**Arbitration CAS 2012/A/2725 International Cycling Union (UCI) v. Vladimir Koev & Bulgarian Cycling Union (BCU), award of 23 July 2012**

Panel: Judge James Robert Reid QC, Sole Arbitrator

*Cycling*
*Doping (heptaminol)*
*Duty to establish how the specified substance entered the athlete's body*
*Absence of intent to enhance sport performance*
*Starting date of the ineligibility period*

1. **In the circumstances, where there is a known and admitted possible source of the substance and no alternative possible source has been suggested, the athlete has established to the comfortable satisfaction of the hearing panel how the specified substance entered his/her body.**

2. **A contemporaneous medical record is a factor which militates against a substance having been taken to enhance sport performance, but for a hearing panel to be comfortably satisfied that there was no intention to enhance sport performance, there would generally need to be a combination of objective circumstances. One such circumstance might be the open use or the disclosure of use of the substance.**

3. **Where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete, the hearing body may start the period of ineligibility at an earlier date commencing as early as the date of sample collection. If more than one year has elapsed between the analysis of the A samples and the notification of the adverse findings, but no explanation for this substantial delay has been proffered, it is appropriate to start the period of ineligibility at the date of the last sample collection.**

## I. THE PARTIES AND PROCEEDINGS

1. The Appellant, International Cycling Union (UCI) is the association of national cycling federations. Its purpose is to direct, develop, regulate, control and discipline cycling in all forms worldwide. It has legal personality pursuant to the Swiss Civil Code and its registered office is in Switzerland.

2. The First Respondent is Mr Vladimir Koev, an elite category cyclist with a licence issued by the Bulgarian Cycling Union (BCU), the national cycling federation of Bulgaria.

3. The Second Respondent is the BCU.

4. On this appeal the UCI challenges the decision of the committee of the BCU made on 28 December 2011 (the Decision).

5. By that Decision the committee of the BCU determined that Mr Koev was not guilty of a breach of the UCI anti-doping rules and held *"Vladimir Koev should not be punished or reprimanded. Whereas, in the next similar case, regardless of the situation, the punishment will be maximum"*.

6. The UCI appeals to CAS against that decision, seeking a sanction of ineligibility against Mr Koev, his disqualification from the 2010 Tour of Romania, a fine and an award of costs against both BCU and Mr Koev.

7. The anti-doping rules of the UCI (UCI ADR) relevant to this appeal are those in force as at 7 June 2010, subject only to the *lex mitior* in respect of any subsequent amendments to those rules.

## II. THE FACTS

8. In 2010 Mr Koev was employed by the Hemus 1896-Vivelo team. By his employment contract Mr Koev was entitled to a gross annual salary for the year 2010 of EUR 1,660 (a net amount of EUR 1,162).

9. Mr Koev participated in and won the 2010 Tour of Romania, a stage race on UCI's international calendar, which was held from 5 June to 12 June 2010.

10. Doping controls were initiated and conducted by UCI during the race.

11. Mr Koev was required by UCI to undergo doping controls in accordance with the UCI ADR on 7, 9 and 11 June 2010.

12. On each occasion he confirmed that the samples had been taken in accordance with the regulations. He did not declare any medication or supplements taken over the previous seven days on the doping control forms.

13. His urine samples were analysed at the World Anti Doping Agency (WADA)-accredited anti-doping laboratory in Bucharest, Romania.

14. The certificates of analysis, dated respectively 21 and 24 June 2010, stated that the samples provided by Mr Koev on 7, 9 and 11 June 2010 contained Heptaminol.

15. Heptaminol is a Prohibited Substance classified under section S.6.b (Specified Stimulant) of the WADA prohibited list. Mr Koev was notified by letter of the adverse findings on 15 September 2011.

16. On 27 September 2011 he requested the analysis of his three B samples. He also asked to have the documentation packages for his A samples.

17. The B sample analyses were conducted on 27 October 2011, when Mr Koev attended, and confirmed the presence of Heptaminol in the three samples. On 1 December 2011 Mr Koev was notified by letter of the results of the B sample analyses.

18. Pursuant to Article 234 of the UCI ADR by letter, also dated 1 December 2011, UCI requested the BCU to initiate disciplinary proceedings against Mr Koev.

19. In its letter the UCI notified the BCU that Mr Koev had a previous anti-doping rule violation for which in 2006 he had been sanctioned with the standard penalty of two years ineligibility from 5 July 2006 to 5 July 2008 and that this had to be taken into account when determining the sanction of the offences alleged. Mr Koev had been sanctioned having provided a sample which contained a prohibited non-specified substance, stanozolol metabolites (an anabolic steroid listed on the WADA list of Prohibited Substances) which had been detected during an anti-doping control on the 2006 Tour of Serbia.

20. A hearing was scheduled by BCU to take place on 23 December 2011 but owing to Mr Koev's ill-health (for which a medical certificate was provided) it was postponed to 28 December. At that hearing Mr Koev accepted that Heptaminol had been found in his urine in both the A and B samples. He gave his explanation in these terms:

*"I am primarily engaged in road cycling and I compete in daily and multi-day races. I find that in this case I have a guilt which I want to explain. I have haemorrhoids that cause internal and external bleeding. They cause me discomfort in my training and competition process. For this reason I was forced to seek medical care. My doctor prescribed me the necessary preparations to help for my treatment. My mistake was first that I did not know that the drug prescribed by my doctor contained also the substance heptaminol. Out of shame and embarrassment I did not tell about my treatment with these medications for haemorrhoids".*

21. Before the Committee Mr Koev was assisted by Mr Todor Kolev who was the manager both of Mr Koev's 2010 team (Hemus 1896-Vivelo) and his 2011 team (Konya Torku Seker Spor Vivelo). He produced as evidence outpatient list no. 10/31.05.2010, a medical certificate dated 31 May 2010 by which Dr Nikolay Nanev gave a case history of *"pain and irritation in the anal area, sometimes of availability of blood in the faeces. He has tried self-treatment, without much effect"*. On examination by rectal touch Dr Nanev recited that he had found *"thrombosis external and internal haemorrhoids"*. He prescribed *"Ginkor Fort 2x2 for the first 3 days, then 2x2 daily for one month. Pilex crème"*. Mr Koev told the Committee that he did not reveal his treatment with the medication for haemorrhoids out of shame and embarrassment. He pointed out he had always readily given samples, he had attended the B sample testing and had appeared before the Committee. He said he thought he had made a mistake in not telling about the haemorrhoids. Having *"taken to heart a good lesson from several years ago"* he would not even think about banned substances.

22. In addition to his own testimony the Committee heard from Mr Kolev. Mr Kolev's evidence was that Mr Koev had always responded to calls for him to give samples for testing. He knew that Mr Koev was treating himself for haemorrhoids and was surprised that the medicine contained the substance. He thought that the athlete had been taking it to alleviate his pain and to feel comfortable in training and competition.

23. The Committee gave its decision pursuant to Article 272 UCI ADR *et seq*. in these terms:

*"From the hearing and the provided medical documents, and after the check made it is evident that for a period of 1 month the athlete Vladimir Koev received a treatment with a diagnosis of thrombosis haemorrhoids. To him a rectal touch examination was made- thrombosis of external and internal haemorrhoids. For the treatment (therapy) he has used the following medications: Zinat 3x500mg, Gentamicin 2x80mg; Expektorans; bed rest and diet friendly feeding, without being aware they contained the substance Heptaminol.*

*The athlete said that out of shame and embarrassment he had not declared the treatment with these medications for haemorrhoids. When called, he regularly appeared in the laboratory in Bucharest which shows that Vladimir Koev had not run away from responsibility.*

*The Bulgarian Cycling Union has always been uncompromising to athletes alleged, of the use of banned stimulants. Not in vain, in recent years we have always required during the International Cycling Tour of Bulgaria, class 2.2 doping control to be conducted. Also during the year we make doping control during our internal competitions.*

*In the case of Vladimir Koev, we believe he is not guilty and the substance which was found in the samples had not been aimed at enhancing his sports form.*

*Our solution is: Vladimir Koev should not be punished or reprimanded. Whereas, in the next similar case, regardless of the situation, the punishment will be maximum".*

24. It should be noted that the decision contains an error in that the panel has conflated the medical certificate provided by Mr Koev in relation to the prescription of the substance (Ginkor Fort) which he alleged caused the positive test for heptaminol and the medical certificate provided when he sought an adjournment of the hearing.

25. UCI was notified of the decision by e-mail on 12 January 2012. On 16 January 2012 UCI asked by e-mail for confirmation that the documents enclosed represented the full case file. On 30 January 2012 BCU confirmed by e-mail that it did.

## III. PROCEEDINGS BEFORE CAS AND CONSTITUTION OF THE ARBITRAL PANEL

26. On 13 February 2012 UCI lodged its appeal with CAS and sought an extension of time for the lodging of its appeal brief until 27 February 2012.

27. Pursuant to Article R32 of the Code of Sports Related Arbitration (CAS Code) the CAS suspended time for lodging the appeal brief pending the Respondents' views on the request for an extension of time. Before the Respondents had expressed any view UCI lodged its appeal brief on 27 February 2012.

28. On 19 March 2012 Mr Koev lodged a letter by way of answer.

29. By letter dated 2 April 2012 BCU sought permission to file an answer out of time.

30. BCU not having lodged an answer within the time limited by the rules and neither Mr Koev nor BCU sought to nominate an arbitrator on 12 April 2012 pursuant to Article R54 of the CAS Code the President of the CAS Appeals Arbitration Division nominated His Honour Judge Reid QC as Sole Arbitrator.

31. By letter dated 18 April 2012 the Sole Arbitrator granted to the Respondents (subject to any objection from UCI) an extension of time of 10 days from receipt of the letter to lodge, respectively, a Supplemental Answer or an Answer. By letter dated 19 April 2012 UCI stated it had no objection to the extension of time.

32. Mr Koev lodged a Supplemental Answer bearing date 25 April 2012 and received by CAS on 9 May 2012. BCU lodged an answer bearing date 25 April 2012 and received by CAS on 9 May 2012. Pursuant to Art R44.3 of the Code the Sole Arbitrator decided to admit the additional submissions notwithstanding that they were served out of time

33. By letters dated respectively 9 May 2012 (UCI), 14 May 2012 (BCU) and 14 May 2012 (Mr Koev) each of the parties agreed that the appeal should be decided on written submissions without an oral hearing.

34. By its appeal UCI sought that Mr Koev should not be granted "no fault or negligence" and that he must bear the full responsibility for his second anti-doping violation. It asked that if the Panel found for the application of Article 295 UCI ADR, Mr Koev should be sanctioned with four years of ineligibility; that if the Panel found that Mr Koev did not meet his evidential thresholds set by Article 295 UCI ADR Mr Koev shall be sanctioned at the minimum with eight years of ineligibility and at the maximum a lifetime ban. In addition UCI requested that pursuant to Article 291.1 UCI ADR Mr Koev should be disqualified from the 2010 Tour of Romania; that pursuant to Article 313 UCI ADR, and all competitive results obtained subsequently to the 2010 Tour of Romania should be disqualified. Under Article 326 UCI ADR, UCI sought a financial sanction equivalent to the net annual income to which Mr Koev was entitled in the year in which the anti-doping rule violation occurred. In addition pursuant to Article 275 UCI ADR UCI sought the costs of the result management i.e. CHF 2'500; the cost of the B-Sample analysis, i.e. EUR 850 and the costs of the A-Sample laboratory documentation package, i.e. EUR 735. UCI further sought an award of costs pursuant to Article 65.4 of the CAS Code and that both Respondents should be jointly and severally liable for payment of those costs.

35. The two Respondents sought the dismissal of the appeal.

## IV. SUBMISSIONS OF THE PARTIES

### A. UCI's Submissions

36. Mr Koev claimed that the presence of the prohibited substance within his body was due to his consumption of Ginkor Fort, a medication allegedly prescribed by Dr Nikolay Nanev on 31 May 2010 to treat haemorrhoids. Positive testing for Heptaminol due to the intake of Ginkor

Fort is a well-documented situation that has led to the sanctions of many athletes. Mr Koev's behaviour, having taken no precaution whatsoever in order to ensure himself not to commit any anti-doping rule violation, is diametrically opposed to the high standard of care set at article 296 ADR. The application of article 296 ADR is solely meant *"where the circumstances are truly exceptional and not in the vast majority of cases". "Sabotage, despite all due care"* is an illustration of what is understood by "exceptional circumstances" (comment of Article 10.5 of the WADA Code).

37. The definition of "No Fault or Negligence" imposes an extremely high duty of care upon the athlete. CAS case law consistently showed that it is the athlete's responsibility to ensure that what goes into his body does not contain a prohibited substance: see *TAS 2006/A/1120*; *TAS 2004/A/613*; *TAS 2005/A/982* and *CAS 2005/A/872*.

38. Thus in the decision *TAS 2006/A/1120*, at paragraph 67, the following statement of principle appears:

*"Le mécanisme de responsabilité mis en place par le RCAD est un régime de responsabilité objective. Les termes du RCAD et la jurisprudence constante du TAS indiquent sans ambiguïté que l'athlète est responsable de la présence de produits dopants dans son organisme. Ainsi, si les coureurs cyclistes bénéficient de la présomption d'innocence, dès lors que la présence d'une substance interdite est établie, l'intention de se doper et la culpabilité de l'athlète sont présumées. Ce mécanisme de responsabilité objective contribue à la sauvegarde de l'équité sportive".*

39. Mr Koev could not relieve himself of his responsibility on the basis that Ginkor Fort was prescribed by a health professional. As stated in the *TAS 2004/A/613* decision, at paragraph 28:

*"En vertu de cette responsabilité, il appartient en premier lieu au coureur de se montrer vigilant et de vérifier le contenu des médicaments qu'il absorbe, même si ces médicaments lui sont présentés par un médecin et que le médecin sait que le coureur est susceptible d'être soumis à des contrôles. Il serait, en effet, trop facile pour un coureur de se retrancher derrière les prescriptions ordonnées par un médecin en alléguant qu'il n'a fait que se soumettre aux injonctions dudit médecin".*

40. The mere fact that Mr Koev failed to inform himself about the nature of said product prevents the application of Article 296 UCI ADR to the case. He could easily have found out that Ginkor Fort contained Heptaminol by simply asking Dr Nanev. There is no evidence that he asked anything. Even if Dr Nanev did mislead him, such incorrect information would not absolve Mr Koev. Even if the packaging of Ginkor Fort that Mr Koev obtained did not specify that it could lead to positive testing or at least clearly indicate the presence of Heptaminol within its composition, a simple internet search on a Bulgarian browser instantly would have indicated the presence of Heptaminol in Ginkor Fort. This is common knowledge based on the numerous decisions in the sports world where athletes have been sanctioned for presence of Heptaminol due to the use of Ginkor Fort for medical reasons. The product's webpage addresses the issue. Mr Koev, faced with a problem of haemorrhoids, should have considered alternative treatments. In Switzerland other remedies were available which would not have resulted in positive doping tests.

41. Mr Koev asserts that he took *"a good lesson to the heart from several years ago"* i.e. his first doping offence, so his awareness of his obligations should have been all the sharper. Given his professional experience, his behaviour was at least neglectful, if not wilful blindness.

42. If the Ginkor Fort treatment was inevitable, Mr Koev should have either refrained from competing until he was sure that the medication had cleared his body or he should have requested a TUE (or a retroactive TUE) according to Articles 33 to 37 UCI ADR which he failed to do. It is uncertain whether Mr Koev would have been granted such TUE by the then National Anti-Doping Commission of Bulgaria and failure to avail oneself of this proceeding has been found careless and sanctioned by CAS (*CAS 2008/A/1577* and *CAS ad hoc Division OG 06/001*). His degree of fault in this anti-doping rule violation was far too grave to permit the application of Article 296 UCI ADR. Therefore at best the period of ineligibility of 2 years could only be reduced under the regime of Articles 295 and 296 UCI ADR to a range between two and four years.

43. Even if it were accepted that the origin of Heptaminol was the Ginko Fort prescribed by Dr Naneev, Mr Koev still had to produce corroborating evidence in addition to his word to establish to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sporting performance in order to benefit from Article 295 UCI ADR.

44. Heptaminol being a stimulant, as classified by the WADA Prohibited List, increases, by its very nature, the sporting capacity of an athlete. The general notice regarding Ginkor Fort indicates that this product, due to the presence of Heptaminol, helps blood transportation. The fact that the nature of a prohibited substance is beneficial to the athlete can prevent the demonstration of absence of intent to enhance sport-performance according to the comment of Article 10.4 of the WADA Code. Further, Mr Koev's failure to disclose the alleged treatment on the doping control forms negated the absence of intent to improve his sporting performance. Despite the request to disclose all medication taken when tested according to the regulations, Mr Koev concealed his alleged treatment for no legitimate reasons. Haemorrhoids being common in cycling, Mr Koev had no reason to feel ashamed and even if his medical condition had been peculiar, hiding it would still lessen the finding of absence of intent.

45. Even if, despite the fact that Mr Koev provided only one medical document in addition to Mr Kolev and the rider's words, the Sole Arbitrator is still convinced to a comfortable satisfaction that Mr Koev did not use the alleged medication with any intent to increase his sport performance, Mr Koev's negligence remains the yardstick to assess his ineligibility period.

46. Mr Koev broke his duty of care as provided at Article 21.1 UCI ADR: he failed to take any measures to ensure compliance with the UCI ADR. As Mr Koev has already been sanctioned with a two years' ineligibility, one would have assumed that this suspension would have resulted in a greater awareness on Mr Koev's part. Given the widespread knowledge of the specific requirements imposed upon athletes with regards to medical treatment, Mr Koev's lack of care negated any grounds for reducing his ineligibility period. Mr Koev should be sanctioned with four years of ineligibility according to Article 306 UCI ADR.

47. If the Sole Arbitrator is not convinced of either the origin of Heptaminol found in Mr Koev's samples and/or his lack of intent to increase his sport performance, the standard sanction should apply under Article 306 UCI ADR which then sets the sanction period between eight years of suspension to a lifetime ban.

## B. Mr Koev's Submissions

48. In substance by his Answer and Supplementary Answer Mr Koev repeated what he had said to the Committee. He had presented the necessary documents before the Bulgarian Federation, to show that he suffered from haemorrhoids. Neither he nor his doctor knew that the substance Heptaminol was forbidden or that the medicines he took contained it. He declared that he had not violated the UCI ADR, because he had not used the prohibited substance to enhance his sporting performance or mask the use of a performance-enhancing substance. The doctor had prescribed him therapy with Ginko Fort. At that time he was not aware of the composition of that drug but now understands that it is venotropic drug composed of Ginkgo biloba extract, troxerutine, and Heptaminol. This is how the prohibited substance Heptaminol has entered his body. He submitted documentation to show that even now he still suffers from the same problem. Because the specified substance entered his body through the medication which he used for treatment of thrombosis haemorrhoids and the substance Heptaminol was not intended to enhance his sport performance or mask the use of a performance-enhancing substance he submitted that he had established all conditions required by Article 295 UCI ADR.

49. The further documentation submitted comprised primarily a certificate from Dr At. Matev dated 23 April 2012 in these terms (in the translation supplied):

*"Conclusion Fistula ani. Papilla ani hypertoficans. Fissura ani. Haemorrhoides interna.*

*With topical anaesthesia Lidocain 1% has been done fistulotomy. It has removed hypertrophy anal pappila. Anal dilatation.*

*Recommendations are given for HDR".*

## C. BCU's Submissions

50. Mr Petar Bonchev, the current President of the BCU (though not at the time of the Decision) submitted that in the view of the BCU Mr Koev had not violated the UCI ADR because he had not used the prohibited substance Heptaminol to enhance his sport performance or mask the use of a performance-enhancing substance. The former president of BCU had given UCI the full case file on which the Committee had based its Decision. The Committee heard Mr Koev and his manager Todor Kolev on 28 December 2011 when the athlete gave a comprehensive explanation of the diagnosis and the prescribed treatment. His manager confirmed that he was aware of the disease and that Mr Koev was treated for haemorrhoids. The Committee came to the decision that Mr Koev was not guilty and the substance which was found in the samples had not been aimed at enhancing his sporting form. It was for this reason that BCU did not punish or reprimand the athlete.

51. As a proof of his innocence Mr Koev had presented to the Committee outpatient list no. 10/31.05.2010 from which it was obvious that his diagnosis was unspecified thrombosis hemorrhoids and his doctor had prescribed him therapy with Ginko Fort. This drug composed of Ginkgo biloba extract, troxerutine, and Heptaminol. This is how the prohibited substance Heptaminol had entered into the athlete's body. During the Tour of Romania and on the dates of the samples collection he was still under treatment. Even now he still suffers from the same problem.

52. Mr Bonchev confirmed that BCU stood behind Mr Koev. He had not violated any clause of UCI ADR intentionally. The specified substance has entered into his body through the medications which he has used for treatment of thrombosis haemorrhoids and the substance Heptaminol was not intended to enhance his sport performance or mask the use of a performance-enhancing substance. Thus Article 295 UCI ADR applied.

## V. JURISDICTION OF THE CAS

53. The jurisdiction of CAS is accepted by all parties.

54. Article R47 of the CAS Code provides as follows:

*"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

55. By Article 275 UCI ADR:

*"If the License-Holder is found guilty of an anti-doping rule violation, he shall bear:*

*1. The cost of the proceedings as determined by the hearing panel.*

*2. The cost of the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the hearing body.*

*3. The cost of the B Sample analysis, where applicable.*

*(…)*

*The License-Holder shall owe the costs under 2) [and 3)] also if they were not awarded in the decision. The National Federation shall be jointly and severally liable for its payment to the UCI".*

56. By Article 329 UCI ADR:

*"The following decisions may be appealed to the Court of Arbitration for Sport:*

*1. a decision of the hearing, body of the National Federation under article 272;*

*(…)".*

57. By Article 331 UCI ADR:

*"The appeal of the UCI shall be made against the license-Holder and against the National Federation that made the contested decision and/or the body that acted on his behalf. The National Federation or body concerned shall be liable for costs if the hearing panel which made the decision against which the appeal has been mode has applied the regulations incorrectly".*

58. By Article 333 UCI ADR and the comment to it, it is provided:

*"The statement of appeal by the License-Holder or the other party to the case must be submitted to the CAS within 1 (one) month of his receiving the full decision as specified in article 111. Failure to respect this time limit shall result in the appeal being disbarred.*

*Comment: within one month shall mean from such-and-such day of the month until such-and-such day of the following month, regardless of the number of days in a calendar month. For example, if the decision was received on 15 January, the last day of the term of appeal is 15 February. If the decision was received on 15 February, the last day of the term of appeal is 15 March. However, if the last day of the term of appeal is a holyday or a non-business day in the country where the contested decision has been notified, the term shall expire at the end of the first subsequent business day (Rule 32 of the Code of Sports-related Arbitration)".*

59. Article R58 of the CAS Code provides as follows:

*"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

60. By Article 345 UCI ADR

*"The CAS shall decide the dispute according to these Anti-Doping Rules and the rest according to Swiss law".*

Accordingly, the UCI ADR and subsidiary Swiss law are applicable in the present procedure.

## VI. THE MATERIAL PROVISIONS OF UCI ADR

61. The material provisions are contained in Chapters II (Doping) and X (Sanctions and Consequences) of UCI ADR.

62. By Chapter II, Art 21:

*"The following constitute anti-doping rule violations:*

*1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.*

*1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily*

*Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an antidoping violation under article 21.1.*

*Warning:*

> *1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.*
>
> *2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.*

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

*1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an antidoping rule violation (…)".*

63. The provisions relating to ineligibility are at Chapter X, Articles 293 to 312 UCI ADR. For the purposes of this appeal reference was made primarily to Articles 293, 295 to 297 and 306 UCI ADR. These articles provide as follows:

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

*295. Where a Rider or Rider Support Personnel can establish how a Specified Substance entered his body or come into his possession and that such Specified Substance was not intended to enhance the Rider's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following:*

> *at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

*To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance. The License-Holder's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*

*296. If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event this article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under articles 306 to 312.*

*297. If a License-Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 (eight) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced.*

*306. For a License-Holder's first anti-doping rule violation, the period of Ineligibility is set forth in articles 293 and 294 (subject to elimination, reduction or suspension under articles 295 to 304, or to an increase under article 305). For a second anti-doping rule violation the period of Ineligibility shall be within the range set forth in the table below.*

***Second Violation***

| *First Violation* | *RS* | *FFMT* | *NSF* | *St* | *AS* | *TRA* |
|---|---|---|---|---|---|---|
| *RS* | *1-4* | *2-4* | *2-4* | *4-6* | *8-10* | *10-life* |
| *FFMT* | *1-4* | *4-8* | *4-8* | *6-8* | *10-life* | *life* |
| *NSF* | *1-4* | *4-8* | *4-8* | *6-8* | *10-life* | *life* |
| *St* | *2-4* | *6-8* | *6-8* | *8-life* | *life* | *life* |
| *AS* | *4-5* | *10-life* | *10-life* | *life* | *life* | *life* |
| *TRA* | *8-life* | *life* | *life* | *life* | *life* | *life* |

*Definitions for purposes of the second anti-doping rule violation table:*

*RS (Reduced sanction for Specified Substance under article 295): The anti-doping rule violation was or should be sanctioned by a reduced sanction under article 295 because it involved a Specified Substance and the other conditions under article 295 were met.*

*FFWT (Filing Failures and/or Missed Tests): The anti-doping rule violation was or should be sanctioned under article 294.3 (Filing Failures and/or Missed Tests).*

*NSF (Reduced sanction for No Significant Fault of Negligence): The anti-doping rule violation was or should be sanctioned by a reduced sanction under article 297 because No Significant Fault or Negligence under article 297 was proved by the License-Holder.*

*St (Standard sanction under articles 293 or 294.1): The anti-doping rule violation was or should be sanctioned by the standard sanction of two (2) years under article 293 or 294.1.*

*AS (Aggravated sanction): The anti-doping rule violation was or should be sanctioned by an aggravated sanction under article 305 because the conditions set forth under article 305 are established.*

*TRA (Trafficking or Attempted Trafficking and administration or Attempted administration): The anti-doping rule violation was or should be sanctioned by a sanction under article 294.2".*

64. Article 326 UCI ADR provides for financial penalties in addition to penalties by way of ineligibility and disqualification. So far as material it provides as follows:

*"326. In addition to the sanctions provided for under articles 293 to 313 anti-doping violations shall be sanctioned with a fine as follows.*

*1. The fine is obligatory for a License-Holder exercising a professional activity in cycling and in any event for members of a team registered with the UCI.*

*a) Where a period of Ineligibility of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the license-Holder normally was entitled to for the whole year in which the antidoping violation occurred. The amount of this income shall be as assessed by the UCI, provided that the net income shall be assessed at 70 (seventy) % of the corresponding gross income. The License-Holder concerned shall have the burden of proof to the contrary. For the purpose of the implementation of this article the UCI shall have the right to receive a copy of the complete contracts of the License-Holder from the License-Holder or any person or organization maintaining the contracts, for example the auditor appointed by the UCI and National Federation. If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half.*

*Comment: 1. income from cycling will include for example the income from image rights;*

*2. suspension of part of a period of Ineligibility of two years or more has no influence on the application of the clause above.*

*b) (…).*

*2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.*

*3. In other cases than those under paragraphs 1 and 2 the imposition of a fine is optional.*

*4. In observance of paragraphs 1 and 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned.*

*5. Except where paragraph 1 a) is applied, no fine may exceed CHF 1,500,000".*

## VII. DISCUSSION

65. It is undisputed that Heptaminol is a Specified Substance being classified under S.6.b (Specified Stimulant) of the WADA Prohibited List and that it was found in the three samples which Mr Koev gave on 7, 9 and 11 June 2010 during the Tour of Romania. It is also undisputed that Mr Koev did not declare (as he should have done) that he was taking Ginkor Fort at the time he gave the three samples, that he did not have the benefit of a TUE, and that he did not apply for a retrospective TUE in respect of the medication he was taking.

66. Although UCI did not concede that the reason for the positive tests was the Ginkor Fort which Mr Koev admitted taking, it did not suggest any other possible source for the substances found in the tests. Indeed UCI submitted a variety of other cases in which athletes had been penalised for having tested positive for Heptaminol as a result of taking Ginkor Fort and referred to Ginkor Fort's own published material which referred to the possibility of positive tests from taking the substance. In the circumstances, where there is a known and admitted possible source of the substance and no alternative possible source has been suggested, Mr Koev has established to the comfortable satisfaction of the Sole Arbitrator how the specified substance entered his body.

67. As to Mr Koev's intentions when taking the substance, he asserts that he had no intent to enhance sport performance. He receives support for this from the evidence that he was prescribed the substance by a medical practitioner for a condition (haemorrhoids) from which he was suffering. That he was suffering from this condition was established by Dr Nanev's certificate of 31 May 2010 which in its turn was supported by the certificate of Dr Matev of 23 April 2012. There is (contrary to the suggestion of UCI) no significance in the absence of further medical evidence. That which has been provided is sufficient.

68. It is surprising that, according to Mr Koev (though there is no direct evidence of this from Dr Nanev), Dr Nanev was unaware of, and did not warn Mr Koev about, the possible consequences of Mr Koev taking Ginkor Fort. This is despite the fact that the possibility of the substance resulting in an athlete testing positive was something of which the manufacturers were well aware and which they took steps to notify potential users or prescribers.

69. It is still more surprising that Mr Koev, who had already undergone a two year period of ineligibility as a result of a previous doping offence and who claimed to have taken the lesson to heart, made no inquiry of the doctor or of anyone else to satisfy himself that the medication was one which he could safely take. Mr Koev is a mature sportsman. It would be unlikely in the extreme that he was not aware of his personal duty to ensure that no Prohibited Substance entered his body, of the warning that he must refrain from using any substance of which he did

not know the composition and that medical treatment is no excuse for using Prohibited Substances except where the rules governing Therapeutic Use Exemptions are complied with.

70. Mr Koev asserts that it was out of shame that when he was tested he did not (as he was obliged to do) reveal that he was taking the medication. It is very difficult to accept this assertion at face value. Haemorrhoids are a common enough condition in the population at large, and (according to UCI) are a common condition amongst cyclists.

71. The scheme of the UCI ADR is that an anti-doping rule violation is established by the proof of the banned substance in the relevant sample or samples. Once that is established the athlete is liable to a standard sanction of ineligibility unless the athlete can bring himself within either the rules as to therapeutic use exemptions (TUEs) or he falls within one of the special cases which may (depending on the circumstances) result in an elimination or reduction of the period of ineligibility or an enhanced penalty.

72. Where the athlete seeks to argue that the period of ineligibility should be eliminated or reduced it is for him to establish the basis upon which he is entitled to avoid the standard penalty.

73. In the present case the Committee appears to have decided that Mr Koev bore no fault or negligence and that the applicable period of ineligibility should therefore be eliminated. Although the decision of the Committee does not specify the provision in the UCI ADR upon which it based its decision that Mr Koev was not guilty and that he should not be punished or reprimanded, it appears that its decision was based upon Article 296 UCI ADR ("No Fault or Negligence"). If its decision had been based on Article 295 UCI ADR ("Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances") it would have been required to impose at a minimum a reprimand.

74. In order for the athlete to be able to take advantage of Article 296 UCI ADR he must establish (as Mr Koev has done) how the Prohibited Substance entered his body. He must also establish that this was through no fault or negligence of his own. On the facts set out above it is clear that Mr Koev has not done this. On his own account he was guilty of considerable negligence. He took a substance prescribed for him without making any inquiry as to its content. If he had done so there can be no real doubt that he would have established that the product contained a prohibited substance. As someone with particular reason to take care over what entered his body, following his previous period of ineligibility, he cannot assert that his failure to take any precaution at all demonstrated that he bore no fault or negligence.

75. The question then is whether he can take advantage of the provisions of Article 295 UCI ADR. In order to do so, having established how the Specified Substance (in this case Heptaminol) entered his body, he must, in the circumstances of this case, produce corroborating evidence in addition to his word, to establish to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance.

76. So far as corroborative evidence was concerned, Mr Koev produced only the documentation from the two doctors which established that he did indeed suffer from haemorrhoids and from one of the doctors that the Ginkor Fort was prescribed to alleviate this condition. There was

no evidence from the doctor which explained why this substance rather than some other was the appropriate treatment or as to his appreciation or lack of appreciation that the substance might result in a positive test. In its case UCI pointed to the availability of other remedies at least in Switzerland which would not have resulted in positive tests, but provided no evidence either that those remedies were available in Bulgaria or that they would have been equally efficacious in the treatment of Mr Koev's particular condition.

77. The contemporaneous medical record is a factor which militates against the substance having been taken to enhance sport performance, but (as is indicated in the Comment to Article 10.4 of the WADA Code) for a hearing panel to be comfortably satisfied that there was no intention to enhance sport performance, there would generally need to be a combination of objective circumstances. One such circumstance might be the open use or the disclosure of use of the substance. In the present case there is no evidence of open use or of disclosure. To the contrary, Mr Koev deliberately failed to declare his use of the substance, asserting only that he was embarrassed about the condition.

78. It was suggested that there was corroboration of his position in the facts that he did not seek to avoid the three tests which proved positive, that there was nothing to suggest that he had tried to avoid tests in the past and that he requested (and attended at) the testing of the B samples. These factors are however only of the very slightest assistance. He was in no position to avoid the three tests which proved positive and the fact that he elected to have the B samples tested and to be present at the tests does not go to his intention in taking the Specified Substance.

79. A factor which weighs against Mr Koev is his apparent complete disregard for any of the precautions which he would be expected to have taken before using a new medicine. His absence of any inquiry or any research on his own behalf, particularly against the background of his earlier period of ineligibility, is something which required, but did not receive, any explanation.

80. The onus on Mr Koev is to establish to the comfortable satisfaction of the Sole Arbitrator that there was no intent to enhance sport performance. That onus of proof is greater than an onus of proof merely on the balance of probabilities, but is not so high as an onus of proof to the criminal standard. It is an onus which he has failed to discharge.

## VIII. CONCLUSIONS

81. It follows that the appeal must be allowed and that he must be subject to the standard period of ineligibility applicable to a second anti-doping rule violation.

82. Under Article 306 UCI ADR that is a period to be fixed between a period of 8 years and lifetime ineligibility. In the circumstances of this case, which cannot be regarded as being one of the most serious, the appropriate period is one of eight years.

83. By Articles 314 and 315 UCI ADR the period of that ineligibility will start on the date of the hearing panel decision providing for ineligibility but where there have been substantial delays in

the hearing process or other aspects of doping control not attributable to the License-Holder the hearing body may start the period of ineligibility at an earlier date commencing as early as the date of sample collection. In this case although the certificates of analysis of the A samples were dated respectively 21 and 24 June 2010 Mr Koev was not notified of the adverse findings until 15 September 2011. No explanation for this substantial delay has been proffered, but there has been no suggestion that it was through any fault on the part of Mr Koev. In these circumstances and pursuant to Article 315 UCI ADR, the Sole Arbitrator finds it appropriate that the period of ineligibility will run from the date of the last sample collection, 11 June 2010.

84. In addition pursuant to Article 291.1 UCI ADR Mr Koev is disqualified from the 2010 Tour of Romania and pursuant to Article 313 UCI ADR all competitive results obtained subsequently to the 2010 Tour of Romania are disqualified.

85. Apart from the period of ineligibility, in accordance with the provisions of Article 326 UCI ADR Mr Koev shall pay a fine of EUR 1,162 being the net amount of his salary for the year 2010.

86. Mr Koev must in addition pay the sums of EUR 850, being the cost of the B sample analysis and EUR 735 being the cost of the A sample laboratory documentation package in accordance with Article 275 UCI ADR.

87. So far as the costs of the result management sought, pursuant to Article 275 UCI ADR, the UCI seeks the sum of CHF 2,500. This is the amount specified in Article 275 UCI ADR as amended on 1 February 2011. In the UCI ADR as they stood at 7 June 2010 the amount was fixed at CHF 1,000 *"unless a higher amount is claimed by the UCI and determined by the hearing body"*. Although the UCI has claimed a higher amount no justification for the higher figure has been put forward and the amount which Mr Koev is required to pay for the result management is therefore fixed at CHF 1,000.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by the International Cycling Union on 13 February 2012 against the decision of the Committee of the Bulgarian Cycling Union of 28 December 2011 is admissible is upheld.

2. The decision of the Committee of the Bulgarian Cycling Union of 28 December 2011 is set aside.

3. Mr Vladimir Koev is declared ineligible for a period of eight (8) years commencing on 11 June 2010.

4. Mr Valadimir Koev is disqualified from the Tour of Romania 2010.

5. All competitive results obtained by Mr Vladimir Koev from 11 June 2011 until the commencement of the period of ineligibility are disqualified with all resulting consequences including the forfeiture of any medals, points and prizes.

6. Mr Vladimir Koev shall pay to the International Cycling Union (a) a fine of EUR 1,162 (one thousand one hundred and sixty-two), (b) EUR 850 (eight hundred and fifty) being the cost of the B sample analysis, and (c) EUR 735 (seven hundred and thirty five) being the cost of the A sample laboratory documentation package, making together a total of EUR 2,747 (two thousand seven hundred and forty-seven).

7. Mr Vladimir Koev shall pay to the International Cycling Union CHF 1,000 (one thousand) as the costs of the result management by the International Cycling Union.

8. (…).

9. (…).

10. All other requests for relief are rejected.