CAS 2023/A/9550 Mario Vušković v. German Football Association (DFB) & National Anti-Doping Agency of Germany (NADA)
CAS 2023/A/9586 National Anti-Doping Agency of Germany (NADA) v. Mario Vušković & German Football Association (DFB)
CAS 2023/A/9607 World Anti-Doping Agency (WADA) v. German Football Association (DFB) & National Anti-Doping Agency of Germany (NADA) & Mario Vušković

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President:	Mr Lars **Hilliger**, Attorney-at-Law, Copenhagen, Denmark
Arbitrators:	Mr Jeffrey G. **Benz**, Attorney-at-Law and Barrister, London, United Kingdom
	Prof Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy
Ad hoc Clerk:	Mr Dennis **Koolaard**, Attorney-at-Law, Amsterdam, The Netherlands

in the arbitration between

Mr Mario Vušković, Croatia

Represented by Mr Paul J. Greene, Attorney-at-Law, Global Sports Advocates, Portland, Maine, United States of America; Mr Tomislav Kasalo, Attorney-at-Law, Kasalo & Raić Ltd., Split, Croatia; and Dr Joachim Rain, Attorney-at-Law, Schickhardt Rechtsanwälte, Ludwigsburg, Germany

- Appellant in CAS 2023/A/9550 / Respondent in CAS 2023/9586 & 2023/A/9607 -

and

National Anti-Doping Agency of Germany (NADA), Bonn, Germany

Represented by Dr Stephan Netzle, Attorney-at-Law, TIMES Attorneys AG, Zurich, Switzerland; and Dr Karsten Hofmann, Attorney-at-Law, Bonn, Germany

- Appellant in CAS 2023/A/9586 / Respondent in CAS 2023/A/9550 & 2023/A/9607 -

and

World Anti-Doping Agency (WADA), Lausanne, Switzerland

Represented by Mr Ross Wenzel, WADA General Counsel, Lausanne, Switzerland; Mr Nicolas Zbinden and Mr Michael Kottmann, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland

- Appellant in CAS 2023/A/9607 -

and

German Football Association (DFB), Frankfurt am Main, Germany

Represented by Dr Martin Stopper and Ms Franziska Wittersheim, Attorneys-at-Law, Lentze Stopper, Munich, Germany

- Respondent in CAS 2023/A/9550 & 2023/A/9586 & 2023/A/9607 -

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I. PARTIES

1. Mr Mario Vušković (the "Athlete") is a professional football player of Croatian nationality, currently employed by the German football club Hamburger Sport-Verein ("HSV").

2. The National Anti-Doping Agency of Germany (*Nationale Anti Doping Agentur Deutschland* – "NADA") is the primary authority, at the national level, for the anti-doping programmes in Germany, and is recognised as such by WADA (defined below).

3. The World Anti-Doping Agency ("WADA") is the international anti-doping agency recognised as such by the International Olympic Committee ("IOC"), constituted as a private law foundation under Swiss law. WADA has its registered seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

4. The German Football Association (*Deutscher Fußball-Bund* – the "DFB") is the national governing body of football in Germany.

5. The Athlete, NADA, WADA and the DFB are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

6. The present appeal arbitration proceedings concern three separate appeals lodged by the Athlete, NADA and WADA against a decision issued by the DFB Sports Tribunal whereby the Athlete was sanctioned with a two-year period of ineligibility for a violation of § 6(2)(a) of the DFB Legal and Procedural Rules ("DFB LPR" – "*presence of a prohibited substance, its metabolites or markers in a sample taken from the body*") for the presence of recombinant erythropoietin ("rEPO") in his sample (the "Appealed Decision").

7. EPO is a protein hormone which triggers the formation of red blood cells from bone marrow cells, leading to more red blood cells in the blood flow. Due to the increase of the red blood cell population the oxygen capacity of the blood is increased, and more oxygen is transported by the blood stream to target tissues. As an effect of better oxygenation, endurance performance is increased.

8. In short, the Athlete seeks a decision fully exonerating him from any alleged anti-doping rule violation ("ADRV"), NADA and WADA seek a decision whereby the period of ineligibility imposed on the Athlete is increased from two to four years, and the DFB seeks a decision dismissing the three appeals and confirming the Appealed Decision.

III. FACTUAL BACKGROUND

9. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings and at the hearing. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Doping control and results management

10. On 16 September 2022, the Athlete was subject to an Out-of-Competition urine doping control at the training grounds of HSV.

11. The analysis of the Athlete's A sample by the WADA-accredited Institute for Doping Analysis and Sports Biochemistry Dresden in Kreischa, Germany ("IDAS"), allegedly revealed the presence of rEPO. EPO belongs to the peptide hormones, growth factors, related substances and mimetics prohibited under S2 of the WADA Prohibited List. All substances listed under S2 of the WADA Prohibited List are non-Specified Substances, forbidden in- and out-of-competition at all times.

12. On 9 November 2022, Dr Yvette Dehnes, Director of the WADA-accredited Norwegian Doping Control Laboratory at the Oslo University Hospital, provided a "*Second opinion on sample 0036111*", confirming that the Athlete's A sample contained rEPO.

13. On 10 November 2022, NADA informed the DFB's Anti-Doping Commission of the Adverse Analytical Finding ("AAF").

14. On 11 November 2022, the DFB Anti-Doping Commission informed the Athlete, amongst others, of the AAF.

15. On 15 November 2022, the Chairman of the DFB Sports Tribunal provisionally suspended the Athlete with immediate effect until the DFB Sports Tribunal would render its decision on the merits.

16. On 12 December 2022, the Athlete's B sample was opened at IDAS in the presence of an authorised representative of the Athlete. The analysis of the B sample allegedly confirmed the A sample's finding, i.e., the presence of rEPO.

17. On 14 December 2022, Dr Dehnes provided a "*Second opinion on sample0036111B_corrected*", confirming that the Athlete's B sample contained rEPO.

B. First Instance proceedings before the DFB Sports Tribunal

18. On 16 December 2022, the DFB Control Committee opened disciplinary proceedings against the Athlete for an alleged infringement of § 6(2)(a) DFB LPR ("*presence of a prohibited substance, its metabolites or markers*") and § 6(2)(b) ("*use or attempted use of a prohibited substance*").

19. On 19 January 2023, the DFB Control Committee pressed charges against the Athlete before the DFB Sports Tribunal.

20. On 3, 9 and 17 March 2023, hearings were held before the DFB Sports Tribunal.

21. On 30 March 2023, the DFB Sports Tribunal issued the Appealed Decision with the following operative part:

> "*1. Licensed player Mario Vuskovic (HSV Fußball AG) is banned for a violation of § 6 No. 2 a) of the legal and procedural rules of the DFB with a ban for the duration of two years from 11.15.2022.*
>
> *2. Licensed player Mario Vuskovic bears the costs of the proceedings under the joint liability of HSV Fußball AG.*"

22. The Panel finds that the reasoning of the Appealed Decision with respect to the alleged ADRV is appropriately summarised by NADA in its Appeal Brief as follows:

- "*In its decision, the DFB Sports Tribunal held that it was convinced with sufficient certainty that the analyses of the A and B Sample of* [the Athlete] *taken on 16 September 2022 and analysed by the Laboratory had revealed the presence of foreign, recombinant erythropoietin (rEPO).*

- *The DFB Sports Tribunal was convinced that the sample no. 0036111 was taken from* [the Athlete] *in compliance with the ISTI, that the sample was handled correctly by the DCO and that the sample arrived at the Laboratory without any indication or signs of openings or leaks. The DFB Sports Tribunal ruled out any confusion of* [the Athlete's] *sample with the sample of another athlete.*

- *The DFB Sports Tribunal noted that the analyses of the sample A/B 0036111 were carried out by the Laboratory using the SAR-PAGE method. While doubts regarding the scientific validity of this method have been raised by* [the Athlete], *the DFB Sports Tribunal concluded, after examination of expert witnesses, that the SAR-PAGE method can be considered scientifically safe, tested many times and applied with correct results, also taking into account the specific probabilities of scientific methods and detection methods.*

- *This gel electrophoretic method for the separation and determination of molecules is a detection method approved by WADA within the meaning of § 6 b) No. 5 (2) DFB LPR. Accordingly, analytical methods or decision-making limits that have been approved by WADA after consultation within the relevant scientific community or that have been the subject of peer review by independent experts are deemed to be scientifically valid. The relevant presumption of scientific validity § 6 b) No. 5 (2) DFB LPR has not been refuted by* [the Athlete] *to the necessary standard.*

- *The DFB Sports Tribunal noted that the Laboratory is accredited by WADA. In accordance with § 6 No. 5 b (4) DFB LPR, it is refutably assumed that the analyses of the samples were in accordance with the ISL and the samples have been processed accordingly, and that* [the Athlete] *failed to refute this assumption.*

- *In particular:*

  a. *Insufficient cooling or temperature fluctuations in the interim storage of the samples for multiple days in the home of the DCO after sample taking have no effect on the analytical procedure and its result.*

  b. *No evidence was presented that taking Ibuprofen or Pantoprazole or the physical strain of* [the Athlete] *prior to sample taking would be likely to cause a false positive rEPO result.*

  c. [The Athlete] *failed to prove an incorrect loading or overloading with protein on the gels or the (negative) comparison paths used in the analyses.*

- *Furthermore, the DFB Sports Tribunal had no material doubt that the Laboratory had correctly and objectively evaluated the results of the analyses and classified them as positive rEPO findings, and there were no indications of a false or even arbitrary evaluation of the analysis results leading to a false positive finding.*

- *The DFB Sport Tribunal* […] *rejected* [the Athlete's] *request to carry out a further analysis of his urine sample (colloquially called "C Sample"). Such a further analysis is not provided in the applicable anti-doping rules or the regulations of WADA.*"

23. With respect to the proportionality of the period of ineligibility to be imposed on the Athlete, the DFB Sports Tribunal ruled as follows in the Appealed Decision (in a certified translation provided by both the Athlete as well as NADA):

- "*For the violation of the anti-doping provisions by* [the Athlete], *thus established according to § 6 No. 2 a)* [DFB LPR}, *§ 8 b No. 1 a) aa)* [DFB LPR] - *in the presence of a prohibited non-specific substance - provides for a ban of four years.*

- [the Athlete] *and the HSV have not proved that the violation was not committed intentionally, which is why it is not possible to shorten the ban to two years in accordance with § 8b No. 1. B)* [DFB LPR].

- *A reduction of the ban according to § 8c No. 2. A)* [DFB LPR] *is also ruled out, as* [the Athlete] *and HSV have not argued that* [the Athlete] *is not at*

fault with regard to the positive doping test or how the prohibited substance entered his body.

- *The other options for reducing the number of prison sentences* [sic] *provided for in the anti-doping provisions are also out of the question.*

- *However, the Sports Court considers that the imposition of a four-year ban in the present Vuskovic case, which was subsequently laid down in its statute, cannot be brought into line with the principle of proportionality.*

- *When imposing Sports Court sanctions, the Sports Courts must strictly observe the principle of proportionality. This is ultimately based on the principle derived from Rule of Law of Art. 20 Para. 3 GG is an essential guiding principle in our legal system everywhere - also in association law. Similar to Public Law, the excessive abuse and abuse of a unilateral power relationship must also be limited and controlled in Civil Law by a proportionate exercise of this position. Accordingly, the Proportionality Principle must be observed without restriction in Sports Court proceedings, even without explicit statutory standardization.*

- *The Federal Anti-Doping Act of 10 December 2015 (BGBl I p. 2210), as last amended by Article 1 of the Ordinance of 10 December 2003, also provides an example of this. March 2023 (BGBl 2023 I No. 67), in his criminal regulations the penalty threats according to the respective typed wrongs. Such an unlawful gradation is not present in the relevant WADA provisions, according to which the following particularities of the individual case cannot be taken into account in the context of the assessment of penalties:*

    - [The Athlete] *is to be treated as a first-time offender, in whom a small amount of a prohibited substance has been found. The Sports Court therefore assumes at most a one-time injection and not a structured, long-term EPO abuse by* [the Athlete].

    - *The interruption of competition and team training activities for a period of four years usually means the end of a career for a professional soccer player as a team player - unlike for an individual athlete. While the individual athlete is able to conserve his performance physically and psychologically through private individual training and thus to bridge the barrier, this is not possible for a team athlete to the same extent through individual training.*

    - *The economic impact of a four-year ban in professional soccer is much more serious and intense for* [the Athlete] *than for athletes of other, less prominent and financially equipped sports. The loss of the economic livelihood would hit the* [the Athlete] *significantly harder than it would other athletes.*

- *It should also be noted that* [the Athlete] *is an athlete of just 21 years of age, where the longer barrier can cause sensitive disturbances in the maturation and development process.*

- *These essential aspects of individual punishment are not reflected in the anti-doping regulations. In the area of the imposition of sanctions, the regulatory focus is solely placed on the type of prohibited substance, the degree of culpability and other actions of the athlete concerned (such as confession and information measures). Further concrete circumstances related to the act or the perpetrator for the individual examination of the sanction allocation, such as for example age, sport, earnings, sanction effects, etc., are not regulated there.*

- *In the view of the Sports Court, these measures of the imposition of the fixed 'severe' four-year ban in the present case can hardly be reconciled with the constitutional and state of law principles in Germany (see also: Munich Higher Regional Court, judgement of 03.28.1996, U (K) 3424/95, Spurt 1996, 133 et seq.). The regulation shortens legal protection on the sanction level and contradicts the essential principles of national (civil) law. The ban based on this would violate the Principle of good faith according to § 242 BGB. The Sports Court therefore assumes that there is a loophole in the regulation, which must be closed on the basis of the principles of justice and proportionality.*

- *In this context, the Sports Court considers that the imposition of a two-year ban is still proportionate and compatible with the prohibition of excessive use. This ban is appropriate and justified on the basis of the specific criteria for the award of penalties.*

- *The period of the provisional ban imposed by the decision of 11.15.2022 is counted against the ban period in accordance with § 8e No. 3* [DFB LPR]."

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 6 April 2023, the Athlete filed a Statement of Appeal with CAS, challenging the Appealed Decision in accordance with Articles R47 and R48 of the 2023 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, the Athlete nominated Mr Jeffrey G. Benz, Attorney-at-Law in London, United Kingdom, as arbitrator. These proceedings were referenced by the CAS Court Office as *CAS 2023/A/9550*.

25. On 19 April 2023, NADA filed a Statement of Appeal with CAS, challenging the Appealed Decision in accordance with Articles R47 and R48 CAS Code. In this submission, NADA requested for a consolidation of the procedure with *CAS 2023/A/9550* and that they be referred to the same Panel. These proceedings were referenced by the CAS Court Office as *CAS 2023/A/9586*.

26. On 24 April 2023, the DFB and NADA (respondents in *CAS 2023/A/9550*) informed the CAS Court Office that they jointly agreed to nominate Prof Luigi Fumagalli, Professor and Attorney-at-Law in Milan, Italy, as arbitrator.

27. On the same date, 24 April 2024, the Athlete agreed with NADA's proposal to consolidate *CAS 2023/A/9550* and *CAS 2023/A/9586*.

28. On 27 April 2023, the DFB agreed with NADA's proposal to consolidate *CAS 2023/A/9550* and *CAS 2023/A/9586*.

29. On the same date, 27 April 2023, WADA filed a Statement of Appeal with CAS, challenging the Appealed Decision in accordance with Articles R47 and R48 CAS Code. In this submission, WADA requested for a consolidation of the procedure with *CAS 2023/A/9550* and *CAS 2023/A/9586* and that they be referred to the same Panel. These proceedings were referenced by the CAS Court Office as *CAS 2023/A/9607*.

30. On the same date, 27 April 2023, WADA filed applications to intervene in *CAS 2023/A/9550* and in *CAS 2023/A/9586*. At the same time, WADA indicated that it had filed its own appeal against the Appealed Decision and had requested for a consolidation of its appeal with *CAS 2023/A/9550* and *CAS 2023/A/9586*.

31. On 8 May 2023, the CAS Court Office informed the Parties that, pursuant to Article R52(5) CAS Code, the President of the Appeal Arbitration Division had decided that *CAS 2023/A/9550*, *CAS 2023/A/9586* and *CAS 2023/A/9607* were consolidated and that, unless there was any objection, all three cases would be referred to the same arbitral tribunal.

32. On 9 May 2023, the CAS Court Office informed the Parties that unless any contrary indication by WADA, WADA's requests for intervention in *CAS 2023/A/9550* and *CAS 2023/A/9586* were considered moot.

33. On 19 May 2023, WADA informed the CAS Court Office that the Parties had reached an agreement on a procedural schedule.

34. On 1 June 2023, the Athlete filed the following two document production requests:

> "*The Standard Operating Procedure ('SOP') used by the laboratory who tested* [the Athlete's] *16 September 2022 urine sample (*[IDAS]*) for the detection and reporting of erythropoietin (EPO) and other EPO-receptor agonists (ERAs) when using PAGE Analytical Methods and/or in connection to the application of said methods, including but not limited to the SOP for the use of the SAR-PAGE method.*
>
> […]
>
> *The files containing electrophoretic data (corresponding to* [the Athlete's] *urinary sample 0036111) referenced in the second opinion letters of Dr.*

Yvette Dehnes dated 9 November 2022 (for the A-Sample) and 14 December 2022 (for the B-Sample)."

35. On 26 June 2023, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the Panel appointed to decide the present case was constituted as follows:

President: Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark
Arbitrators: Mr Jeffrey G. Benz, Attorney-at-Law and Barrister in London, United Kingdom
Prof Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy
Ad hoc Clerk: Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, The Netherlands

36. On 7 July 2023, NADA commented on the Athlete's document production requests, opposing the first request, but not opposing the second request. NADA also argued that it was not the Results Management Authority in this case and suggested that the Panel liaise directly with IDAS with respect to the second request.

37. Also on 7 July 2023, WADA commented on the Athlete's document production requests, opposing the first request and leaving the second request for NADA, which it argued was the Results Management Authority in this case.

38. Also on 7 July 2023, all Parties separately informed the CAS Court Office that they had not been able to agree on a renewed proposed procedural schedule.

39. On 20 July 2023, in light of the disagreement between the Parties, on behalf of the Panel, the CAS Court Office informed the Parties of the filing deadlines for their respective Appeal Briefs and Answers. The Parties were also informed that the Panel considered it necessary to hold an in-person hearing. Furthermore, considering the consolidation of the three proceedings and the Parties' agreement on the filing of an Answer by WADA, WADA's requests for intervention were redundant and, unless any objection would be filed by any of the Parties by 27 July 2023, WADA would be added as respondent to *CAS 2023/A/9550* and *CAS 2023/A/9586*. Finally, with respect to the Athlete's document production requests, the Parties were informed as follows:

"*Production Request #1*

The Panel finds that the Athlete's document production request is insufficiently elaborated to justify a deviation from the general rule set forth in WADA Technical Document TD2022LDOC that 'the Laboratory is not required to provide any additional documentation, such as Standard Operating Procedures (SOP) […]*'. This request is therefore* <u>*dismissed*</u>*.*

Production Request #2

Considering that neither of the other Parties objected to the Athlete's request, the Panel has decided that this document production request is

> *granted. The Panel holds the DFB, the NADA and WADA jointly responsible to submit the documentation requested to be produced by **27 July 2023**.*" (emphasis in original)

40. On 27 July 2023, NADA provided the CAS Court Office with the documentation corresponding to the Athlete's second document production request.

41. On the same date, 27 July 2023, WADA informed the CAS Court Office that it agreed that its requests for intervention had become moot, but that there was no need for WADA to be included formally as a respondent in the two other (consolidated) proceedings.

42. On 28 August 2023, the Athlete, NADA and WADA filed their respective Appeal Briefs in accordance with Article R51 CAS Code.

43. On 18 October 2023, WADA informed the CAS Court Office that it noted that the Athlete relied on (and adduced) materials of another case (*viz.* the matter of Mr Peter Bol – the "Bol Case") in support of his appeal. In particular, the Athlete produced a statement issued by Dr Chen in the context of the Bol Case, as well as an opinion by Dr Dehnes, apparently with the agreement of Mr Bol. WADA considered that the Athlete was only able to do so because he happens to share the same lawyer and expert as Mr Bol and that it was highly unusual (and improper) to seek to rely on elements from a confidential case file involving a third party in support of one's case. WADA argued, *inter alia*, that it simply cannot be right that one party (i.e., the Athlete) can obtain a limited confidentiality waiver (in favour of himself) to produce specific elements from the case that he wants to rely on (for comparative purposes) without the other Parties (including NADA and the DFB) having access to the entire file (so that they can respond using whatever elements they deem appropriate) and that this would constitute a clear and obvious violation of the other Parties' right to be heard. On this basis, WADA submitted that the material from the Bol Case relied upon by the Athlete should not be admitted to the file and that any submissions or evidence that are based on such material should be entirely disregarded. WADA further argued that, if that is not done, then (i) the entire Bol Case file would have to be made available to all Parties so that they and their experts are in a position to respond, with the required confidentiality, privacy and data protection waivers from all relevant persons (including Mr Bol); and (ii) the other Parties and experts should be given clear and explicit guarantees (including by Mr Bol) that they can express their opinion freely with respect to the merits of the material from the Bol Case file.

44. On 30 October 2023, the Athlete objected to WADA's request, submitting, *inter alia*, that there is no procedural rule that permits WADA's request, that WADA incorrectly recounted what happened in the Bol Case and that WADA incorrectly characterizes why certain exhibits and references to the Bol Case have been introduced as evidence. The Athlete also requested for a public hearing to be held pursuant to Article R57 CAS Code.

45. On 31 October 2023, the DFB indicated its agreement with WADA's request.

46. On the same date, 31 October 2023, NADA indicated its agreement with WADA's request, although indicating that releasing further information or documents relating to the Bol Case is no solution to create procedural equality. NADA submitted that to restore the integrity of this procedure, it is necessary to exclude all references to the Bol Case and to focus on the Athlete's case.

47. On 3 November 2023, WADA filed unsolicited comments with the CAS Court Office concerning the Athlete's letter dated 30 October 2023, *inter alia*, submitting that the Athlete incorrectly recounted what happened in the Bol Case.

48. On 7 November 2023, on behalf of the Panel, the CAS Court Office informed the Parties as follows:

> "*Before deciding on the requests filed by WADA, NADA and the DFB not to admit the Bol Materials (i.e., Exhibits 6 and 26 to the Athlete's Appeal Brief) and any submissions or evidence that are based on the Bol Materials to be disregarded, the Panel invites the Athlete to seek Mr Bol's consent for (1) the entire Bol case file to be made available to WADA, NADA and the DFB; and (2) that they and their experts are guaranteed that they can respond freely with respect to the merits of the Bol case, without breaching confidentiality, data protection/privacy law and without fear of suit. The Athlete is invited to provide evidence of Mr Bol's consent to the CAS Court Office* ***by 15 November 2023***."

49. On 14 November 2023, the Athlete informed the CAS Court Office that Mr Bol had given the consent requested by way of a statement, but that Mr Bol himself too requested to be provided with his "*full case file as a matter of completeness for my records*".

50. On 15 November 2023, NADA indicated that the first instance hearing before the DFB Sports Tribunal was already public, which is a reason to deny a public hearing before CAS. NADA also considered that Mr Bol should consent to the admission of further listeners/participants to the hearing.

51. On the same date, 15 November 2023, WADA indicated that because the Parties may in effect make submissions in respect of the Bol Case, and as Mr Bol is not a party to the proceedings, it considered it inappropriate for the hearing to be public.

52. On the same date, 15 November 2023, the DFB indicated that it agreed with the Athlete's request for a public hearing.

53. On 22 November 2023, on behalf of the Panel, the CAS Court Office informed the Parties that the Panel would decide on the Athlete's request for a public hearing at a later stage. The Parties were further informed as follows:

> "*It is the Panel's understanding that WADA has full access to the entire Bol case file, or at least that it is in a position to obtain access to it through Sport*

Integrity Australia (with Mr Bol's consent). Should such understanding be incorrect, WADA is invited to inform the CAS Court Office ***by 23 November 2023****.*

In case WADA indeed has full access to the entire Bol case file, or can obtain access to it through Sport Integrity Australia, WADA is invited to share the entire Bol case file (with Mr Bol's consent) with the Athlete, NADA and the DFB directly ***by 28 November 2023****, i.e., no copy is to be shared with the CAS Court Office. Rather, any material from the entire Bol case file that is considered relevant by any of the Parties is to be submitted as evidence with their Answers and they and their experts are permitted to make submissions in this respect (with Mr Bol's consent). This notwithstanding, the Panel kindly invites the Parties to apply restraint in this respect, as the Panel's mandate is to adjudicate and decide the case involving the Athlete, not the case of Mr Bol.*

The Panel finds that, upon receipt of the entire Bol case file, counsel for the Athlete is best positioned to assess what material may not previously have been presented to Mr Bol and share such material with him with the consent of all Parties involved. Counsel for the Athlete is kindly invited to confirm that this is acceptable to him as well as to Mr Bol ***by 23 November 2023****.*

By obtaining access to the entire Bol case file and Mr Bol's consent, the Panel finds that the Athlete's reliance on the Bol Materials (i.e., Exhibits 6 and 26 to the Athlete's Appeal Brief) does not violate the right to be heard of WADA, NADA and the DFB. Therefore, the Bol Materials and any submissions or evidence of the Athlete that are based on the Bol Materials are admitted on file and the objections filed by WADA, NADA and the DFB in this respect are ***dismissed****.*

The deadlines of the Parties to file their Answers will ***resume*** *upon receipt of the entire Bol case file, i.e., in principle as from* ***29 November 2023****.*"

54. On 24 November 2023, counsel for the Athlete confirmed that the Panel's findings were acceptable to him and Mr Bol and that Mr Bol had no problem whatsoever with a public hearing being held in this matter.

55. On 11 December 2023, following an extension of its time limit to do so, WADA confirmed that it had received the Bol Case file from Sport Integrity Australia and that it had shared it as received with the Athlete, NADA and the DFB.

56. On 20 December 2023, following prior attempts to schedule a case management conference, the CAS Court Office informed the Parties on behalf of the Panel that the case management conference was postponed until the Answers had been received, at which stage the Panel would decide if a case management conference would still be necessary.

57. On 18 January 2024, the Athlete informed the CAS Court Office that the Parties jointly proposed to hold a 2-day hearing in-person in Lausanne, Switzerland.

58. On 1 February 2024, following consultation of the Parties, the CAS Court Office confirmed that an in-person hearing would be held in Lausanne, Switzerland, on 14 and 15 May 2024.

59. On 2 February 2024, the Athlete, NADA, WADA and the DFB filed their respective Answers in accordance with Article R55 CAS Code.

60. Also on 2 February 2024, WADA informed the CAS Court Office that Sport Integrity Australia had asked for the possibility to attend the hearing as an observer and that WADA did not oppose to such request.

61. On 26 February 2024, the CAS Court Office informed the Parties that the Panel did not consider it necessary to hold a case management conference, but invited the Parties to indicate if they considered a case management conference necessary and, if so, for what reason. The Parties were further informed that the Panel had decided to hold a public hearing and invited the Parties to agree on a hearing schedule, including any expert conferencing sessions they considered appropriate.

62. On 29 February 2024, NADA requested to hold a case management conference before drafting a proposed hearing schedule.

63. On the same date, 29 February 2024, WADA confirmed its agreement with NADA's request for a case management conference, but only after the Parties had tried to agree on a hearing schedule amongst themselves. WADA also requested a confirmation from counsel for the Athlete that Mr Bol's previous guarantees also applied without restriction to a public hearing.

64. On 13 March 2024, the Athlete requested the anticipated oral testimony of Dr Christian Reichel, Head of Proteomics and Analytical Biochemistry at the Seibersdorf Laboratories and expert called by WADA, to be excluded from the case file, because he had not filed an expert report, in the absence of which the Athlete could not know the area of expertise upon which Dr Reichel intended to testify.

65. On 20 March 2024, the CAS Court Office informed the Parties that the Panel had decided to hold a case management conference. The Athlete was also requested to provide an explicit confirmation from Mr Bol that the guarantees contained in his statement dated 14 November 2023 also applied to a public hearing.

66. On 27 March 2024, NADA and WADA opposed the Athlete's request to exclude Dr Reichel's oral testimony.

67. On 1 April 2024, the Athlete provided the CAS Court Office with an explicit confirmation from Mr Bol that the guarantees contained in his statement of November 2023 also applied to a public hearing.

68. On 4 April 2024, the CAS Court Office informed the Parties, *inter alia*, as follows:

> "[…] [H]*aving considered the Parties' submissions, the Panel has decided that* [the Athlete's] *objection to the testimony of Dr Reichel is* ***dismissed****. Dr Reichel has been called as an expert in WADA's Answer, including a description of his area of expertise and his expected testimony, which is in accordance with the requirements set forth by Article R55 of the CAS Code. This notwithstanding, to enable* [the Athlete] *to better prepare for the cross-examination of Dr. Reichel, WADA is invited to file an expert report for Dr. Reichel* ***by 18 April 2024****.*
>
> *Finally, having carefully considered the Parties' positions, the Panel prepared the attached tentative hearing schedule. Unless any major objections are raised* ***by 8 April 2024****, this hearing schedule will be confirmed by the Panel.*" (Emphasis in original)

69. On 8 April 2024, WADA suggested that each party's experts be allowed to attend the others' "*individual examinations*", purely as observers, in order to render the expert conferencing sessions more efficient.

70. On 15 April 2024, a case management conference was held virtually. In addition to the members of the Panel, Ms Andrea Sherpa-Zimmermann, CAS Counsel, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the case management conference:

    a) For the Athlete:

        1) Mr Paul J. Greene, Counsel;
        2) Dr Joachim Rain, Counsel;
        3) Mr Tomislav Kasalo, Counsel.

    b) For WADA:

        1) Mr Nicolas Zbinden, Counsel.

    c) For NADA:

        1) Dr Lars Mortsiefer, Chairman of the Board of NADA;
        2) Dr Stephan Netzle, Counsel;
        3) Dr Karsten Hofmann, Counsel.

    d) For the DFB:

        1) Ms Franziska Wittersheim, Counsel;
        2) Mr Mahammad Safarli, Trainee.

71. During the case management conference, the Panel confirmed that it was indeed the Panel's intention that the Parties' experts would attend the individual examination of other experts in the same expert conferencing session as observers. Furthermore, the Athlete reiterated his request for a public hearing, although he indicated that he would

not object if no public hearing would be held. The Panel indicated that it would consider it useful to have a list of issues to be discussed in the expert conferencing sessions and that further instructions in this respect would follow by letter.

72. On 17 April 2024, the CAS Court Office informed the Parties that, in the absence of any objections raised by the Parties, the tentative hearing schedule circulated by the CAS Court Office on 4 April 2024 was confirmed, except that the hearing would start at 9:00am CET on both dates as agreed between the Parties and the Panel during the case management conference. The Parties were also informed that the hearing would be public in the sense that the hearing would be recorded and that the recordings of the hearing would be made public afterwards. The Panel informed the Parties that their requests with respect to observers attending the hearing were granted. Furthermore, the Parties were informed that the Panel had no objection to PowerPoint presentations being used during the hearing, as long as such presentations would not contain any new information and/or evidence and if such presentations would be filed with the CAS Court Office by 3 May 2024. The Parties were also invited the liaise between themselves and with the experts called to compile a list of contentious issues (and/or issues agreed upon as the case may be) for each expert conferencing session.

73. On 18 April 2024, WADA filed an expert report of Dr Reichel.

74. On 25 April 2024, pursuant to Article R56 CAS Code, the Athlete requested WADA's new technical document (TD2024EPO) released publicly on 11 March 2024 and which would enter into effect on 15 June 2024, to be admitted on file on the basis of exceptional circumstances. According to the Athlete, the changes to TD2024EPO are important since they prove unequivocally that an adjustment in intensity signal was required but never done in the Athlete's case, which could mandate "*a finding pursuant to the doctrine of lex mitior that the case against him must be thrown out*".

75. On 3 May 2024, WADA objected to the admissibility of TD2024EPO because it considered that such document was "*plainly irrelevant to the present case*". NADA agreed that the TD2024EPO was not relevant, but neither supported nor opposed the admission of such publicly available document on file.

76. On 8 May 2024, the CAS Court Office informed the Parties that the Panel had decided to admit the Athlete's new exhibit (*i.e.* TD2024EPO) into the file and that the reasons for such decision would be set forth in the final Award.

77. On 9, 12 and 13 May 2024 respectively, the Athlete, WADA, NADA and the DFB returned duly signed copies of the Order of Procedure, provided to them by the CAS Court Office on 8 May 2024.

78. On 9 and 10 May 2024, the Athlete and NADA provided the CAS Court Office with lists of topics and questions for the expert conferencing sessions to be held during the hearing. The Athlete also submitted a PowerPoint presentation to be used by Dr Chen and Mr Scott during the hearing. Finally, NADA informed the CAS Court Office that

Mr Aaron Walker, Deputy Director WADA Intelligence and Investigation, expert called by NADA, was not available on the hearing date.

79. On 13 May 2024, WADA objected to the PowerPoint presentation submitted by the Athlete.

80. On 14 and 15 May 2024, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel.

81. The hearing was attended in person, unless indicated otherwise. In addition to the members of the Panel, Ms Andrea Sherpa-Zimmermann, CAS Counsel, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Athlete:

1) Mr Mario Vušković, the Athlete;
2) Mr Paul J. Greene, Counsel;
3) Mr Tomislav Kasalo, Counsel;
4) Dr Joachim Rain, Counsel;
5) Dr Philippe Winter, representative of HSV;
6) Mr Jonas Boldt, Member of the Board of HSV;
7) Mr Damir Smoljan, Associate of the Athlete's Agent; and
8) Mrs Sanja Vušković, the Athlete's mother.

b) For NADA:

1) Dr Lars Mortsiefer, Chairman of the Board of NADA;
2) Dr Stephan Netzle, Counsel; and
3) Dr Karsten Hofmann, Counsel.

c) For WADA:

1) Mr Ross Wenzel, WADA General Counsel;
2) Mr Nicolas Zbinden, Counsel; and
3) Mr Robert Kerslake, Counsel.

d) For the DFB:

1) Dr Martin Stopper, Counsel;
2) Ms Franziska Wittersheim, Counsel; and
3) Mr Mahammad Safarli, Trainee;

e) For Sport Integrity Australia (as observer):

1) Ms Emily Fitton, Director Legal of Sport Integrity Australia.

82. The following persons were heard, in order of appearance:

1) Mr Mario Vušković, the Athlete;
2) Dr David Chen, Professor in the Department of Chemistry at the University of British Columbia, Canada, expert called by the Athlete;
3) Mr Paul Scott, Principal and CEO of Korva Scientific, expert called by the Athlete;
4) Dr Sven Voss, Director at IDAS and Member of the WADA EPO Working Group, expert called by NADA and WADA;
5) Dr Yvette Dehnes, Director of the Norwegian Doping Control Laboratory at the Oslo University Hospital and Member of the WADA EPO Working Group and a number of further WADA Working Groups, expert called by NADA, WADA and the DFB;
6) Prof Jean-François Naud, Associate Professor and Director of the Anti-Doping Laboratory of the INRS Armand-Frappier Santé et Biotechnology, Montreal, Canada, and Member of the WADA EPO Working Group and the WADA Assessment Team to verify compliance with the International Laboratory Standard, expert called by NADA, WADA and the DFB in the present proceedings, but originally retained as an independent expert by the DFB Sports Tribunal;
7) Dr Christian Reichel, Head of Proteomics and Analytical Biochemistry at the Seibersdorf Laboratories, expert called by WADA.
8) Dr Wolfgang Schillings, Team Doctor for the professional football club Hamburger SV, expert called by the Athlete;
9) Dr York Olaf Schumacher, Head of Medicine and Emergency Services at Aspetar Orthopedic and Sports Medicine Hospital in Doha, Qatar and Head of the WADA Expert Group on the Athlete Biological Passport (ABP) and Member of further WADA Expert Groups, expert called by NADA and WADA.
10) Dr Steven Baack, Senior Consultant for Icarus Risk Management GmbH, expert called by the Athlete; and
11) Dr Keith R. Ashcroft, Qualified Forensic Polygraph Examiner, expert called by the Athlete.

83. At the outset of the hearing, WADA's objection to the PowerPoint presentation presented by the Athlete was discussed, following which the Panel deliberated on the issue and informed the Parties of its decision to dismiss WADA's objection and indicated that the reasons for such decision would be set forth in the final Award.

84. All witnesses and experts were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties had full opportunity to examine and cross-examine the witnesses and experts.

85. During the hearing, once the DFB announced that it saw no need to cross-examine Prof Martin Nolte, Professor for public law, constitutional and European law and sports law in Cologne, Germany, expert called by NADA, NADA indicated there was no need to examine him. Prof Nolte was therefore not heard, but his expert opinion remained part of the case file.

86. The Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the members of the Panel.

87. Before the hearing was concluded, the Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

88. The following summaries of the Parties' positions are illustrative only and do not necessarily encompass every submission advanced by the Parties. However, the Panel confirms that it has carefully considered all the submissions made by the Parties, regardless of whether specific reference is made to them in the following summaries.

89. The Athlete's appeal solely concerns the question whether he committed an ADRV, whereas the appeals of NADA and WADA solely concern the question of the quantum of the period of ineligibility to be imposed in case the Athlete is found to have committed an ADRV.

90. The first part under section (A) below contains summaries of the Athlete's Appeal Brief and the Answers filed by NADA, WADA, the DFB and the Athlete concerning the question whether an ADRV was committed.

91. The second part under section (B) below contains summaries of the Appeal Briefs filed by NADA and WADA and the Answer filed by the DFB concerning the quantum of the period of ineligibility to be imposed.

92. It is to be noted that the Athlete did not address the substance of the appeals filed by NADA and WADA. Indeed, the Athlete's Answer does not address the question of whether the period of ineligibility to be imposed should be two or four years. Although the Athlete requests the appeals of NADA and WADA to be rejected in his requests for relief in his Answer, he submits that it is abundantly clear that he did not commit any violation of any applicable anti-doping rules and must be fully acquitted. The Athlete argues that, accordingly, there would therefore be no need for the Panel to consider the appropriate sanction in this matter and any discussion of sanction by WADA and NADA is pointless since they cannot meet their burden to prove that an ADRV was committed. The Athlete's Answer is therefore not included under section (B), but under section (A) below.

93. Since the DFB objects to all three appeals, its Answer contains two parts. Insofar as the DFB's Answer concerns the Athlete's appeal it is summarised under section (A), insofar as it concerns the appeals of NADA and WADA it is summarised under section (B).

A. The Athlete's Appeal

i. The Athlete's Appeal Brief

94. The Athlete's Appeal Brief, in essence, may be summarised as follows:

- The Athlete has never taken EPO as accused. IDAS was completely wrong when it concluded that the Athlete's urine sample provided on 16 September 2022 contained synthetic EPO. The mistakes made because of IDAS' inexperience and incompetence were compounded by Dr Dehnes' erroneous second opinion and Prof Jean-Francois Naud's inept and incorrect opinion submitted in the first instance hearing.

- The Athlete's false positive raises the same troubling issues that led to a false positive in the Bol Case, a case that concluded with a remarkable set of announcements: (1) Sport Integrity Australia publicly admitted that Mr Bol's sample collected in October 2022 had been wrongly reported as positive; and (2) WADA publicly proclaimed that it would review the rEPO (synthetic EPO) testing process in light of the false positive reported in the Bol Case.

- Dr David Chen reviewed Mr Bol's laboratory analysis back in spring 2023 and recognized that the faint trail or "smear" above Mr Bol's endogenous EPO band (uEPO) was the result of overloading, not rEPO. In the Athlete's case, Dr Chen again recognized that the faint diffusion or "smear" above the Athlete's uEPO band was the result of overloading, not rEPO.

- A second concurring expert opinion from Mr Paul Scott reinforces that the Athlete's case is about IDAS' error, not cheating. Mr Scott agrees with Dr Chen's assessment that sample overload led to an incorrect interpretation of the Athlete's 16 September 2022 urine sample by IDAS and determined that the mandates of TD2022EPO were not correctly followed.

- Furthermore, Dr Wolfgang Schillings, team doctor of HSV, found no evidence that the Athlete used synthetic EPO in September 2022 after carefully evaluating the Athlete's blood samples taken between August 2021 and November 2022. Most tellingly, the Athlete's blood markers that cover the period of time including September 2022 (erythrocytes, haemoglobin and haematocrit) are all normal, leading to the undeniable truth that the Athlete has never taken rEPO.

- In addition, Mr Steven Baack found that it was "*highly unlikely and implausible*" that a young player like the Athlete could have gotten access to EPO and used it in September 2022.

- Finally, Dr Keith R. Ashcroft, a Polygraph Examiner, concluded that the Athlete was being truthful with more than 99% certainty when stating he had never taken EPO and has never received or been administered EPO by a third-party.

- In short, NADA, WADA and the DFB have no hope of proving to the comfortable satisfaction of the hearing panel that the Athlete took synthetic

EPO in September 2022. The only possible outcome to this appeal is a determination that the Athlete (like Mr Bol before him) is an innocent victim, not a villain.

95. On this basis, the Athlete submit the following requests for relief in his Appeal Brief:

"*A. Overturn the Challenged Decision issued by the DFB Sports Court which incorrectly determined that Mario's 16 September 2022 urine sample contained recombinant erythropoietin (rEPO).*

B. Find that there is no violation of any applicable anti-doping rules (i.e., issue a ruling that fully exonerates Mario and states that he did not violate the anti-doping regulations of WADA, NADA, the DFB and/or FIFA).

C. Grant Mario all relief that this Panel deems to be just and equitable including an award of fees and costs in part or in whole."

ii. NADA's Answer

96. NADA's Answer, in essence, may be summarised as follows:

- NADA disagrees with the Athlete's theory that his sample was "overloaded" in the analytical procedure which caused IDAS to erroneously report the Athlete's sample as positive for rEPO. NADA denies that IDAS misinterpreted the immunoblot image of the Athlete's sample.

- NADA also disagrees with the Athlete's attempt to deduce from the Bol Case that his sample was also falsely found to be positive. These two cases are decisively different, as the expert witnesses called by NADA set out in their Joint Expert Opinion and will further demonstrate at the hearing.

- The results of the analyses of the Athlete's blood sample routinely taken by his club are simply irrelevant in the context of the finding of rEPO in his urine sample.

- The result of Mr Baack's fruitless investigation is equally unhelpful for the Athlete's position. How the Athlete came into possession of rEPO or how rEPO was administered, is not relevant for his liability.

- The results of the polygraph examinations are of limited value for the Athlete's defence: if admitted at all, such tests must be treated as "*mere personal statements, with no additional evidentiary value whatsoever given by the circumstances that they were rendered during a lie detector test*" (CAS 2008/A/1515, para, 119).

- Finally, the Athlete's sample was analysed and interpreted in full compliance with the WADA TD2022EPO and that the Athlete's conclusion that the alleged breaches "*led to a false positive*" is misplaced.

97. On this basis, NADA submits the following requests for relief in its Answer:

> "*(1) The CAS is requested to confirm the finding of the DFB Sports Tribunal that Mario Vušković has committed an Anti-Doping Rule Violation (ADRV, presence of EPO in his sample no. 0036111).*
>
> *(2) Mario Vušković shall be sanctioned with a period of Ineligibility of four (4) years (instead of two (2) years), beginning on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed, against which any period of Provisional Suspension and any period of Ineligibility served is to be credited.*
>
> *(3) The Appeal of the Player (CAS 2023/A/9550) shall be dismissed to the extent it is admissible.*
>
> *(4) The Appeal of WADA (CAS 2023/A/9607) shall be upheld, with the exception of WADA's request No. 5 (allocation of arbitration costs).*
>
> *(5) The costs of these consolidated proceedings (including the costs of the procedure before the DFB Sports Tribunal) shall be borne by Mario Vušković and/or the DFB and/or WADA.*
>
> *(6) NADA is granted a fair contribution to its legal fees and other expenses.*"

iii. WADA's Answer

98. WADA's Answer, in essence, may be summarised as follows:

- WADA does not wish to discuss the Bol Case any more than is necessary as it is simply a distraction from the real issue in this case, i.e. whether rEPO was correctly identified in the Athlete's samples. WADA will only recall what it said in its letter of 18 October 2023. In short, the Athlete's premises are simply wrong: it was never accepted (by Sport Integrity Australia or WADA) that the Bol Case was a false positive (in other words that no exogenous EPO was present in Mr Bol's sample), and *a fortiori*, it was never accepted either that the Bol Case was not brought forward because of a sample overloading. The Bol Case was not brought forward because the B sample did not confirm the AAF reported for the A sample; as recalled in WADA's prior correspondence, this is not unprecedented in EPO cases (even ones that have subsequently resulted in an ADRV) as EPO is not stable in urine over time.

- In fact, the Bol Case if anything is unhelpful to the Athlete. The expert witnesses called by WADA have reviewed the analytical data of the Bol Case and confirmed that it was a very different case. In their view, whereas the Bol Case showed a very faint smear in the A sample, and a smear that was "*too weak*" in the B sample to meet the identification criteria (which resulted in an

atypical finding), "*the presence of rEPO is stronger in both samples (A + B)*" of the Athlete.

- In short, this is a case where the identification criteria (which are not challenged) are clearly met in both A and B sample. Under the applicable rules, that AAF can only (potentially) be invalidated if departures are identified by the athlete that could reasonably have caused the positive. There are no such departures here. Rather, the arguments put forward by Dr Chen, including his main argument regarding 'overloading' are misguided and based on his lack of expertise and practical experience in this very specific area. His expert report is replete with wrong assumptions and basic mistakes. A host of world-leading experts with both practical, day-to-day experience and academic expertise all testify that this is a case where the positivity criteria are plainly met.

99. On this basis, WADA submits the following requests for relief in its Answer:

"*1. The appeal of Mario Vušković is dismissed.*

2. The arbitration costs related to Mario Vušković's appeal shall be borne by Mario Vušković.

3. WADA is granted a significant contribution to its legal and other costs."

iv. The DFB's Answer

100. The DFB's Answer, in essence, may be summarised as follows:

- The Athlete's appeal has no merits because there are no grounds for the Appealed Decision to be set aside. The Appealed Decision correctly found that the Athlete has committed an ADRV according to § 6(2)(a) DFB LPR after the sample was analysed as positive for rEPO in accordance with the applicable regulations (especially with the WADA Technical Documents). The Athlete's attempt to compare the present case with the Bol Case does not change the fact that the Athlete's sample was chiralized as an AAF.

- In particular, the Athlete's attempt to compare his case with the Bol Case is completely misleading. It should be emphasised that in the Bol Case, the circumstances were different as Mr Bol's sample returned an atypical finding, meaning that it was neither positive nor negative. Only after numerous further analyses of Mr Bol's samples (which are not at issue in the present case and were not carried out), the results of the various samples turned out to be either negative or atypical findings. Especially, Mr Bol's B sample was corrected and found to be negative, as a result of which Sport Integrity Australia decided that it would not progress an ADRV.

- In the present case, however, the facts are totally different. The result of the Athlete's A sample as an AAF was confirmed by the analysis of the B sample which was conducted in the presence of the Athlete's authorised representative and without any objections from the Athlete at that time. Carrying out a further analysis for each and every sample which was found to contain rEPO, even if both A and B samples had the same results, would only be a superfluous burden in the process of the fight against doping and create an unnecessary set-back for the doping control procedure.

- In addition, Dr Chen indicated that usage of 15 ml urine sample by the Australian Sports Drug Testing Laboratory led to the sample overload as 15 ml was the maximum amount allowed. In the present case, however, the amount of urine sample used was 10 ml. Therefore, the Athlete's argument of sample overloading is simply refuted by the expert commissioned by his legal representative and contradicts the arguments in the Bol Case.

- Furthermore, the Athlete's reference to the statement of WADA about the Bol Case is fallacious, as WADA did not publicly admit that "*its synthetic EPO testing process is flawed*", but only stated that the current review process will be assessed in light of the particularities of the Bol Case.

101. On this basis, the DFB submits the following requests for relief in its Answer:

"*1. Dismiss all prayers for relief submitted by the Appellants.*

2. Order the Appellants to pay the costs of the proceedings before the CAS.

3. Order the Appellants to pay a contribution to the legal fees and other costs of DFB incurred in connection with these proceedings, in an amount to be determined at the discretion of the Panel."

v. The Athlete's Answer

102. The Athlete's Answer, in essence, may be summarised as follows:

- NADA submits that the DFB Sports Tribunal "*correctly rejected*" the Athlete's request for further analysis and that there was no legal basis for further analysis of the Athlete's sample in any event. In reality, NADA was prepared to move forward with further analysis, but WADA blocked it from happening. If this had actually been done (as it was in the Bol Case), the Athlete would have been exonerated long ago from the false positive reported in his case as Mr Bol was.

- The opposite approach was taken in the Bol Case, where further analysis was performed on Mr Bol's sample more than eight months after it was collected. Tellingly, the threat of "degradation" was never even mentioned as a factor in the further analysis of Mr Bol's sample.

- The newly released testing documents in the Bol Case are particularly relevant since they led to the determination that a false positive had been reported, which prompted the ensuing bombshell public announcement by Sport Integrity Australia and WADA in July/August 2023.

- Amazingly, it has now been six months since WADA publicly proclaimed that it would review the rEPO testing process in light of the false positive reported in the Bol Case, but it appears that WADA has done nothing at all to prevent the reporting of another EPO false positive.

- In analysing the documents from the Bol Case, Dr Chen was struck by the very different approach taken during the further analysis of Mr Bol's samples as compared to the analysis of the Athlete.

103. On this basis, the Athlete submits the following requests for relief in its Answer:

> "*A. Overturn the Challenged Decision issued by the DFB Sports Court which incorrectly determined that Mario's 16 September 2022 urine sample contained recombinant erythropoietin (rEPO).*
>
> *B. Find that there is no violation of any applicable anti-doping rules (i.e., issuing a ruling that full exonerates Mario and states that he did not violate the anti-doping regulations of WADA, NADA, the DFB and/or FIFA).*
>
> *C. Grant Mario all relief that this Panel deems to be just and equitable including an award of fees and costs in part or in whole, and at the same time.*
>
> *D. Reject all the requests for relief sought by NADA and WADA in its respective Appeal Briefs.*"

B. The Appeals of NADA and WADA

i. NADA's Appeal Brief

104. NADA's Appeal Brief, in essence, may be summarised as follows:

- NADA does not agree with the quantum of the sanction. According to § 8(b)(1)(a)(aa) DFB LPR, a period of ineligibility of four years applies, unless the Athlete can demonstrate that he did not act intentionally.

- Although the DFB Sports Tribunal concluded that there was no possibility under the applicable rules to reduce the four-year period of ineligibility, it found that a four-year ban against the Athlete was not in line "*with the principle of proportionality*" as stipulated in Article 20(3) of the German Constitution.

- NADA disagrees: when determining the consequences of an ADRV, the respective hearing panel is bound by the applicable anti-doping rules. The list of

the grounds for elimination or reduction of the otherwise applicable period of ineligibility is exhaustive, and there is no *lacuna* to fill. The grounds for elimination or reduction of the otherwise applicable period of ineligibility allow for a proportionate assessment of the sanction for an ADRV based on the specific circumstances of the individual case without neglecting the overriding goals of the global doping regulation shaped by the World Anti-Doping Code (the "WADC") – namely the harmonisation of the fight against doping and the protection of "clean" athletes. This is why CAS panels consistently hold that the principle of proportionality is sufficiently integrated in the system of doping sanctions according to the WADC, which has been adopted by the DFB and integrated in the DFB LPR.

- Prof Nolte, *inter alia*, concludes in his expert opinion that "*the four-year period of ineligibility meets the requirements of a proportionality test*".

- Hence, there is no reason not to apply the standard sanction as provided in § 8(b)(a) DFB LPR for the presence of rEPO in the sample of the Athlete, namely a period of ineligibility of four years.

- The individual aspects mentioned in the Appealed Decision "*(i.e. 'is to be treated as a first-time offender', 'small amount of a prohibited substance', 'interruption of competition and team training activities for a period of four years usually means the end of a career for a professional soccer player as a team player – unlike for an individual athlete', 'economic impact of a four-year ban in professional soccer is much more serious and intense […] than for athletes of other, less prominent and financially equipped sports', and 'it is an athlete of just 21 years of age')*" are actually reflected in the applicable anti-doping rules and its system of proportionality.

105. On this basis, NADA submits the following requests for relief in its Appeal Brief:

"*(1) The present Appeal is admissible, and the CAS has jurisdiction to decide the present anti-doping dispute.*

(2) The CAS is requested to confirm the finding of the DFB Sports Tribunal that Mario Vušković has committed an Anti-Doping Rule Violation (ADRV, presence of EPO in his sample no. 0036111).

(3) Mario Vušković shall be sanctioned with a period of Ineligibility of four (4) years (instead of two (2) years), beginning on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed, against which any period of Provisional Suspension and any period of Ineligibility is to be credited.

(4) The costs of this proceeding (including the costs of the procedure before the DFB Sports Tribunal) shall be borne by Mario Vušković and/or the DFB.

(5) Mario Vušković and/or the DFB shall pay a fair contribution to the legal fees and other expenses of NADA."

ii. WADA's Appeal Brief

106. WADA's Appeal Brief, in essence, may be summarised as follows:

- In terms of sanction, the Appealed Decision correctly found that there was no basis in the applicable rules to reduce the standard period of ineligibility of four years applicable to the Athlete's violation. The DFB Sports Tribunal nonetheless decided to reduce the mandatory four-year period of ineligibility to a two-year period only on account of the principle of proportionality.

- The Appealed Decision erred as a matter of law: the CAS case law is clear that there is no scope for an application of the principle of proportionality within the framework of the WADC, as this principle is embodied in the sanctioning regime of the WADC. There was therefore no ground to reduce the mandatory four-years ineligibility period, all the more in respect of a violation involving rEPO which is intrinsically intentional.

- In addition, the fact that it was the Athlete's first ADRV (which is plainly irrelevant to the question of whether the ADRV was intentional) can – logically – not be cause for a reduction because the standard four-year period of ineligibility is precisely meant to apply to a first ADRV. If it had been a second violation, the period of ineligibility would have been higher per Article 10(9)(1) of the NADA Anti-Doping Code ("NADA ADC").

- Further, the potential impact of a four-year period of ineligibility on the Athlete's career, on his financial situation, on the Athlete's age are simply irrelevant to the sanction to be imposed. If such factors could be taken into account in the assessment of the appropriate consequences, it would obviously lead to unfair and unequal treatment amongst athletes, who may receive a different sanction for exactly the same violation depending on their personal situation. Not only does that have no basis in the WADC, but it would manifestly undermine the harmonization of sanctions, which is a fundamental principle underpinning the WADC.

- In summary, the applicable framework of sanctions in the WADC is clear and embodies the principle of proportionality. It requires an Athlete to establish a lack of intent to depart from the standard sanction of four years of ineligibility, which in turn requires that the source of the prohibited substance is established. In the present case, the Athlete has not established the source of the prohibited substance detected in his system and has not otherwise established that he

committed the ADRV without intent. It follows, per the clear CAS case law, that the ADRV must be deemed intentional, and a four-year period of ineligibility is imposed.

107. On this basis, WADA submits the following requests for relief in its Appeal Brief:

"*1. The appeal of WADA is admissible.*

2. The decision number 218/2022/2023, dated 30 March 2023, rendered by the DFB Sports court in the matter of Mario Vušković is set aside.

3. Mario Vušković is found to have committed an anti-doping rule violation.

4. Mario Vušković is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension and/or ineligibility effectively served by Mario Vušković before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

5. The arbitration costs shall be borne by the German Football Association and the National Anti-Doping Agency of Germany jointly or severally, or, in the alternative, by all the Respondents jointly and severally.

6. WADA is granted a significant contribution to its legal and other costs."

iii. The DFB's Answer

108. The DFB's Answer with respect to the appeals filed by NADA and WADA, in essence, may be summarised as follows:

- The Athlete has neither proved that the violation was not committed intentionally which opens the possibility to shorten the ban to two years in accordance with § 8(b)(1)(b) DFB LPR, nor has he provided evidence that he is not at fault with regard to the positive doping test or how the prohibited substance entered his body as per § 8(c)(2)(a) DFB LPR.

- However, the DFB Sports Tribunal decided to reduce the period of ineligibility by two years in the Athlete's favour based on the principle of proportionality, one of the most fundamental principles of German law, in particular, German constitutional law. In the present case, it would not have been proportionate to impose a sanction of an ineligibility period of four years on the Athlete for the following reasons:

  - The Athlete is a first-time offender;
  - It does not concern a structured, long-term EPO abuse by the Athlete;
  - The amount of the prohibited substance found in the sample is extremely low;

- The interruption of competition and training activities for more than two years means the end of a professional career for the Athlete;
- The economic impact is enormous;
- The psychological impact (especially at the Athlete's age) that severely impair his development.

- NADA and WADA are basing their submissions on wrong assumptions when they are alleging that there was no basis for a reduction of the sanction to two years of ineligibility and that the principle of proportionality could not be applied to the present case.

- The principle of proportionality applied by the DFB Sports Tribunal results from Article 20(3) of the German Constitution which states that:

  - The measure must pursue a constitutionally legitimate purpose;
  - This legitimate purpose can be furthered at all by the measure;
  - There is no milder means by which this purpose can be achieved just as effectively; and
  - The measure is proportionate to the purpose it pursues.

- Furthermore, Article 12(1) of the German Constitution sets forth the freedom of occupation to choose an occupation in the German legal system. It is of no question that the sanctions in the anti-doping regulations restrict the Athlete's freedom to choose an occupation and right to engage in work, since athletes earn (at least some of) their living from doing sports and participating in competitions. Such restriction in German law, as well as in legal systems of various countries with democratic societies, has to be accompanied by legitimate objectives and proportionality.

- It is also without doubt that all sanctions enshrined in anti-doping regulations serve the legitimate objectives of the fight against doping in sport, promoting clean athletes and establish a level playing field. Therefore, the appropriateness and necessity of suspensions, in particular for doping, will regularly have to be affirmed because health and equality of opportunity, i.e. overriding goods of international sporting interest, are to be protected by means of suspensions.

- However, whether all sanctions in those regulations are proportionate or not has already been decided in the German case of *Kathrin Krabbe vs German Athletics Federation* (*Deutschen Leichtathletikverband*) (the "Krabbe Case"). The DLV Legal Committee already confirmed in 1992 in the Krabbe Case that a four-year ban from competition for a first-time doping violation was inappropriate and violated the principle of proportionality. This was ultimately also confirmed by the Higher Regional Court of Munich in 1996. Reference is also made to legal doctrine questioning the compatibility of even a two-year ban with the principle of proportionality, it should be no surprise when the DFB Sports Tribunal decided to reduce the sanction from four to two years.

- In addition, § 242 of the German Civil Code is the standard for judicial review of association penalties. It defines the principle of good faith, which in terms of content amounts to a comprehensive weighing of the interests of the association and the Athlete. Within the framework of the review of the substantive examination, ambiguities to the detriment of the athlete can be eliminated or the question of punishment and fault can be clarified.

- Contrary to what WADA and NADA argue, applicability of the principle of proportionality is not completely ruled out by the WADC nor by the NADA ADC. In the past, CAS has ruled on the principle of proportionality in general and especially in connection with the reduction of doping sanctions.

- Contrary to what WADA and NADA intend to argue, the applicable rules regarding ADRVs have a regulatory gap that must be filled as to what regards the proportionality of the sanction to be applied to the Athlete in the present case. In case of a "gap" in the anti-doping regulations, the deciding tribunal is authorized to fill that regulatory gap. The "gap" was filled correctly by the DFB Sports Tribunal.

109. On this basis, the DFB submits the following requests for relief in its Answer:

"*1. Dismiss all prayers for relief submitted by the Appellants.*

2. Order the Appellants to pay the costs of the proceedings before the CAS.

3. Order the Appellants to pay a contribution to the legal fees and other costs of DFB incurred in connection with these proceedings, in an amount to be determined at the discretion of the Panel."

iv. The Athlete's Answer

110. As indicated above, the Athlete does not defend himself against the substance of the appeals filed by NADA and WADA. However, for the sake of completeness, the Athlete's prayers for relief in his Answer provide as follows:

"*A. Overturn the Challenged Decision issued by the DFB Sports Court which incorrectly determined that Mario's 16 September 2022 urine sample contained recombinant erythropoietin (rEPO).*

B. Find that there is no violation of any applicable anti-doping rules (i.e., issuing a ruling that full exonerates Mario and states that he did not violate the anti-doping regulations of WADA, NADA, the DFB and/or FIFA).

C. Grant Mario all relief that this Panel deems to be just and equitable including an award of fees and costs in part or in whole, and at the same time.

D. Reject all the requests for relief sought by NADA and WADA in its respective Appeal Briefs."

VI. JURISDICTION

111. Article R47 CAS Code provides as follows:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.*"

112. The Appealed Decision contains the following notice:

> "*Appeal against the decision of the DFB Sports Court is admissible. The appeal must be filed in writing within one week of notification of this decision at the DFB Federal Court,* […]*, and the reasons for the decision must be justified in writing within two weeks of notification of the reasons for the decision. Failure to observe a time limit will result in the dismissal of the appeal. In addition, refer to the options for appeal under § 18 No. 4 of the anti-doping provisions of the DFB and Art. 13.2. Of the NADA Code.*"

113. § 18(4) of the DFB Anti-Doping Regulations (the "DFB ADR") provides as follows (in a translation into English provided by the Athlete that remained undisputed):

> "*Against decisions of the DFB sports court, the person concerned, the DFB, NADA, WADA, FIFA, IOC, IPC and the National Anti-Doping Organization of the country where the affected person resides of which he is a citizen or in which he is licensed must appeal to the DFB Federal Court. The filing of the appeal is based on § 25 of the legal and procedural code of the DFB.*"

114. Article 13.2.1 NADA ADC provides as follows:

> "*In cases that arise as a result of participation in an international competition event or in cases that affect top international athletes, legal remedies against decisions can only be brought before the CAS in the final instance.*"

115. Article 77(1) of the FIFA Anti-Doping Regulations (the "FIFA ADR") provides as follows:

> "*In cases arising from participation in an International Competition or in cases involving International-Level Players, the decision may be appealed exclusively to CAS.*"

116. It is not in dispute that the Athlete is an International-Level Athlete. Although the DFB Sports Tribunal indicated an appeal route in the Appealed Decision in accordance with Article 9.1.1(e) of WADA's International Standard for Results Management ("ISRM"), it did not indicate explicitly whether the Athlete was an International-Level Athlete, as suggested by the comment to Article 9.1.1(e) ISRM.

117. Be this as it may, the Panel notes that there is a discrepancy between the various regulations. On the one hand, the notice in the Appealed Decision and § 18(4) DFB ADR provide for the competence of the DFB Federal Court as appeal instance, whereas on the other hand, the NADA ADC and the FIFA ADR provide for the competence of CAS as appeal instance.

118. Regardless of the confusion between the various regulations, all Parties agree that CAS is competent to adjudicate and decide on the matter at hand as an appeal instance and confirmed the same by signing the Order of Procedure, although the DFB submitted with respect to the jurisdiction of CAS that it "*reserves all rights to reopen the proceedings before the DFB Federal Court, which have only been suspended*".

119. The Athlete submits that, out of precaution, he also filed an appeal with the DFB Federal Court, seeking a stay of such proceedings pending CAS's confirmation that it has exclusive jurisdiction over the Athlete's appeal.

120. The Panel considers it necessary to address the contradictory provisions on jurisdiction set forth above.

121. Article 2(1) FIFA ADR (entitled "*Obligations of Member Associations and Confederations*") provides as follows:

> "*All Associations shall undertake to comply with the Code, the International Standards and these Regulations. These Regulations shall be incorporated either directly, or by reference, into the rules of each Association. Each Association shall include in its rules the procedural regulations necessary to implement these Regulations and any changes that may be made to them. In the event of a discrepancy between these Regulations and the rules of a Member Association or Confederation, these Regulations shall prevail and apply to the case at hand.*"

122. Accordingly, since the DFB ADR contain a discrepancy in comparison with the FIFA ADR with respect to the forum for filing an appeal, the FIFA ADR prevail, and these provide for the exclusive jurisdiction of CAS.

123. This is supported by Article 13.2.1 NADA ADC, which also provides for the exclusive jurisdiction of CAS.

124. No Party disputed CAS jurisdiction here, all Parties signed the Order of Procedure, and all Parties participated fully in the proceedings.

125. In light of all of the above, it follows that the CAS Appeals Arbitration Division has exclusive jurisdiction to adjudicate and decide on appeals filed against the Appealed Decision.

VII. ADMISSIBILITY

126. Article R49 CAS Code provides as follows:

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

127. The various regulations also provide for different time limits to appeal. Article 82(1)(a) FIFA ADR provides for a 21-day deadline to appeal, whereas Article 13.2.3.4 NADA ADC refers to the applicable rules of the Anti-Doping Organization responsible for the Results Management / disciplinary procedure and the DFB LPR provide for a time limit to appeal of one week for filing an appeal with the DFB Federal Court.

128. Given that the jurisdiction of CAS is based, *inter alia*, on the FIFA ADR, the Panel finds that a time-limit to appeal of 21 days applies, nor has any party contested the admissibility of any of the three appeals filed.

129. The Athlete and NADA filed their appeals within the applicable deadline of 21 days, which expired on 20 April 2023.

130. Pursuant to Article 13.2.3.5 NADA ADC and Article 82(1)(b) FIFA ADR, WADA's time limit to appeal is the later of i) 21 days after the last day on which another party entitled to lodge an appeal could have lodged an appeal; or ii) 21 days after WADA received the full case file relating to the decision.

131. WADA filed its appeal on 27 April 2023, i.e., within the time limit of 21 days of expiry of the time limit to appeal of the Athlete and NADA.

132. It follows that the appeals of the Athlete, NADA and WADA are admissible.

VIII. APPLICABLE LAW

133. Article R58 CAS Code provides as follows:

> "*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation,*

> *association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

134. WADA submits that pursuant to Article 7(1) WADC, Results Management is governed by the rules of the Anti-Doping Organization which initiated and directed sample collection. Since the sample in the matter at hand was collected on the initiative of NADA, it follows that the NADA ADC is in principle applicable to the present matter. However, WADA indicated that the Appealed Decision was based on the DFB LPR and the DFB ADR and that § 5(2) DFB LPR indicates that "[i]*n the event of any discrepancy between the* [DFB ADR] *and the* [FIFA ADR]*, the provisions of the* [FIFA ADR] *shall prevail*". WADA submits that the outcome of this case would be the same under these rules.

135. NADA submits that it was not and is not the Results Management Authority in this case, but that the DFB is the Results Management Authority. NADA maintains that the applicable anti-doping rules in the matter at hand are the DFB LPR.

136. The DFB submits that the Panel shall decide the case on the basis of the DFB LPR and, subsidiarily, German law, together with all its applicable statutes, jurisprudence as well as fundamental legal principles.

137. The Athlete did not make any specific submissions on the applicable law and regulations.

138. The Panel notes that the Athlete was sanctioned on the basis of the DFB LPR in the Appealed Decision. However, considering that neither of the Parties identified any material differences between the DFB LPR, the DFB ADR, the NADA ADC and the FIFA ADR, because § 5(2) DFB LPR provides that the FIFA ADR shall prevail in case of any discrepancies, and considering that neither of the Parties have provided full translations into English of the DFB LPR, the DFB ADR or the NADA ADC, and given that the FIFA ADR is available in English, the Panel considers it legally correct and most efficient to apply the FIFA ADR to the matter at hand.

139. To the extent the DFB submits that German law is subsidiarily applicable, this issue will be addressed below when the DFB's reliance on German law is discussed, if necessary.

IX. PRELIMINARY ISSUES

A. The Admissibility of TD2024EPO

140. As indicated above, on 25 April 2024, pursuant to Article R56 CAS Code, the Athlete requested WADA's new technical document (TD2024EPO) released publicly on 11 March 2024 and which would enter into effect on 15 June 2024, to be admitted on

file on the basis of exceptional circumstances. According to the Athlete, the changes to TD2024EPO are important since they prove unequivocally that an adjustment in intensity signal was required but never done in the Athlete's case, which could mandate "*a finding pursuant to the doctrine of lex mitior that the case against him must be thrown out*".

141. On 3 May 2024, WADA objected to the admissibility of TD2024EPO because it considered that such document was "*plainly irrelevant to the present case*". NADA agreed that the TD2024EPO was not relevant, but neither supported nor opposed the admission of such publicly available document.

142. On 8 May 2024, the CAS Court Office informed the Parties that the Panel had decided to admit the Athlete's new exhibit (*i.e.* TD2024EPO) into the file and that the reasons for such decision would be set forth in the final Award.

143. Article R56 CAS Code provides as follows:

> "*Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.*"

144. The Panel noted that TD2024EPO had been published on 25 April 2024. Given that the Athlete had filed his Answer on 2 February 2024, he could not have included and addressed the content of this document in such submission.

145. The Panel further considered that it could not be excluded that TD2024EPO could have a certain bearing on the proceedings. Given that WADA had indicated that it would review the rEPO testing procedure following the conclusion of the Bol Case, the Panel considered that the results of such review could potentially be derived from TD2024EPO and that the Athlete should therefore be granted leave to submit arguments in this respect.

146. Consequently, the Panel decided that the Athlete had established exceptional circumstances based on which TD2024EPO was admitted on file.

147. During the hearing, WADA reiterated its objection to the admissibility of TD2024EPO or at least requested the Panel to decide that no questions could be asked about it during the expert conferencing session, following which the Panel reiterated its decision that TD2024EPO was admitted on file and that questions could be asked about it.

B. WADA's objection to the PowerPoint presentation submitted by the Athlete

148. Following a discussion at the outset of the hearing, the Panel informed the Parties that WADA's objection to the PowerPoint presentation presented by the Athlete to

be used for the examination of Dr Chen and Mr Scott was dismissed and that the reasons for such decision would be set forth in the final Award.

149. On 9 May 2024, the Athlete submitted a PowerPoint presentation to be used by Dr Chen and Mr Scott during the hearing.

150. On 13 May 2024, WADA objected to the PowerPoint presentation submitted by the Athlete.

151. The Panel considered that WADA did not establish that the PowerPoint presentation contained any new information or new arguments. Although the PowerPoint presentation contained at least one image that had hitherto not been included in the case file, the Panel finds that such image was merely a visible demonstration of an argument already made in Dr Chen's expert opinion. The addition of arrows to other images does not alter the images as such or provide new information and was not deemed inappropriate by the Panel.

X. MERITS

A. The Main Issues

152. The main issues to be resolved by the Panel are the following:

i. Does NADA have standing to be sued?
ii. Did the Athlete commit an ADRV pursuant to Article 6 FIFA ADR?
iii. If an ADRV was committed, what is the appropriate sanction to be imposed?

i. Does NADA have standing to be sued?

153. NADA maintains that its standing as an appellant derives from Article 13(2)(3) WADC, in particular Article 13(2)(3)(1)(d). However, it is disputed by NADA that there are sufficient grounds for the Athlete as well as WADA to take NADA to justice. Neither the Athlete nor WADA demonstrate or assert that the doping control test and sample taking was not conducted in compliance with the applicable rules and somehow caused the positive analytical finding. The Athlete's extensive explanations on the jurisdiction of CAS in his Statement of Appeal may justify the Athlete's right to appeal, but it does not support in any way his choice to name NADA as respondent. The same applies to WADA. In addition, NADA notes that it was and is not the Results Management Authority in this case, which it submits shall be taken into account by the Panel when determining who shall bear the costs of this consolidated appeals procedure.

154. More specifically, NADA submits that the DFB and NADA agreed in § 3 DFB ADR that NADA was authorised to conduct doping controls as a Testing Authority. However, in case of any possible ADRV, the respective Results Management (both pre-adjudication and adjudication phases) remained with the DFB. NADA was not a

party to the first instance proceedings resulting in the Appealed Decision, but only an observer.

155. First of all, the Panel notes that NADA refers to § 3 of the DFB ADR but did not provide a translation into English of such provision. Only the German version of the DFB ADR is on file.

156. This notwithstanding, the Panel notes that the proceedings in *CAS 2023/A/9550*, *CAS 2023/A/9586* and *CAS 2023/A/9607* are consolidated with the agreement of all Parties concerned. The Parties also agreed that WADA could file an Answer, even though it was not a respondent in any of the three proceedings.

157. Indeed, on 20 July 2023, considering the consolidation of the three proceedings and the Parties' agreement on the filing of an Answer by WADA, the CAS Court Office informed the Parties on behalf of the Panel that WADA's requests for intervention were redundant and that, unless any objection would be filed by any of the Parties by 27 July 2023, WADA would be added as respondent to *CAS 2023/A/9550* and *CAS 2023/A/9586*.

158. On 27 July 2023, WADA informed the CAS Court Office that it agreed that its requests for intervention had become moot, but that there was no need for it to be included formally as a respondent in the two other (consolidated) proceedings. No objections were raised by the Athlete, NADA and the DFB in this respect, as a consequence of which WADA was not formally included as a respondent in *CAS 2023/A/9550* and *CAS 2023/A/9586*.

159. In view of the fact that all Parties filed Answers in which they could address the substance of all three consolidated proceedings and in light of the outcome of the proceedings, as addressed in more detail in the costs section of the present Award, the Panel does not consider it necessary to determine whether NADA had standing to be sued in the proceedings related to the appeals filed by the Athlete and WADA.

ii. Did the Athlete commit an ADRV pursuant to Article 6 FIFA ADR?

160. Article 6 FIFA ADR (entitled "*Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample*") provides as follows:

> "*1. It is the Player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under art. 6.*
>
> *2. Sufficient proof of an anti-doping rule violation under art. 6 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Player's "A" Sample where the Player waives*

> *analysis of the "B" Sample and the "B" Sample is not analysed; or where the Player's "B" Sample is analysed and the analysis of the Player's "B" Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's "A" Sample; or where the Player's "A" or "B" Sample is split into two parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Player waives analysis of the confirmation part of the split Sample.*"

161. It is the Athlete's position that no ADRV was committed, because the presence of rEPO in his sample was not established, whereas WADA, NADA and the DFB submit that IDAS correctly reported an AAF for the presence of rEPO in the Athlete's A sample and that such presence was confirmed by the analysis of the Athlete's B sample, as well as by the second opinions issued by Dr Dehnes.

162. WADA submits that in cases where an analytical method is not challenged (such as in the present case), there is an AAF if the identification criteria as described in the relevant WADA document are met. According to WADA, the AAF can then only be invalidated if the Athlete establishes a departure which could reasonably have caused the AAF, in which event the burden would fall on the Anti-Doping Organization to establish that the departure did not cause the AAF.

163. The Panel notes that the Athlete indeed did not formally challenge the analytical method applied in the matter at hand. The application of TD2022EPO and the use of SAR-PAGE to detect the presence of rEPO as such have not been contested by the Athlete. Rather, it is disputed between the Parties whether the identification criteria set forth in TD2022EPO are satisfied and whether this may have been caused by an overloaded sample.

a. TD2022EPO

164. As set forth in more detail below, based on TD2022EPO, the presence of rEPO is, in principle, established by means of a comparison of the immunoblot image of an athlete's sample with both positive and negative control samples. If an athlete's sample resembles the immunoblot image of the positive control sample and not that of the negative control sample, the presence of rEPO in an athlete's sample is, in principle, established.

165. The introduction of TD2022EPO clarifies that "[t]*his Technical Document (TD) has been established to harmonize the detection and reporting of erythropoietin (EPO) and other EPO-receptor agonists (ERAs) by Laboratories when analyzed using polyacrylamide gel-electrophoretic (PAGE) Analytical Methods*" (emphasis in original).

166. More specifically, in the matter at hand, IDAS used the SAR-PAGE analytical method, which is defined in TD2022EPO as "*sodium N-lauroylsarcosinate ('sarcosyl') polyacrylamide gel electrophoresis*".

167. More specifically, pursuant to Article 3.1 TD2022EPO, "[f]*or reporting an AAF for ERA(s), results from the CP(s) need to fulfil the quality and identification criteria described in this TD*".

168. Article 3.2 TD2022EPO provides that "[w]*hen results from the* […] *SAR-PAGE CP for rEPOs are inconclusive (e.g., presence of interferences, band(s) intensity too low to ensure reliable identification), the results of the ERA analysis shall be reported as an ATF* [i.e., Atypical Findings]".

169. Article 3.3 TD2022EPO provides that "[w]*hen the results from the CP(s) for ERAs do not fulfil the quality and identification criteria described in this TD, the results of the ERA analysis shall be reported as a Negative Finding*".

170. Article 3.4 TD2022EPO provides that "*WADA requires that a second opinion for electrophoretic methods is provided by one of the experts of the WADA EPO Working Group before any AAF or ATF for ERAs is reported in ADAMS*".

171. Accordingly, there can be three different outcomes after sample analysis: i) a positive finding (i.e., an AAF); ii) an atypical finding (i.e., an ATF); or iii) a negative finding.

172. In the matter at hand, IDAS reported an AAF for rEPO based on the A sample, which was confirmed by a second opinion of Dr Dehnes. Subsequently, IDAS also reported the presence of rEPO in the Athlete's B sample, which conclusion was also confirmed by a second opinion of Dr Dehnes.

173. It is not challenged by the Athlete and the Panel finds that AAF was reported in ADAMS in compliance with the formal requirements set forth in TD2022EPO.

174. What is in dispute is whether the immunoblot image obtained after SAR-PAGE separation of the Athlete's urine samples was interpreted correctly by IDAS and Dr Dehnes and, therefore, whether rEPO was present in the Athlete's sample.

175. Article 2.4.2.2 TD2022EPO states the following about the SAR-PAGE analytical method:

> "[…] *ERAs can be distinguished from endogenous EPO (uEPO, bEPO) based on their characteristic band shape and different apparent molecular mass. The migration behaviour (band) of each ERA, i.e., its position and shape (width, focused or more diffused) can be used to confirm the identity and/or exogenous origin of the substance. The position of the band apex (as determined by the lane profile plot reviewed in the image processing software) or the boundaries of the width of the band can be used to ascertain that its position and shape differs from the position of endogenous EPO run in parallel, as illustrated in Fig. 2.*
>
> *For detection of rEPO, in particular, refer also to Annex B – EPO c.577del Variant (below).*

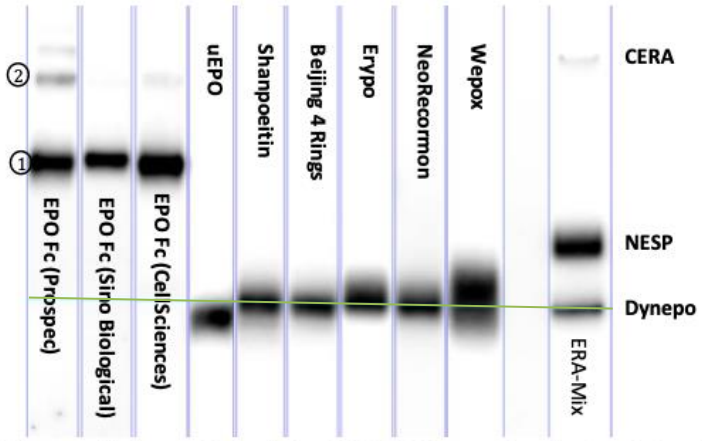


Figure 2. Immunoblot image obtained after SAR-PAGE separation, showing the broad band characteristic of some commercially available Epoetin-α and –β preparations (Shanpoetin™, Beijing 4 rings, Erypo®, NeoRecormon®, Wepox) and EPO-Fc preparations (Propec, Sino Biological, CellSciences). The bands corresponding to the EPO-Fc monomer and EPO-Fc dimer are marked with numbers 1 and 2, respectively. The relative position of endogenous urinary EPO, as well as that of CERA, NESP and Epoetin-δ (Dynepo), are also shown.[1]

[…]

The following identification criteria define the requisites that the SAR- or SDS-PAGE image from the CP shall fulfil to consider an AAF for the presence of ERAs with a structure related to EPO (rEPO, NESP, CERA, EPO-Fc)."

176. As a general observation prior to assessing the different identification criteria, the Panel finds that it derives from Figure 2 that the band for endogenous EPO (uEPO), i.e. EPO that is naturally present in the human body, remains almost entirely below the band apex of Epoetin-δ (Dynepo) (the "Dynepo Line"), whereas the bands of the commercially available preparations of exogenous EPO adjacent to the uEPO band clearly extend above the Dynepo Line.

177. As to the Dynepo Line, Article 2.4.2.2(a) TD2022EPO provides as follows:

"*Epoetin-δ (Dynepo) has a characteristic band shape ("sharp band") and higher apparent molecular mass than endogenous uEPO/bEPO. Due to the sharper band (albeit a faint smear may also be present in both the Dynepo standard and the Dynepo administration samples, representing glycoforms of higher mass). Epoetin-δ can also be differentiated from other rEPOs (-α and -β as well as the biosimilars) (Fig. 2). To consider an AAF for Epoetin-δ, the band apex line of the ERA in the Sample shall coincide with the corresponding apex line in the Epoetin-δ reference preparation (Fig. 3).*"

[1] The Panel has added a more visible horizontal line to Figure 2 (the band apex of Epoetin-δ (Dynepo) – the "Dynepo Line"). The Panel noted that the Dynepo Line is not exactly horizontal, which is also the case with the original Dynepo Line in Figure 2 of TD2022EPO.

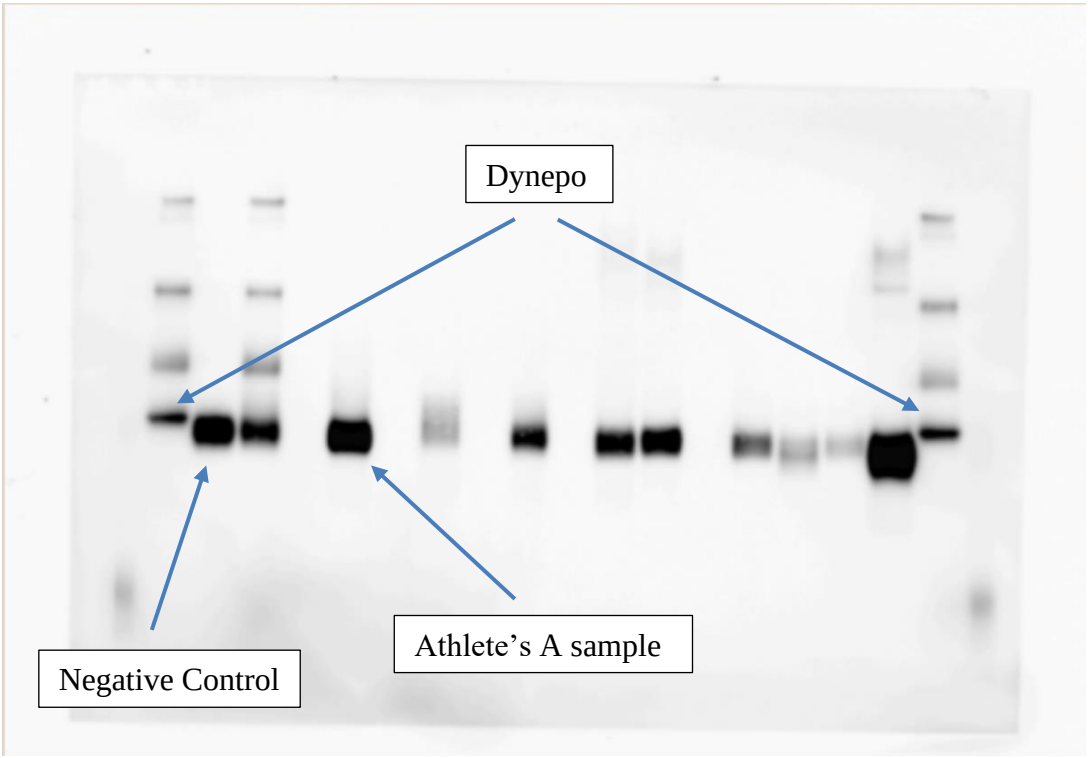
178. Simply put, the Panel understands that Epoetin-δ (Dynepo) is exogenous EPO that, due to its characteristic band shape, is a suitable and reliable substance to distinguish between endogenous uEPO and exogenous rEPO.

b. "Single bands", "Mixed bands" or "multiple bands"

179. TD2022EPO distinguishes between three sets of identification criteria: i) Single ERA Band(s) Detected; ii) Mixed Bands from Different ERA(s) Detected; and iii) Multiple separated ERA bands detected.

180. Whereas WADA, NADA, the DFB and their experts submit that the identification criteria for "mixed bands" apply, the Athlete and his experts argue that the identification criteria for "single bands" or "multiple bands" apply.

181. The original immunoblot image of the Athlete's A sample is as follows:



182. The Panel observes that the band of the Athlete's A sample has a somewhat different shape than the negative control sample (i.e. bulging on the sides) and that it clearly contains a faint or diffuse area above the dense band that extends above the Dynepo Line, whereas this is not the case for the negative control sample.

183. Turning to the identification criteria for "mixed bands", Article 2.4.2.2(b) TD2022EPO provides as follows:

"- *In the case of rEPO, a mixed band consisting of endogenous EPO (uEPO, bEPO) and rEPO not completely resolved can be detected: the band shape resembles that of the rEPO plus parts or the total of the uEPO/bEPO band;*

- *A diffuse or faint area of the band above the corresponding endogenous band, which extends beyond the band apex of Epoetin-δ (Dynepo), is also indicative for the presence of epoetin-α and -β (Fig. 4 and 5).*

- *A mixed band will change depending on the relative amount of rEPO and uEPO present in the Sample, as happens at different times after rEPO administration (Fig. 4 and 5).*

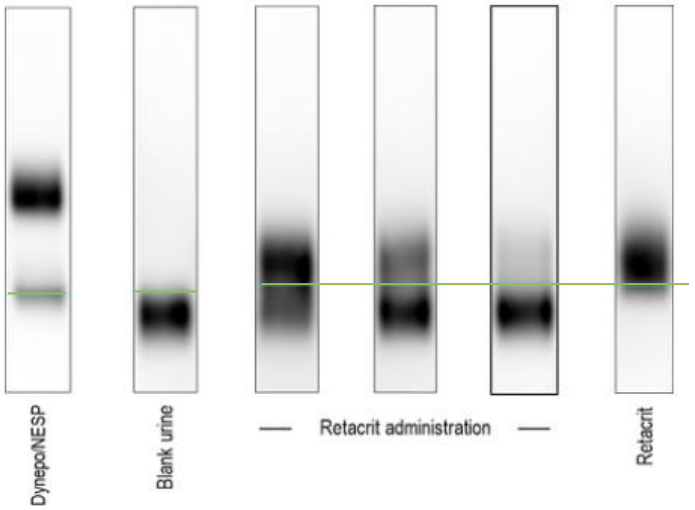


Figure 4. Immunoblot image obtained after SAR-PAGE separation of Dynepo/NESP reference standards, a negative blank urine, samples collected at different timepoints after Retacrit administration (7.5 IU/kg BW, i.v.) and Retacrit (epoetin-ζ) reference standard (std). Following Retacrit administration, more or less isolated/smeared double bands (uEPO + Retacrit) may occur [24]. [2]

184. The Panel understands from Figure 4 that the shape of a mixed band varies over time. In general, the Panel finds that the characteristics of column 5 in Figure 4 resembles the characteristics of the Athlete's A sample in para. 181 above.

185. Turning to the identification criteria for "multiple bands", Article 2.4.2.2(c) TD2022EPO provides as follows:

"- *Multiple bands corresponding to different ERAs (e.g., u/bEPO, rEPO, NESP, CERA and EPO-Fc) or the same ERA (e.g., EPO-Fc) are detected in the same Sample. The individual identification criteria as described for each ERA shall apply.*

[2] The Panel has added a more visible Dynepo Line to Figure 4. The Panel noted that the highlighted Dynepo line in the two columns on the left is lower than in the four columns on the right, which is also the case with the original Dynepo Line in Figure 4 of TD2022EPO.

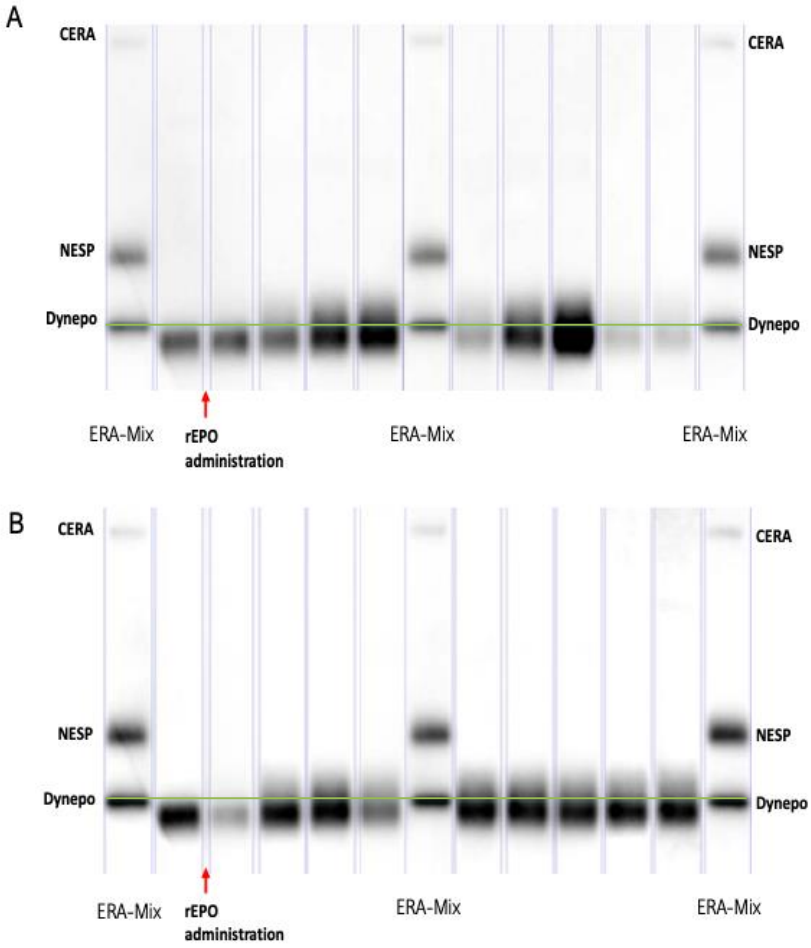
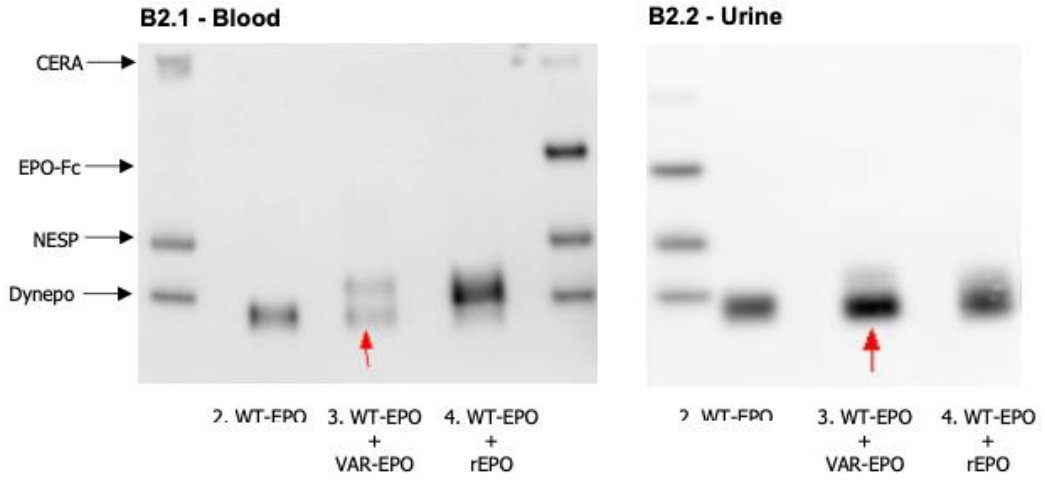


Figure 5. Immunoblot image obtained after SAR-PAGE separation of urine samples collected at different timepoints after subcutaneous application of 12.7 IU/kg Biopoin. A) image obtained without contrast processing; B) same image after contrast optimization with GASepo software v2.1. [3]

186. The Panel finds that the identification criteria between "mixed bands" and "multiple bands" does not excel in clarity, not least because the identification criteria applicable to "mixed bands" refer also to Figure 5, which is included in the section governing the identification criteria for "multiple bands".

187. However, the Panel finds that the distinction between "mixed bands" and "multiple bands" becomes particularly clear from Table B1 in conjunction with Figure B2.1 TD2022EPO. With respect to a "*Double-band*", Table B1 refers to "*Lane 3, Figure B2.1*". Figure B2.1 shows the following:

[3] The Panel has added a more visible Dynepo Line to Figure 5.



188. The Panel finds that lane 3 of Figure B2.1 shows two separate bands one above the other that are not, or are only very faintly, connected. Had the GASepo software been used for this sample, two apexes would have been visible.

189. With respect to a "*Typical smear band of rEPO*", Table B1 TD2022EPO refers to "*Lane 4, Figure B2.2; Figures 4 and 5 of* [TD2022EPO]".

190. The Panel finds the characteristics of the Athlete's sample indeed closely resemble the characteristics of "*Lane 4, Figure B2.2*", those of lane 4 and 5 of Figure 4, and those of lane 4, 5, 6, 8, 9, 10, 11 and 12 of Figure 5.

191. Furthermore, with respect to Dr Chen's evidence that, based on the GASepo analysis performed by IDAS, it is to be concluded that the Athlete's sample only had a "single band" and not a "mixed band", because then multiple peaks should have been identified, the Panel finds that this argument is to be dismissed, precisely because there is a mixed band and not a double band.

192. The GASepo image of the Athlete's sample relied upon by Dr Chen is as follows:

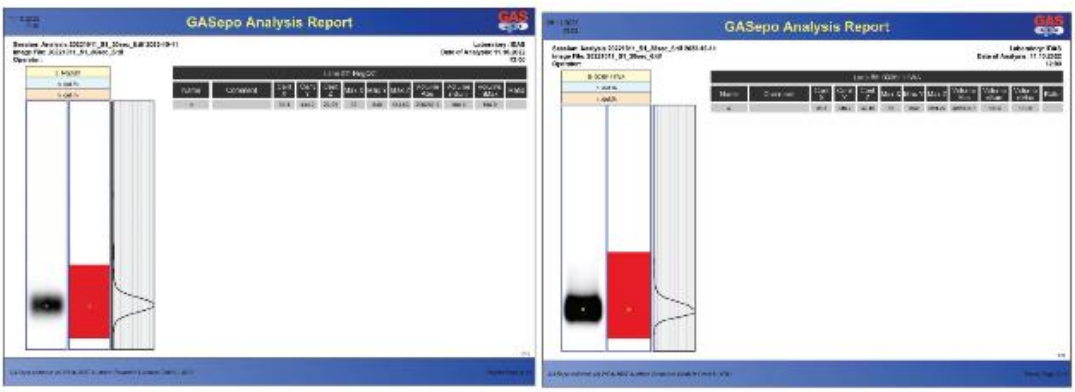


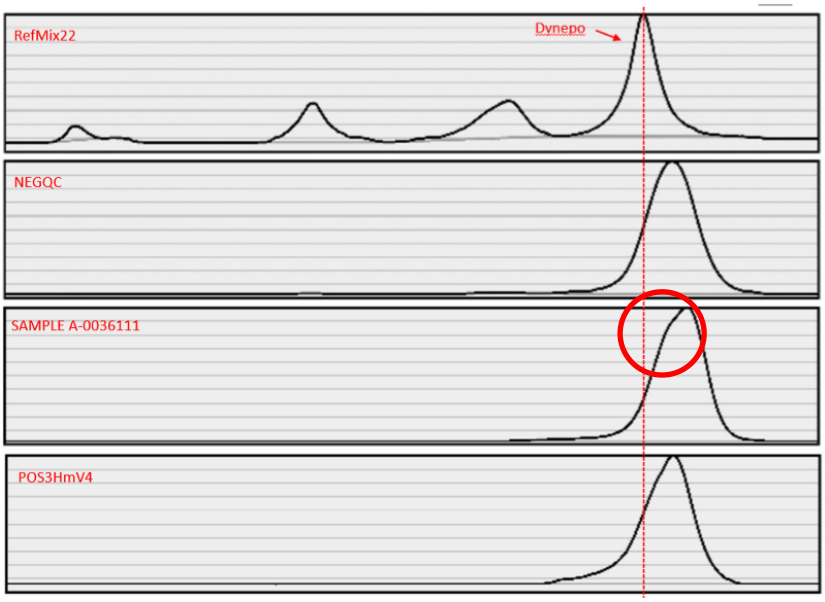
Figure 5. The above images illustrate that Sample 0036111 only has one band that accounts for 100% of the peak area.

193. At the outset, Dr Dehnes, Prof Naud and Dr Voss noted in their joint expert opinion that the GASepo software "*was not created to evaluate properly the "smear" of rEPO typical of a mixed band consisting of endogenous and rEPO not completely resolved on SAR-PAGE gels*".

194. The Panel accepts that no two apexes are visible in the GASepo image relied upon by Dr Chen. However, because the GASepo software does not distinguish between uEPO and rEPO, the Panel finds that it cannot be ruled out that rEPO was nonetheless present in the Athlete's sample and that the apex consists of a mix between uEPO and rEPO.

195. To the contrary, the Panel observes that the top part of the apex displayed in lane 3 of Figure 5 above is not identical to the lower part of the same apex. Rather, the upper part of the apex is slightly distorted, i.e., it is not a gradual continuous decay as suggested by Dr Chen, which the Panel considers indicative of the existence of a second (significantly less dense) apex that is however not clearly visible because it is overwhelmed by the apex that largely consists of uEPO.

196. The Panel finds that this is more clearly demonstrated with the below image that was presented by Mr Scott and that was also generated by GASepo software. The Panel finds that it is not so much about the percentage of EPO left or right of the Dynepo Line, but rather about the shape of the left side of the apex of the Athlete's sample (marked with a circle), which the Panel considers to be indicative of a "mixed band", not least because a similar distortion can be seen in the positive control sample, but not in the negative control sample.



197. The Panel finds that neither Dr Chen nor Mr Scott established that the distorted shape of the apex was caused by overloading of the Athlete's sample rather than by a second apex of rEPO. The concept of overloading is addressed in more detail below.

198. Consequently, the Panel finds that the Athlete's A sample is a "mixed band" and, accordingly, that the identification criteria for "mixed bands" apply.

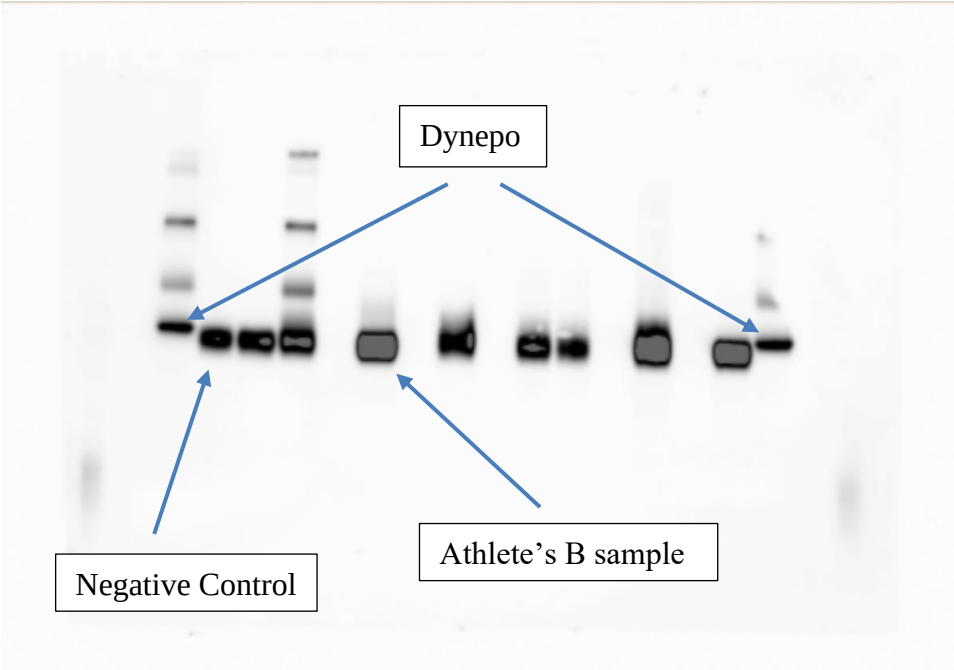
c. Are the identification criteria for "mixed bands" satisfied?

199. As cited above, the identification criteria for "mixed bands" are as follows:

> "- *In the case of rEPO, a mixed band consisting of endogenous EPO (uEPO, bEPO) and rEPO not completely resolved can be detected: the band shape resembles that of the rEPO plus parts or the total of the uEPO/bEPO band;*
>
> - *A diffuse or faint area of the band above the corresponding endogenous band, which extends beyond the band apex of Epoetin-δ (Dynepo), is also indicative for the presence of epoetin-α and -β (Fig. 4 and 5).*
>
> - *A mixed band will change depending on the relative amount of rEPO and uEPO present in the Sample, as happens at different times after rEPO administration (Fig. 4 and 5).*"

200. The Panel finds that these criteria are clearly satisfied in the Athlete's A sample, i.e., a mixed band is visible: a dense black band fading into a more diffuse grey band that resembles the band shape of rEPO (in particular the one of retacrit in Figure 4 TD2022EPO). The grey diffuse band clearly and significantly extends above the Dynepo Line.

201. The original immunoblot image of the Athlete's B sample is as follows (330s exposure time):



202. The Panel finds that also with respect to the Athlete's B sample, a "mixed band" of uEPO and rEPO is visible with a faint, albeit clearly distinguishable, diffuse grey band extending above the Dynepo Line.

203. Discussions took place during the hearing as to whether any additional criteria were applicable and what significance should be given to the fact that the first sentence ends with a semicolon (;) rather than a period (.) like the second and third sentence.

204. The Panel finds that the second sentence provides for the only hard identification criterion applicable in case of "mixed bands", whereas the first and third sentence do not contain hard identification criteria.

205. Furthermore, Dr Dehnes issued second opinions dated 9 November and 14 December 2022 for the Athlete's A and B sample respectively, confirming the presence of rEPO, in line with Article 3.4 TD2022EPO.

206. More specifically, with respect to the Athlete's A sample, Dr Dehnes concluded as follows:

> "*After reviewing the submitted filed containing electrophoretic data corresponding to urinary sample 0036111, I find that the initial SAR-PAGE analysis shows a mixed band with a diffused band above the endogenous EPO-band.*
>
> *The confirmation analysis by SAR-PAGE shows again a mixed band, where the molecular mobility of the diffuse upper-part of this band corresponds to the diffuse signal of rEPO in the positive quality control samples (containing both endogenous and recombinant EPO), and different from the mobility of endogenous EPO as seen in the negative control sample. This corroborates the presence of rEPO in the sample.*
>
> *As the sample complies with the identification criteria described in TD2022EPO, I can conclude that sample 0036111 contains recombinant EPO.**
>
> **Disclaimer: According to TD2022EPO Annex B, further investigation is necessary to rule out the possibility that this urinary result is caused by the endogenous expression of VAR-EPO. If the investigations identify the athlete to be a VAR-EPO carrier, this opinion shall be disregarded.*"

207. With respect to the Athlete's B sample, Dr Dehnes concluded as follows:

> "*I have reviewed the submitted files containing electrophoretic data from ERA analysis of urinary sample 0036111B.*
>
> *The analysis of sample 0036111B by SAR-PAGE shows a mixed band, where the molecular mobility of the diffuse upper part of the band corresponds to the diffuse signal of recombinant EPO in the positive quality control samples*

> *(containing both endogenous and recombinant EPO), and different from the mobility of endogenous EPO as seen in the negative control samples.*
>
> *As the sample complies with the identification criteria described in TD2022EPO, I can conclude that sample 0036111B contains recombinant EPO.*"

208. The Panel agrees with the observations of Dr Dehnes in her second opinions.

209. Consequently, the Panel finds that the identification criteria for "mixed bands" are satisfied with respect to the Athlete's A and B sample, resulting in the conclusion on the basis of TD2022EPO that rEPO was present in the Athlete's sample.

d. Sample overloading

210. The mere fact that the identification criteria for "mixed bands" was satisfied is not necessarily decisive in this case, because the Athlete argues that this conclusion was based on an overloaded sample, rather than by the presence of rEPO. If such argument would be upheld, this may have caused the AAF, as a result of which the Athlete would have to be acquitted.

211. Dr David Chen, Professor in the Department of Chemistry at the University of British Columbia, Canada, expert called by the Athlete, prepared expert opinions dated 30 January 2023, 16 February 2023, 2 March 2023 and 14 March 2023 as part of the first-instance proceedings. For the present appeal arbitration proceedings before CAS, Dr Chen prepared a new report in which he holistically conveyed his opinion in a single report dated 4 August 2023.

212. The first issue addressed in Dr Chen's expert opinion relates to the concentration of the urine sample provided by the Athlete and more specifically the question whether it may have been overly concentrated due to intense physical efforts by the Athlete prior to sample collection, i.e. "proteinuria" or "effort urine". In this respect, Dr Chen refers to Article 2.2.1.2 TD2022EPO which provides as follows:

> "*When needed and based on the results from the ITP, the volume of the confirmation Aliquot taken from the "A" Sample or the volume of the eluate obtained after immunopurification of the Aliquot should be adjusted to ensure an appropriate ERA signal and facilitate the interpretation of results.*" (emphasis in original)

213. Dr Chen maintains that in this case "*the concentrations of the urine samples or the volume of immune purification retentates were never adjusted as required by the WADA TD to account for concentration variability in the urine sample even though significant overloading was present in both analysis*".

214. In this respect, the Panel notes that TD2022EPO only requires immunopurification to take place "[w]*hen needed and based on the results from the ITP*". Accordingly, it is

not necessary that immunopurification is always applied. Unlike suggested by Dr Chen, considering that IDAS and Dr Dehnes in her second opinions did not consider it necessary to apply additional immunopurification, this was also not required by TD2022EPO. The Panel finds that Dr Chen did not establish a clear basis as to why additional immunopurification had to be applied.

215. In any event, it is not in dispute that one run of immunopurification was applied to the Athlete's sample. More runs of immunopurification were performed in the Bol Case, but this is explained by the atypical finding with respect to his B sample, which mandated additional retesting, whereas IDAS and Dr Dehnes had no such doubts as to the outcome of the sample analysis of the Athlete's sample.

216. As to Dr Chen's argument that the Athlete's sample was collected "*after intense exercise on the training field*", the Panel finds that this has not been established. Rather, the Athlete's urine sample was collected after a training session on the day before a match. Although the Panel accepts that the Athlete exercised prior to sample collection, it is not considered credible that such exercise was extremely intense in view of the match to be played the next day. SAR-PAGE is also applied to athletes in endurance sports such as marathons, where effort urine is a more common phenomenon. In fact, according to Dr Dehnes, one of the main reasons SAR-PAGE is used is that effort urine is not an issue, unlike with its predecessor IEF-PAGE.

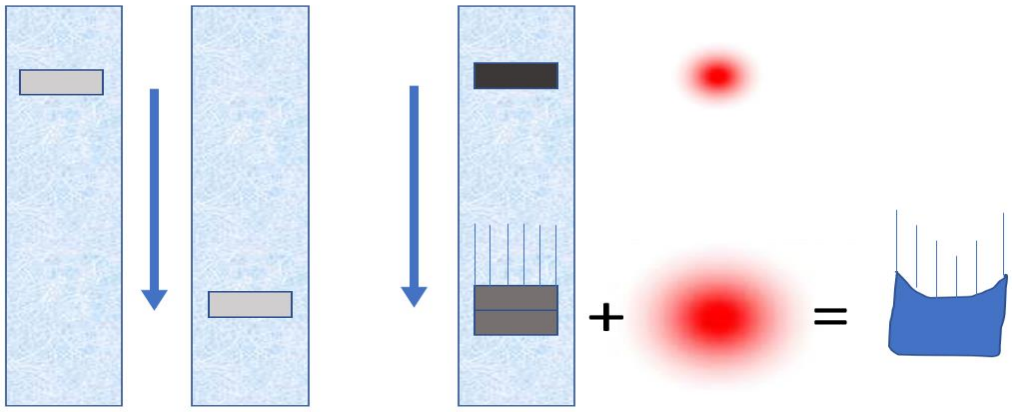
217. Against this background, the Panel does not consider it credible that a training session of a football player on a day before a match would be impacted so much by exercise that it would have a material impact on the concentration of the urine sample.

218. Dr Chen further indicates that, in case of doubt about the outcome of sample analysis, besides SAR-PAGE, "*other methods such as IEF-PAGE should be used to obtain more scientific evidence*". Again, considering that IDAS and Dr Dehnes in her second opinions did not have any doubts about the presence of rEPO in the Athlete's sample, TD2022EPO does not require the application of other methods.

219. The key argument in Dr Chen's expert report is that "*sample overload is what caused the smear above the endogenous urine EPO band in Sample 0036111, the smear was not caused by the presence of rEPO*". Dr Chen maintains that "*Sample 0036111A has the classic pattern of an overloaded sample: it has a high intensity (optical density) in the gel spot, bulging on the sides of the gel spot, and bimodal leakage from the upper corners that is creating a faint trail or "smear" on the top*" and that "[t]*he diffusion starts from the two "horns", then diffuses laterally to form the smear*". Dr Chen refers to the following pure protein bands with such "horns" and "smears":

Figure 3. Pure protein bands (NESP) showing bimodal leakage and smears on top of the band. All spots were taken from "Desharnais, P., J.F. Naud, and C. Ayotte, *Desialylation improves the detection of recombinant erythropoietins in urine samples analyzed by SDS-PAGE.* Drug Test Anal, 2013. **5** (11-12): p. 870-6". [5]

220. Dr Chen explained this more elaborately during the hearing, where he basically submitted that in case of an overloaded sample, "*there are not enough horses to pull the load*", thereby leaving a trail, which he demonstrated by the following image:



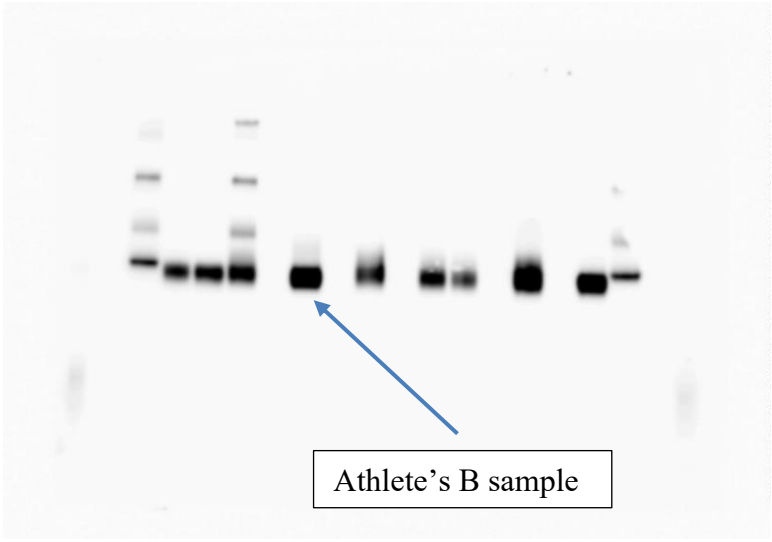
221. The Panel accepts that the band of the Athlete's sample contains bulging or "horns" on the left and right top of the band. However, the Panel finds that the Athlete's sample contains a much clearer and longer "smear" than the bands displayed in Figure 3 of Dr Chen's expert report. Where the diffusion in Dr Chen's examples starts from the two "horns", the Panel finds that this is not true for the "smear" in the Athlete's sample. Indeed, as concluded above, the Panel finds that the Athlete's sample contains a "mixed band", and not only a single band with a diffusion on top, as suggested by Dr Chen. This is even more clear in the Athlete's B sample than in his A sample.

222. Furthermore, Dr Dehnes, Prof Naud and Dr Voss argued in their joint expert report that "*Dr. Chen unfortunately ignores the fact that the bimodal leakage ("horns") is not caused by an overload or overly concentrated sample but just by an overexposed picture*". Dr Dehnes, Prof Naud and Dr Voss presented immunoblot images of the Athlete's A and B sample with different exposure times. When the exposure time is shortened, the bulging on the sides of the Athlete's band reduces, but the smear above the uEPO band remains clearly visible. The Panel finds that Dr Dehnes convincingly testified that the band of an overloaded sample would be broad and bulge but would not contain a smear.

223. Dr Reichel also noted in his expert opinion that "[t]*he main discriminating difference between rec. EPO and endogenous EPO in using the SAR-PAGE method is the faint area above the endogenous band in case of mixed bands, as we can clearly see from the A-sample result*", but that "[t]*here is a diffuse area present on sample 0036111A but not on the negative control despite comparable signal intensities*". The Panel finds that Dr Reichel's conclusion is factually correct and that there is no reason to question his conclusion as to the presence of rEPO in the Athlete's sample.

224. The Panel finds that this is most convincingly demonstrated by the Athlete's B sample if an exposure time of 60s is applied, instead of 330s. Applying an exposure time of

60s, the band shape of the Athlete's B sample no longer contains any "horns", but it still clearly shows a clear diffuse or faint area above the endogenous band, clearly and significantly extending above the Dynepo Line:



225. Additionally**,** the Panel noted that Prof Naud testified that the amount of protein in the Athlete's sample was not sufficient to create overloading. Dr Voss added that in-house experiments had been conducted with concentrations higher than that of the Athlete, but unlike with the Athlete's sample, no diffuse area above the endogenous uEPO band was detected in any such tests comparable to what is seen in the Athlete's sample:

The image on the left shows endogenous uEPO from two different individuals loaded in an increasing concentration to detect a possible diffuse signal coming from overloading. The blue line indicates demarcation between the endogenous and the recombinant area.

The image on the right shows the result of the B-sample analysis. While Mr. Vuskovic's sample shows a strong endogenous EPO signal, the negative samples in the left image with stronger endogenous EPO signals than present in Mr. Vuskovic's sample, do not show the diffuse signal above the endogenous band; they do not resemble samples containing rEPO. Further, Mr. Vuskovic's sample is not overloaded.

226. On this basis, the Panel accepts that even if "overloading" of the Athlete's sample had been established, *quod non*, it still does not explain the clear and significant diffuse or faint area above the Athlete's endogenous uEPO band.

227. Furthermore, unlike suggested by Dr Chen, who argued that "*a smear on top of an endogenous uEPO band is not a sign of the presence of rEPO*" and that the identification criteria set forth in TD2022EPO are therefore not met, the relevant identification criterion for "mixed bands" provides as follows: "*A diffuse or faint area of the band above the corresponding endogenous band, which extends beyond the band apex of Epoetin-δ (Dynepo), is also indicative for the presence of epoetin-α and -β (Fig. 4 and 5)*". The Panel reiterates its conclusion that such identification criterion is satisfied. Indeed, the Athlete's EPO band does not just show a "smear", but indeed a clear and significant "*diffuse or faint area of the band above the corresponding endogenous band, which extends beyond the* [Dynepo Line]".

228. In this respect, the Panel thus accepts the evidence of Dr Reichel, Dr Dehnes, Prof Naud and Dr Voss that the Athlete's sample contains a "mixed band" rather than a "single band" or a "double band", that the identification criteria for a "mixed band" are satisfied, and that the satisfaction of the identification criteria is not caused by an overloaded sample.

229. Finally, insofar Dr Chen suggests that IDAS should have used "double blotting" to eliminate the potential for a smear on top of the uEPO caused by nonspecific protein binding interference during single blotting of SAR-PAGE, the Panel finds that, based on TD2022EPO there is no requirement for double blotting to be applied. Furthermore, Dr Dehnes, Prof Naud and Dr Voss also maintain that use of the double blotting procedure was not necessary. The Panel sees no reason to question such collective conclusion. The mere fact that double blotting was apparently applied in the Bol Case does not make this any different, because additional retesting took place in the Bol Case as a consequence of the B sample atypical finding, as addressed in more detail below.

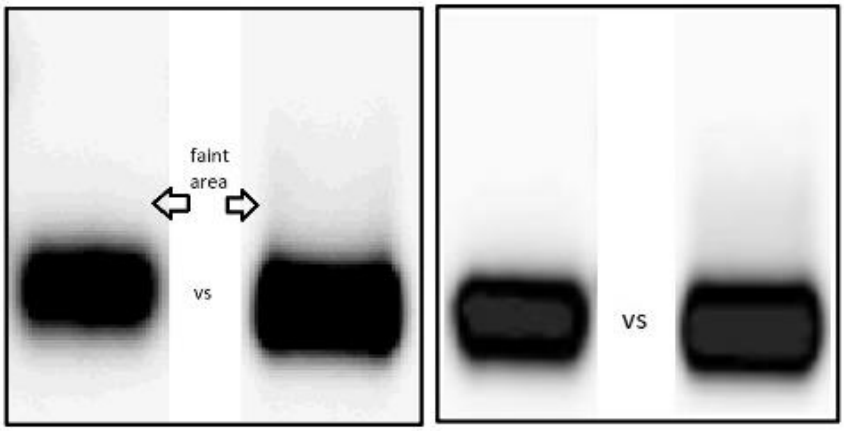
230. Based on all the above, the Panel finds that the Athlete did not prove that there was any overloading of the Athlete's sample. Accordingly, the Panel finds that the conclusion reached by IDAS and Dr Dehnes that the Athlete's sample contained rEPO is not undermined by Dr Chen's evidence.

e. The expert evidence of Mr Scott

231. Mr Paul Scott, Principal and CEO of Korva Scientific and expert called by the Athlete, supports Dr Chen's conclusions with respect to the overloading of the Athlete's sample, which is dismissed by the Panel for the reasons set forth above.

232. Mr Scott also concludes that the characteristics of the Athlete's band more closely resemble the characteristics of the negative control sample than the positive control sample. Mr Scott suggests that this is particularly true based on a comparison of the densitometric profiles, rather than based on the immunoblot images alone. More specifically, Mr Scott suggests that "*it is clear that in both the A and B samples, both*

the Sample 0036111 and the NQC (negative quality control) have a significant faint area above the [Dynepo Line]*, though, at least for the B sample, it can be noticed that the faint area extends further*" by relying on the following images of the negative quality controls on the left side and the Athlete's A and B sample respectively on the right side in these images:



233. The Panel accepts Mr Scott's evidence insofar he suggests that, in the examples incorporated in TD2022EPO, some small portion of the negative quality control samples extend beyond the Dynepo Line. However, just looking at the images above, the Panel finds that the diffuse or faint area above the endogenous uEPO band is clearly more visible on the right side of both images than on the left. This is all the more true if one relies on the original immunoblot images of the Athlete's A and B sample, rather than on the exposes images relied on by Mr Scott.

234. Insofar Mr Scott relies on densitometric profiles generated by GASepo software, the Panel finds that the use of such software, or the images generated by it, are not considered relevant in TD2022EPO in assessing whether the identification criteria are satisfied. Dr Dehnes, Prof Naud and Dr Voss explain in their joint report that "*GASepo was not created to evaluate properly the 'smear' of rEPO typical for a mixed band consisting of endogenous and rEPO not completely resolved on SAR-PAGE gels*".

235. The percentage of total EPO above and below the Dynepo Line is not an identification criterion for "mixed bands". It is decisive that there is a mixed band with rEPO extending above the endogenous uEPO band. Both conditions are satisfied in the matter at hand.

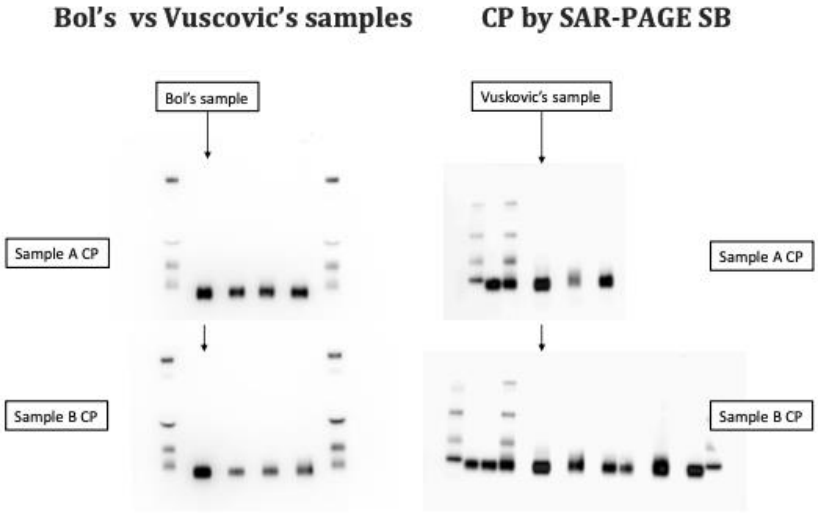
f. The comparison with the Bol Case

236. As indicated above, sample analysis with SAR-PAGE in accordance with TD2022EPO can result in three outcomes: i) a positive finding (i.e. an AAF); ii) an atypical finding (i.e. an ATF); or iii) a negative finding.

237. In the Athlete's case, IDAS as well as Dr Dehnes in her second opinions concluded that the Athlete's A sample as well as the B sample contained rEPO.

238. In the Bol Case, it was concluded that the A sample resulted in an AAF, but the B sample resulted in an atypical finding. Accordingly, Mr Bol's B sample was not negative as alleged by the Athlete, nor positive, but it was atypical. This explains why additional retesting was performed on Mr Bol's sample. The fact remains that the analysis of Mr Bol's B sample did not confirm the AAF of the analysis of Mr Bol's A sample and that he was eventually not prosecuted.

239. Dr Dehnes compared the immunoblot images of the A and B samples of the Athlete and Mr Bol:



240. Based on this comparison, the Panel finds that it is abundantly clear that the diffuse or faint area above the Athlete's endogenous uEPO band is much more clearly visible in the Athlete's A and B sample than in Mr Bol's A and B sample.

241. Based on this argument alone, the Panel finds that any alleged problems with the analysis of Mr Bol's sample are irrelevant for the Athlete's case.

242. Although it is obviously not for the Panel to make findings with respect to the Bol Case, in view of the Athlete's reliance on the Bol Case, the Panel considers it incumbent to make certain observations in this respect. The Panel can imagine that there were doubts about the interpretation of the immunoblot images of Mr Bol's sample, as the faint or diffuse area above the endogenous uEPO band is not as clear as in the Athlete's case.

243. This notwithstanding, there were considerable doubts as to whether Mr Bol's sample was to be considered positive for exogenous rEPO. Indeed, certain experts are apparently still of the view that Mr Bol's sample contained rEPO. Given the Panel's finding that the Athlete's immunoblot image contains a clear diffuse or faint area

above the endogenous uEPO band in comparison with the bands of Mr Bol and the doubts about Mr Bol's sample, the Panel finds that this is indeed a compelling argument in support of the joint conclusion of Dr Dehnes, Prof Naud and Dr Voss that no doubts should exist with respect to the presence of rEPO in the Athlete's sample. In fact, by comparing the evidence in the case of the Athlete to the evidence in the Bol Case, the Panel finds that presence of rEPO in the Athlete's sample is much more clear here than in the Bol Case.

244. Unlike as suggested by the Athlete, there is no indication on file establishing that the presence of synthetic rEPO in Mr Bol's sample was not confirmed following analysis of the B sample because Mr Bol's sample was overloaded or that mistakes were made with the handling or analysis of his sample.

245. The mere fact that WADA indicated that it would review the rEPO testing process in light of the Bol Case does not make this any different.

246. Consequently, the Panel finds that the Athlete's comparison with the Bol Case has no material impact in the matter at hand.

g. The comparison with a urine sample of the Athlete collected on 14 October 2022

247. In his expert opinion, Dr Chen also relies on the following image:

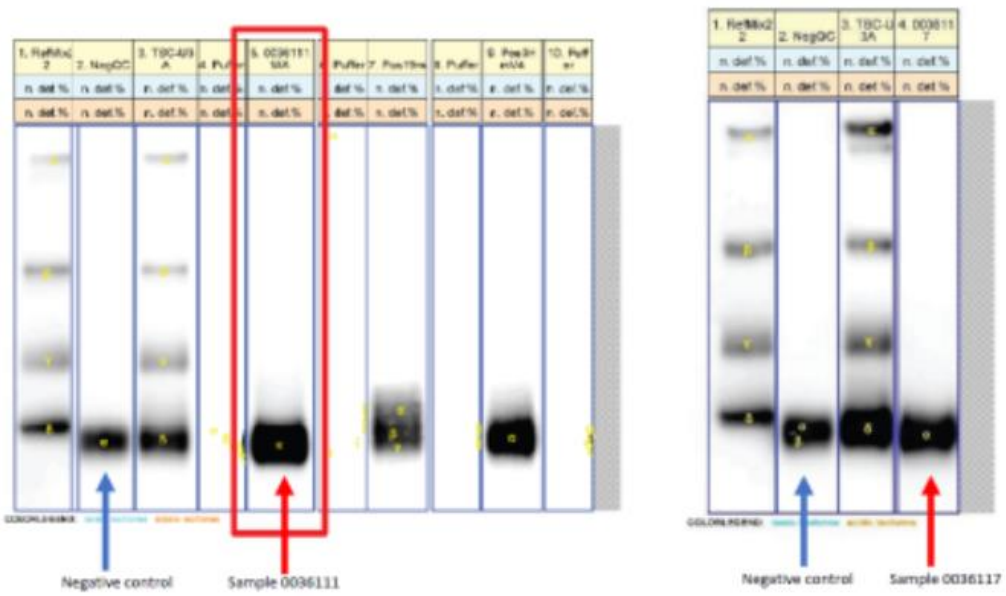


Figure 12. Comparison of the overloaded sample and non-overloaded sample of the same person. The overloaded sample was deemed positive for rEPO, and the non-overloaded sample was deemed negative. However, there is no fundamental difference between the two gel spots, and the intensity and all other characteristics of the two spots can be made similar, if not identical, with the GASepo software, or by adjusting the amount of the samples loaded on the gels.

248. Both images related to urine samples derived from the Athlete. The left image relates to the Athlete's positive urine sample collected on 16 September 2022, whereas the right image relates to a negative urine sample collected on 14 October 2022.

249. Unlike as suggested by Dr Chen in the description below Figure 12, the Panel finds that the left image clearly contains a diffuse or faint area above the endogenous uEPO band that extends above the Dynepo Line, whereas no such diffuse or faint area is visible in the right image.

250. Also considering that the Panel finds that it has not been established that the Athlete's sample was overloaded, the Panel finds that the comparison with another sample of the Athlete relied upon by Dr Chen carries no weight in determining whether the Athlete's sample contained rEPO.

251. To the contrary, particularly if the exposure time in the immunoblot images is reduced as in para. 224 above, the Panel finds that the diffuse or faint area above the endogenous uEPO band in the Athlete's sample is clearly visible and extends above the Dynepo Line.

h. The aliquot chain of custody for the Athlete's A sample

252. Dr Chen maintains that "[t]*he aliquot chain of custody for the A-Sample CP performed on 10 October 2022 was not properly documented*". More specifically, Dr Chen argues that "*there is no way to know from the A-Sample Laboratory Documentation Package whether a new aliquot was properly prepared, and/or the volume of the aliquot that was used and/or the identity of the person that prepared the new aliquot*" and that "*there is no proof that a new aliquot was drawn from the A-Sample container for the repeat A-Sample Confirmation Procedure done on 10 October 2022, which is an independent material breach of the governing WADA rules*".

253. In response, Dr Dehnes, Prof Naud and Dr Voss suggest that page 9 of the A sample Laboratory Documentation Package shows that 10mL of urine was prepared for the confirmation, that page 12 shows that one aliquot was used first for a repeat analysis on 4 October 2022 and that the second aliquot was used on 10 October 2022 for the confirmation.

254. The Panel notes that Dr Dehnes, Prof Naud and Dr Voss did not address each and every aspect that Dr Chen considers to be missing. However, the Panel finds that the Athlete and Dr Chen have failed to prove that such potential omissions could reasonable have caused the positive test.

i. TD2024EPO

255. When submitting TD2024EPO into evidence, the Athlete argued that the changes to the TD2024EPO are important since they prove unequivocally that an adjustment in intensity signal was required but never done in the Athlete's case. The Athlete

submits that, simply put, IDAS failed to follow the WADA TD in a material way since it did not account for the Athlete's overly concentrated urinary protein sample. TD2024EPO changes the wording from TD2022EPO from "should be adjusted" to "shall be adjusted".

256. Article 2.2.1.2 TD2022EPO is cited above (see para. 212). Article 2.3.1.2.1(c) TD2024EPO provides as follows:

> "*When needed and based on the results from the ITP, the intensity signals of the confirmation Aliquot and/or the NQC and/or the PQT shall be adjusted to ensure appropriate ERA intensity signals (endogenous EPO ± rEPO) and facilitate the interpretation of results.*
>
> *[Comment: This adjustment could be made, for example, by adjusting the volume of the "A" confirmation Aliquot or the volume of the eluate obtained after immunopurification of the Aliquot or by adjusting the volume or EPO concentration of the NQC/PQC.]*"

257. The Panel accepts that the word "shall" imposes more stringent obligations on a laboratory than the word "should". However, as addressed above, the fact remains that this wording is preceded by a reference to "[w]*hen needed*". On this basis, the Panel finds that additional immunopurification was not required, neither under TD2022EPO, nor under TD2024EPO, particularly considering that Dr Dehnes, Prof Naud and Dr Voss did not consider it necessary for additional runs of immunopurification to have been applied in the matter at hand.

258. Even though the Athlete did not persist on his *lex mitior* argument as put forward by letter dated 25 April 2024 during the hearing, for completeness, the Panel finds that there is no scope for the application of the concept of *lex mitior* in the Athlete's favour for the reasons set forth above.

j. The expert evidence of Dr Schillings

259. The conclusion of Dr Schillings' expert opinion provides as follows:

> "*After a careful evaluation of the blood samples taken between August 2021 and November 2022, along with training and game day physiological data, supplements and vitamin injections and treatments provided by HSV, I find no evidence to support the use of rEPO in September 2022. Most tellingly, the blood markers in* [the Athlete's] *samples that cover the period of time including September 2022 (erythrocytes), hemoglobin and hamatocrit) are all normal.*
>
> *As already mentioned above in detail, the measured blood markers erythrocytes, hemoglobin and haematocrit of* [the Athlete] *were absolutely normal at all times, before and after 16 September 2022. There were no*

abnormal parameters in terms of medical or hormonal interference from external sources.

Therefore, I again emphasize that there is nothing I have evaluated as the HSV team doctor to support that the [Athlete] *administered rEPO in September 2022.*"

260. Dr Schillings, *inter alia*, presented the following table with blood markers of "private" samples taken from the Athlete:

Date of sample	Erythrocytes (Mrd/ml)	Haemoglobin (g/dl)	Haematocrit (%)
30 August 2021	5,05	15,0	42,7
30 December 2021	4,92	14,3	43,2
1 February 2022	-*	-*	-*
24 June 2022	4,79	14,1	42,0
3 November 2022	4,78	14,1	41,5
12 November 2022	4,9	14,5	42,3
15 November 20222	4,86	13,9	41,0

* Not measured. Sample was taken due to illness of the player. Measurement of erythrocytes, haemoglobin and haematocrit was not part of the examination.

261. Dr Schumacher, on the contrary, concludes that "[b]*ased on the evaluation of the provided documents (blood data, performance measures), it is not possible to conclude that the athlete has not used EPO. The data neither support nor disprove the finding of rEPO in the player's sample 0036111*".

262. After having analysed the expert opinions of Dr Schillings and Dr Schumacher, the Panel finds that the evidence provided by Dr Schillings does not rule out the possibility that the Athlete may have administered rEPO.

263. In particular, the Panel notes that no "private" samples have been taken in temporal proximity to the "official" urine sample of the Athlete that is claimed to contain rEPO. As noted by Dr Schumacher, "*the samples closest in time taken by the club were obtained on 24.6.2022 (i.e. more than 2.5 months before sample 0036111) and 3.11.2022 (i.e. 1.5 months after sample 0036111)*".

264. In any event, the "private" samples taken from the Athlete by HSV do not comply with the standards set by WADA, as a consequence of which the reliability cannot be guaranteed. Samples may have been intentionally or unintentionally left out, the chain of custody is not documented and there is no certainty that the "private" samples indeed originate from the Athlete.

265. Consequently, the Panel finds that Dr Schillings' expert evidence has no impact on the Panel's conclusions with respect to the ADRV committed by the Athlete.

k. The expert evidence of Dr Baack

266. The conclusion of Dr Baack's expert opinion provides as follows:

> "*From our observations and investigations described above it seems highly unlikely and implausible how an athlete should get access to and administer EPO, in particular without leaving any traces and considering the extremely high hurdles and risks of such administration.*"

267. The Panel finds the investigation conducted by Dr Baack unconvincing. Unfortunately, professional athletes have been able to acquire access to prohibited substances such as rEPO for many years. The Panel finds that Dr Baack's investigation does not prove that rEPO is particularly difficult to find in Hamburg or in Split. There is also no reason why the Athlete could only have acquired rEPO in these two cities and not elsewhere. There is also no reason why the Athlete should have obtained rEPO himself and not through a doctor or other middleman. The mere fact that no traces of communication about EPO were found on the Athlete's mobile phone does not make this any different, because there is no way of knowing whether the Athlete may have had another mobile phone or he may have been in contact with a middleman only in person, rather than by phone.

268. In any event, the Panel finds that it is not for WADA, NADA or the DFB to establish that it was possible for the Athlete to obtain and administer rEPO, it is for the Athlete to prove that this was impossible. Although this is admittedly a high standard to meet, the Panel does not consider this to be unreasonable in light of its finding that rEPO was present in the Athlete's sample.

269. Consequently, the Panel finds that Dr Baack's expert evidence has no impact on the Panel's conclusions with respect to the ADRV committed by the Athlete.

l. The expert evidence of Dr Ashcroft

270. The conclusion of Dr Ashcroft's expert opinion provides, *inter alia*, as follows:

> "*The statistical probability that* [the Athlete's] *test data were produced by a deceptive person is approximately less than one per cent (p-value <0.004) or about less than one in a hundred.*"

271. Although the Panel does not question Dr Ashcroft's authority and expertise when it comes to polygraph examinations, the Panel finds that his expert opinion is of no practical value in the matter at hand.

272. Most relevantly, the polygraph examinations do not take away the fact that rEPO was present in the Athlete's sample.

273. Furthermore, although the Panel is prepared to follow the findings of the CAS panel in CAS 2019/A/6313 where it was found that the lie detector evidence "*is at the very least sufficiently credible to warrant that it be taken into consideration, as supporting*

the Panel's assessment of his credibility in denying any intentionally [sic] *doping*" (CAS 2019/A/6313, para. 88), the Panel agrees with NADA when it submits that "intent" has not been an issue in this case to date.

274. Consequently, the Panel finds that Dr Ashcroft's expert evidence has no impact on the Panel's conclusions with respect to the ADRV committed by the Athlete.

m. Conclusion

275. Consequently, based on all the above, the Panel is comfortably satisfied that the Athlete committed an ADRV pursuant to Article 6 FIFA ADR.

iii. If an ADRV was committed, what is the appropriate sanction to be imposed?

276. Article 20 (heading) and (1) FIFA ADR provide as follows:

> "*The period of Ineligibility for a violation of arts 6 (Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample),* […] *shall be as follows, subject to potential elimination, reduction or suspension pursuant to arts 22 (Elimination of the Period of Ineligibility where there is No Fault or Negligence), 23 (Reduction of the period of Ineligibility based on No Significant Fault or Negligence) or 24 (Elimination, reduction, or suspension of period of Ineligibility or other consequences for reasons other than Fault):*
>
> 1. *Subject to art. 20 par. 4 of these Regulations, the period of Ineligibility shall be four years where:*
>
> a) *the anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional;*
>
> b) *the anti-doping rule violation involves a Specified Substance and FIFA can establish that the anti-doping rule violation was intentional.*"

277. It is not in dispute that rEPO is a non-Specified Substance, as a consequence of which Article 20(1)(a) FIFA ADR is applicable, providing for a four-year period of ineligibility, unless the Athlete can prove that the ADRV was not intentional.

278. The Panel observes that the Athlete did not put forward any arguments with respect to a possible lack of intent. Rather, the Athlete's case was that he did not commit an ADRV and that he should therefore be acquitted of all charges against him. He did not put forward any alternative reasoning based on which, if he would be found guilty of an ADRV, the period of ineligibility to be imposed on him should be reduced.

279. The only party to the present proceedings requesting for a period of ineligibility of less than four years to be imposed is the DFB. However, the DFB specifically admits that "*the Athlete has neither provided that the violation was not committed*

intentionally which opens the possibility to shorten the ban to two (2) years in accordance with § 8b no. 1 b) of the DFB LPR nor has he provided any evidence that he is not at fault with regard to the positive doping test or how the Prohibited Substance entered his body, as per § 8c no. 2 a) of the DFB LPR". Rather, the DFB argues that "*the DFB Sports Court decided to reduce the period of ineligibility by two (2) years in the Athlete's favour based on the principle of proportionality, one of the most fundamental principles of German law, in particular, German constitutional law*".

280. Consequently, the Panel finds that based on the FIFA ADR, in principle, a four-year period of ineligibility is to be imposed on the Athlete, but that it needs to be examined whether such period of ineligibility can be reduced based on the application of the principle of proportionality under Article 20(3) of the German Constitution.

a. The application of the principle of proportionality under Article 20(3) of the German Constitution

281. Even though the DFB Sports Tribunal reached the conclusion in the Appealed Decision that the applicable anti-doping regulations did not provide for any leeway to reduce the period of ineligibility to be imposed on the Athlete, it nonetheless decided to reduce the period of ineligibility to two years on the basis of the principle of proportionality under Article 20(3) of the German Constitution, taking into account the Athlete's age, the impact of the period of ineligibility on the Athlete's career and finances, and that it was the Athlete's first ADRV.

282. According to NADA and WADA, CAS jurisprudence establishes that there is no scope for the application of the principle of proportionality in an anti-doping context beyond the applicable anti-doping regulations and that, in any event, the specific elements relied upon by the DFB Sports Tribunal to reduce the period of ineligible are to be dismissed.

283. The DFB did not submit the original German text of Article 20(3) of the German Constitution, but it submits that such provision provides as follows:

"*(i) the measure must pursue a constitutionally legitimate purpose;*

(ii) this legitimate purpose can be furthered at all by the measure [sic]*;*

(iii) there is no milder means by which this purpose can be achieved just as effectively, and

(iv) the measure is proportionate to the purpose it pursues."

284. The Panel finds that the principle of proportionality is already built into the system of imposing sanctions under the WADC, on which the DFB LPR, the DFB ADR, the NADA ADC and the FIFA ADR are based.

285. In this respect, the Panel agrees with the reasoning of the CAS panel in CAS 2018/A/5546 & 5571 and the references cited therein:

> "*86. Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated:*
>
> > *"The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim" (para. 51).*
>
> *87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction" (emphasis added, para. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code.*"

286. The Panel also considers the reasoning of the CAS panel in CAS 2018/A/5958 compelling:

> "[T]*he WADC* […] *has the principle of proportionality built into it within the nature of its sanctioning regime. It is on this basis of proportionality that the concepts of 'no fault or negligence' and 'no significant fault or negligence' are conceived and applied in the rules, and which provide the potential basis for an elimination or reduction of an athlete's suspension within an otherwise strict-liability regime. There is, as such, no separate basis of 'proportionality' on which to reduce an athlete's suspension for an anti-doping rules violation.*"

287. On this basis alone, the Panel finds that there is no scope for the application of a general principle of proportionality outside of the applicable sanctioning regime in the applicable anti-doping regulations, i.e. the FIFA ADR in the matter at hand. The Panel finds that German law has no particular role to play in international anti-doping proceedings.

288. Indeed, Article 88(4) FIFA ADR provides as follows:

> "*These Regulations shall be interpreted as an independent and autonomous text and not be reference to existing law or statutes.*"

289. Insofar the DFB LPR or the DFB ADR provide for the subsidiary application of German law, which has not been established, in accordance with § 5(2) DFB LPR, the FIFA ADR shall prevail. Accordingly, also from this angle, there is no scope for the application of a general principle of proportionality.

290. Moreover, the Panel considers one argument in Prof Nolte's expert opinion particularly compelling. As stated by Prof Nolte, "[t]*he UNESCO Convention against Doping in Sport makes the principles of harmonized and globally uniform anti-doping binding under international law*". Germany is a signatory of the UNESCO Convention against Doping in Sport and is therefore bound by it. Allowing an exception for the application of the principle of proportionality outside the scope of the applicable anti-doping regulations for German cases only would undermine the harmonization of an international anti-doping regime.

291. Finally, the Panel finds that the DFB's reliance on the Krabbe Case is not compelling, because such ruling was pronounced prior to the introduction of the WADC, which first took effect in 2004, and before Germany became a signatory of the UNESCO Convention against Doping in Sport. The Panel finds that the Krabbe Case therefore has no precedential value.

292. Consequently, the Panel finds that there is no scope for the application of the principle of proportionality under Article 20(3) of the German Constitution.

b. The individual circumstances invoked by the DFB Sports Tribunal

293. This conclusion notwithstanding, even if there would be scope for the application of the principle of proportionality under Article 20(2) of the German Constitution, *quod non*, the Panel finds that the individual circumstances invoked by the DFB Sports Tribunal in the Appealed Decision to justify the imposition of a reduced period of ineligibility are not compelling.

i. First-time offender

294. Insofar the DFB Sports Tribunal argues that a reduced period of ineligibility is to be imposed on the Athlete because he is a first-time offender, the Panel finds that this element is already built into the anti-doping regulations. Indeed, if an athlete commits an ADRV for a second time, significantly harsher sanctions are imposed, potentially resulting in a period of ineligibility twice as long as for a first ADRV.

295. Article 20(1) FIFA ADR is only applicable to a first-time offender, so that the mere fact that this is the first ADRV of the Athlete is not a factor justifying a deviation from this provision or the sanctioning regime in general.

ii. Small amount of a prohibited substance

296. The Appealed Decision also suggests that "*a small amount of a prohibited substance*" was found and that the DFB Sports Tribunal "*assumes at most a one-time injection and not a structured, long-term EPO abuse*".

297. The Panel finds that there is no evidence on file corroborating such factual conclusions/assumptions. There is no indication of the quantity of rEPO found in the Athlete's sample. The amount detected also depends on when the rEPO was administered, i.e. the more the time between administration and sample collection, the smaller the quantity of rEPO detectable. It is also well-known that rEPO may be administered by micro-dosing, rather than by a one-off injection. The quantity of the substance detected in a sample is therefore no indication of the seriousness of the ADRV.

298. In any event, applying sanctions based on the quantity of a prohibited substance detected in an athlete's sample is a complete overhaul of the sanctioning regime applied in anti-doping proceedings. The DFB has also not provided any statistical data based on which it can be concluded that the amount of the rEPO detected in the Athlete's sample is lower than average or other evidence that would enable the Panel to take this into account as a factor in sanctioning the Athlete.

iii. Team sports v. individual sports

299. The Appealed Decision provides that, during a period of ineligibility, "[w]*hile the individual athlete is able to conserve his performance physically and psychologically through private individual training and thus to bridge the barrier, this is not possible for a team athlete to the same extent through individual training*".

300. The Panel accepts that the consequences of a period of ineligibility and the possibilities to return to professional sport may not be the same in team sports as in individual sports. However, the Panel also finds that there is no reason why an equal ADRV in team sports should be sanctioned more leniently than the same infringement in an individual sport.

301. Furthermore, the Panel notes that specific provision is made for team sports in the sense that unlike in individual sports, pursuant to Article 30(2) FIFA ADR, an athlete in team sports may return to train with a team or to use the facilities of a club or other member organisation of a FIFA Member Association or any other Signatory of the Code during the shorter of i) the last two months of the athlete's period of ineligibility; or ii) the last one quarter of the period of ineligibility imposed. The Panel therefore finds that the difference between team sports and individual sports has already been built into the anti-doping sanctioning system.

iv. Football v. other sports

302. The Appealed Decision provides that "[t]*he economic impact of a four-year ban in professional soccer is much more serious and intense for* [the Athlete] *than for athletes*

of other, less prominent and financially equipped sports. The loss of the economic livelihood would hit the [the Athlete] *significantly harder than it would other athletes.*"

303. The Panel finds that the reasoning of the DFB Sports Tribunal contains various flaws. First of all, the Panel finds that it is not necessarily true that football is more prominent and financially equipped than other sports. Indeed, there are other sports where significant amounts of money are earned by athletes, sometimes more than in football. Furthermore, not all football players earn significant amounts of money. The Panel sees no reason to treat ADRVs in football structurally different from ADRVs in other sports.

304. The Panel also considers the suggestion of the DFB Sports Tribunal problematic that athletes with significant income should be sanctioned less severely than athletes with more modest income. Indeed, it may be said that athletes who earn significant amounts of income have a larger responsibility to participate clean than athletes with more modest income.

305. The Panel also has not been provided with any insight in the Athlete's income and the average income of football players or athletes from other sports that would enable it to take this into account as a factor in sanctioning the Athlete.

v. Age

306. Finally, the Appealed Decision indicates that "[i]*t should also be noted that* [the Athlete] *is an athlete of just 21 years of age, where the longer barrier can cause sensitive disturbances in the maturation and development process*".

307. The Panel finds that there is no particular reason justifying harsher sanctions on older athletes than on younger athletes. While younger athletes may still return to professional sport, this is more difficult to achieve by older athletes. With an age of 21, the Panel finds that the Athlete is also not particularly young or inexperienced.

308. In the absence of any specific arguments advanced with respect to the Athlete's "*maturation and development process*", the Panel finds that it is barred from taking this into account in considering a reduction of the period of ineligibility to be imposed on the Athlete.

vi. Conclusion

309. For the reasons set forth above, not least because the Athlete himself has not invoked any mitigating factors that should be taken into account to reduce the four-year period of ineligibility, the Panel finds that there is no reason to deviate from the application of Article 20(1) FIFA ADR.

310. Prof Nolte also stated that under German criminal law a prison sentence of up to three years in the case of self-doping is considered proportionate, which remained uncontested by the Athlete and the DFB. Compared to a prison sentence of three years

for self-doping, the Panel finds a four-year period of ineligibility for intentional doping not necessarily disproportionate.

311. Considering the circumstances, in particular that the Athlete is found to have committed an intentional ADRV, the Panel does not consider the imposition of a four-year period of ineligibility to be disproportionate, unreasonable or unfair. Equally as important, the hallmark of the world anti-doping system embodied in the WADC, as adopted by German sports organisations and the German government through the UNESCO Convention, is the need for harmonisation, and creating a German exception would create a disparity within that system that is simply not justified based on the facts of this case or the legal arguments put forward.

312. Consequently, the Panel finds that a four-year period of ineligibility is to be imposed on the Athlete.

c. The commencement of the period of ineligibility imposed

313. Article 29 FIFA ADR provides as follows:

> "[…] [E]*xcept as provided provided below, the period of Ineligibility shall start on the date of the final-hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed.*"

314. Accordingly, the four-year period of ineligibility imposed on the Athlete shall, in principle, commence on the date of the present Award.

315. However, Article 29(2)(a) FIFA ADR provides as follows:

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

316. Because the Athlete has been provisionally suspended since 15 November 2022, the period between 15 November 2022 and the date of the present Award is to be credited against the four-year period of ineligibility imposed, with the consequence that the four-year period of ineligibility imposed on the Athlete commenced on 15 November 2022.

317. Consequently, a four-year period of ineligibility is imposed on the Athlete, commencing as from 15 November 2022.

B. Conclusion

318. Based on the foregoing, the Panel holds that:

i) It is not necessary to determine whether NADA has standing to be sued in the proceedings related to the appeals filed by the Athlete and WADA.
ii) The Athlete committed an ADRV pursuant to Article 6 FIFA ADR.
iii) A four-year period of ineligibility is imposed on the Athlete, commencing as from 15 November 2022.

XI. COSTS

(…).

* * * * * * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 5 April 2023 by Mr Mario Vušković against the decision issued on 30 March 2023 by the DFB Sports Tribunal is dismissed.

2. The appeals filed on 19 and 27 April 2023 respectively by the National Anti-Doping Agency of Germany and the World Anti-Doping Agency against the decision issued on 30 March 2023 by the DFB Sports Tribunal are upheld.

3. The decision issued on 30 March 2023 by the DFB Sports Tribunal is confirmed, save for paragraph 1 of the operative part, which shall read as follows:

   Licensed player Mario Vuskovic (HSV Fußball AG) is sanctioned with a period of ineligibility of 4 (four) years for a violation of Article 6 of the FIFA Anti-Doping Regulations, commencing as from 15 November 2022.

4. (…).

5. (…).

6. (…).

7. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 27 August 2024

THE COURT OF ARBITRATION FOR SPORT

Lars **Hilliger**
President of the Panel

Jeffrey G. **Benz**
Arbitrator

Luigi **Fumagalli**
Arbitrator

Dennis **Koolaard**
Ad hoc Clerk