulations with respect to the riders’ image contracts

45. Art. 2.15.116 of the Regulations sets out a rule forbidding ProTour teams and riders to sign contracts for image rights whereby the remuneration exceeds 15% of the total remuneration paid to the rider (the “15% rule”).
46. The 15% rule has been inserted for the first time in the Regulations in view of the granting of the ProTour licences. At the workshop held by E&Y in September 2004 with all the applicants, the E&Y auditors explained that, because of the non-retroactivity principle, only the new contracts were expected to comply with the 15% rule.
47. In the Appellant’s application, there were a few contracts whose expiry date had been recently extended beyond 31 December 2004, which did not respect the 15% rule. The Appellant’s own interpretation was that such an extension did not render those contracts “new” and, hence, they would not be caught by the 15% rule. As the Appellant received at least one of

the E&Y reports (and perhaps both) only after the 12 November 2004, the Appellant did not and could not know that his interpretation would have been prejudicial to the attainment of the ProTour License. In addition, Mr Rumpf testified that, between 28 October and 12 November 2004, nobody from the UCI administration contacted the Appellant in order to draw the Appellant's attention to the problems outlined in the E&Y Reports.

48. In particular, the Appellant was not knowledgeable about the distinction made by E&Y auditors (and not to be found in the Regulations) between "reservations" and "remarks", i.e. between more serious and less serious shortcomings relating to the contracts of employment, the insurances and the social security cover. Indeed, it would seem to the Panel that some of the shortcomings listed by E&Y under the heading "remarks" could well be inserted under the heading "reservations", due to their apparent relevance (e.g. the lack in some employment contracts of a "declaration" clause expressly required by the Regulations, the lack of some insurances, the absence of some contracts). However, according to Mr Rumpf's testimony, several teams obtained a ProTour licence even though they were not fulfilling all the requirements of the Regulations, provided that such flaws were classified among the "remarks" in the pertinent E&Y reports. Therefore, the distinction between flaws which yielded a "reservation" and flaws which yielded a "remark", to be found in the E&Y reports, was a crucial piece of information for any applicant, but it was not delivered to the Appellant before the Preliminary Opinion. In any event, even if the Appellant had received the E&Y reports beforehand, they were not drafted in such way as to clearly indicate that the Appellant's ProTour licence could be at risk, inasmuch as they comfortably stated that the riders' contracts "*have not revealed any significant anomalies*", without any hint that the ensuing "reservations" would prevent the release of the licence.
49. Indeed, the Appellant quickly reacted when it could see the relevance of the image rights issue in the Preliminary Opinion; in his testimony, Mr Rumpf declared that the Appellant handed to him the correctly amended contracts immediately after the hearing of 22 November 2004 in front of the Licence Commission. This circumstance demonstrates that, if the Respondent had respected the Appellant's rights to be heard and to obtain a fair proceeding, the Appellant could have easily corrected his mistaken interpretation of the 15% rule and avoided the negative judgment on this issue.
50. Furthermore, the Panel considers that the Respondent's unclear behaviour could lead the Appellant to believe that it could legitimately present the amended contracts even after the deadline of art. 2.15.026 of the Regulations.
51. Indeed, on 1 July 2004, the Respondent wrote to the Appellant and strangely mentioned 23 November 2004 as the deadline to meet the conditions required to obtain a licence: "[...] *provided that, on 23 November 2004, the application still meets all the other conditions required to obtain a licence, as well as today, a four-year UCI ProTour licence will be granted to your team [...]*". As was mentioned, the amended contracts were delivered on 22 November 2004, thus before the said date of 23 November 2004.

52. More significantly, on 19 November 2004, the Respondent wrote to the Appellant – with a copy to the Licence Commission – asking to provide “*a copy of all 2004 and 2005 image contracts signed with your riders. It is up to you to decide if you wish to provide the Licence Commission with additional documentation[...]*”. Obviously, the Respondent was asking the Appellant to provide the Licence Commission with the *amended* image contracts, as on that date the faulty contracts were already in the hands of the Licence Commission and the negative judgment related to the breach of the 15% rule was already known to the Appellant.
53. The Panel agrees with the Respondent that stringent financial and contractual requirements are needed for the orderly management and development of professional sports. Moreover, the Panel concurs with the Respondent’s position that, in order to take part in top professional cycling, teams must be well-organized and scrupulously comply with all the administrative deadlines. However, the Panel finds that the Respondent’s behaviour, and in particular the express request (after the set deadline) of providing to the Licence Commission the amended image contracts, could lead the Appellant to believe that the Licence Commission would take into consideration the documents filed by the Appellant after 12 November 2004, and that the express request of documentation would prevail over art. 2.15.026. If this was not the case, the Respondent’s letter of 19 November 2004 was illogical, and it should have been clearly declared before or during the hearing of 22 November 2004 that any new production of documents was useless.
54. Therefore, the contradictory attitude of the Respondent was such that the Appellant was legitimately entitled to believe that it had the right to provide the amended contracts even after the 12 November 2004. Arguably, to claim otherwise could be deemed as a breach of fundamental rights such as the principles of good faith and the prohibition of *venire contra factum proprium* (cf. CAS OG 02/006, New Zealand Olympic Committee v/FIS-IOC-SLOC, in *Digest of CAS Awards*, III, 609).
55. Based on the foregoing, the Panel finds, and so holds, that the Appealed Decision’s reference to the 15% rule as a reason to deny the UCI ProTour Licence to the Appellant is materially ungrounded or evidently unjustified.

D. *Conclusion on the merits of the Appealed Decision*

56. The Panel has found that the Appellant’s fundamental rights to be heard and to obtain a fair procedure were breached. However, according to the constant jurisprudence of the CAS, a procedural violation is not enough in and by itself to set aside an appealed decision (see CAS 2001/A/345, in *Digest of CAS Awards III*, 240 and the references quoted therein); it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body could be cured through the due process accorded by the CAS, and the appealed decision’s ruling on the merits was the correct one, CAS panels had no hesitation in confirming the appealed decision.

57. In the Panel's view, the above analysis on the merits of the Appealed Decision has shown that the procedural defects of the licensing procedure had a critical bearing on the outcome of the same procedure. As a consequence, the Panel holds that the violations of the Appellant's fundamental procedural rights, in addition to the other questionable aspects of the Appealed Decision, have yielded a ruling that, as a whole, is materially ungrounded and evidently unjustified.
58. For all the above reasons, the Panel finds, and so holds, that the Appellant's appeal must be allowed and the Appealed Decision must be set aside.

Other grounds of appeal

59. The Appellant submitted other grounds of appeal – concerning, in particular, the right of personality, competition law, and the principle of proportionality – which, in its opinion, would also render the Appealed Decision unlawful. Since the Panel has already held that the Appealed Decision is to be set aside, it is not necessary to rule on the other grounds of appeal.

New decision on the Appellant's application issued by the CAS

60. According to art. 2.15.241 of the Regulations, the Panel "*will deliver a new decision replacing the challenged decision. This decision will definitively decide the dispute*". Therefore, the Panel must issue a decision *ab novo* with regard to the Appellant's application.
61. For the reasons already expounded, the Panel considers that the Appellant did not have an unethical behaviour and that its application met all the required conditions to obtain a licence. However, it is undisputable that, for the Phonak team, the year 2004 was marked by blood tests with average high values, a confirmed doping case and two cases of adverse analytical findings. This sequence of events, undoubtedly, is a circumstance which might have contributed to bringing the sport of cycling into disrepute.
62. Nevertheless, the high average blood values were observed in April 2004 and did not prevent the issuance of the Provisional Licence a couple of months later. After Dr Zorzoli's presentation in June 2004, the Phonak team's average blood values were in line with the average blood values of the other teams (with the obvious exception of the two riders with adverse analytical findings). In any event, according to Dr Zorzoli's testimony, during the season no rider from the Phonak team had to be stopped because of blood values above the thresholds set by the Regulations.
63. As far as the riders Camenzind, Hamilton and Perez are concerned, the Appellant took immediately the correct measures. According to Dr Zorzoli's testimony, the Appellant established an acceptable Medical Concept, comparable to that of other teams.

64. Relying on Dr Zorzoli's testimony, the Panel finds that the Appellant might not have been irreproachable in its internal organisation during the 2004 season. Nevertheless, since the doping suspicions were raised, the Appellant took several measures and dismissed some staff members and hired others so as to prevent further problems. With regard to the next seasons, the Appellant does not appear as being less prepared than the other UCI ProTour Licence holders as far as the anti-doping requirements and health security measures are concerned. In addition, more pressure will be on the Appellant, for it cannot ignore that it will be under constant scrutiny by the general public opinion as well as by the sporting authorities, in order to check whether it will rigorously act in accordance with sporting ethics, including matters of doping and health.
65. Based of the foregoing, the Panel is of the opinion that the granting of a UCI ProTour Licence for a period of two years is proportionate. Such measure will give the opportunity to the Appellant to demonstrate, as far as required, that there was in fact no connection between its riders' high blood values and adverse analytical findings and its internal organisation, and to confirm that the team can reach the level of excellence necessary for the UCI ProTour. In any event, the Regulations allow the Licence Commission to withdraw the ProTour licence at any moment should the team no longer comply with the conditions set out by art. 2.15.040.
66. For those reasons, the Panel accepts the Appellant's application and, considering in particular some events of the year 2004 in light of the criterion no. 8 of art. 2.15.011 of the Regulations, holds that the granting of a UCI ProTour licence for two years is appropriate.

The Court of Arbitration for Sport rules:

1. The appeal filed by ARcycling AG on 15 December 2004 is upheld.
 2. The appealed decision issued on 22 November 2004 by the Licence Commission of the Union Cycliste Internationale is set aside.
 3. The application of ARcycling AG for the obtainment of a UCI ProTour Licence for the Phonak Hearing System team is accepted, and a UCI ProTour Licence is granted to it for a period of two years, namely for the cycling seasons 2005 and 2006.
 4. All other motions or prayers for relief are dismissed.
- (...)