Arbitration CAS 2017/A/5017 Serghei Tarnovschi v. International Canoe Federation (ICF), award of 11 July 2017

Panel: Mr Dirk-Reiner Martens (Germany), President; Mrs Maidie Oliveau (USA); The Hon. Michael Beloff QC (United Kingdom)

Canoe
Doping (GHRP-2)
Athletes' burden to prove by a balance of probability the absence of intention to commit an anti-doping rule violation
Potential consequences of the existence of an anti-doping rule violation on a guilty athlete's competitive results

1. **Where the International Canoe Federation's Anti-Doping Rules (ICF ADR) place the burden of proof upon an athlete or another person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. One appellant's failure to submit corroborating evidence establishing his/her absence of intent to commit an anti-doping rule violation shall result in the requirement of the aforementioned standard not having been met.**

2. **According to article 10.8 of the ICF ADR, and in addition to the automatic disqualification of the results in the competition which produced the positive sample under article 9 of said rules, all other competitive results of an athlete obtained from the date a positive sample was collected (whether in-competition or out-of-competition), or other anti-doping rule violation occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.**

I. FACTUAL BACKGROUND

1. The Parties

1. Serghei Tarnovschi (hereinafter the "Appellant") is a canoeist who was born in Ukraine but has been competing since 2014 for the Republic of Moldova at international level. He was awarded the bronze medal in the C1 1000m at the 2016 Olympic Games in Rio.

2. The International Canoe Federation (hereinafter the "Respondent") is the international governing body for the sports of canoe and kayak. It has its registered seat in Lausanne, Switzerland.

2. The Dispute between the Parties

3. This case concerns an appeal brought by the Appellant against a doping sanction levied upon him by the Respondent.

4. The circumstances stated below are a summary of the main relevant facts, established on the basis of the Parties' submissions and the evidence provided in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

5. On 8 July 2016, the Appellant delivered a urine sample on the occasion of an out-of-competition doping control conducted in Racice, Czech Republic under the Pre-Rio Taskforce Testing Program. The Appellant's A- and B- samples were tested at the Institute of Doping Analysis and Sports Biochemistry ("IDAS") in Dresden, Germany. They revealed an adverse analytical finding ("AAF") for GHRP-2, a growth hormone-releasing peptide. The determined dose of GHRP-2 in the A-sample was approximately 6 Pg/ml of GHRP-2.

6. GHRP-2 is a prohibited substance according to S2 of WADA's 2016 List of Prohibited Substances and Methods. It is not a "specified substance" within the meaning of 4.2.2 of the ICF Anti-Doping Rules ("ADR").

7. On 4 August 2016, the results of the 8 July doping control were submitted to the World Anti-Doping Agency ("WADA"), the International Olympic Committee ("IOC") and the Respondent, but not to the Appellant.

8. On 16 August 2016, the Appellant won a bronze medal in the men's canoe C1 1000-meter competition at the Olympic Games in Rio 2016. His post-competition doping test was negative.

9. On 18 August 2016, the Respondent provisionally suspended the Appellant on the basis of the AAF ascertained as above.

10. The Appellant had reported on the 8 July doping control form ("DCF") several nutritional supplements he was taking. Among these supplements, Explosin and Glutamine were the only ones which had not been provided by the Moldovan Olympic team. Hence, the Appellant requested the Aegis Sciences Corporation in Nashville, Tennessee, U.S.A. (hereinafter "AEGIS") examine these two supplements in their laboratory. Accordingly, the portion of Explosin which the Appellant says was left over from an original bottle and which he had transferred into a smaller bottle for ease of travel, as well as the Glutamine were sent to AEGIS for testing. The Explosin in the smaller bottle tested positive for GHRP-2 while the Explosin from a different sealed container of Explosin, which was specifically purchased for the testing, tested negative for GHRP-2. The Glutamine tested negative for GHRP-2 as well.

11. Between his first use of Explosin and the doping control on 8 July 2016 the Appellant underwent several doping controls, the last one on 17 June 2016. All such tests proved negative.

12. In the proceedings, following the Appellant's provisional suspension on 16 August 2016 the ICF Doping Control Panel issued the contested decision on 30 January 2017 (the "Decision"). Its operative part reads as follows:

> *"1. The Respondent is guilty of the offence of using a prohibited substance under ICF Anti-Doping Rules as per Art. 2.1.*
>
> *2. The following sanction shall be imposed on the Respondent:*
>
> *A) According to the ICF Anti-Doping Rules article 10.2.1 the period of Inelegibility of the athletes shall be four years.*
>
> *B) Disqualification of the all* [sic] *results obtained from the date of the positive sample was collected, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes. In this case disqualified* [sic] *of the Olympic medal in Rio 2016 Olympic Games".*

II. ARBITRAL PROCEEDINGS

1. Initiation of the CAS proceedings

13. On 3 March 2017, the Appellant filed his Statement of Appeal with the CAS, followed by the Appeal Brief on 17 March 2017.

14. The Appellant nominated Ms Maidie E. Oliveau as an arbitrator.

15. The Respondent nominated the Hon. Michael J. Beloff, Q.C. as an arbitrator.

16. Mr. Dirk-Reiner Martens was appointed as President of the Panel.

17. On 10 April 2017, the Respondent filed its Answer to the Appeal Brief.

18. On 18 April 2017, pursuant to the Parties' request the Panel agreed that a hearing be held.

19. On 24 April 2017, the Parties were notified that the Panel had decided to accept the Appellant's request to have a representative of AEGIS testify at the hearing via telephone.

20. The Parties agreed that their expert witnesses would be available for expert conferencing: the Respondent's expert, Professor Saugy, would attend the hearing in person while the Appellant's expert witnesses, Mr Crouch and Dr Shelby, would be available by telephone.

21. On 23 May 2017, a hearing was held at the CAS headquarters. In addition to the Panel, assisted by Mr William Sternheimer, Deputy Secretary General of the CAS, the following persons were present:

For the Appellant: Messrs Paul J. Greene and Matthew Kaiser, Counsel; Mr Serghei Tranovschi, Appellant; Ms Cristina Vasilianov, Secretary General of the Moldova Olympic Committee; Dr Alexandru Buza, team doctor; Ms Irina Aga, translator.

For the Respondent: Messrs Jorge Ibarrola and Yvan Henzer, Counsel; Mr Simon Toulson, Secretary General; Professor Martial Saugy, expert.

22. At the outset of the hearing the Parties confirmed that they had no objection to the composition of the Panel. At the conclusion of the hearing the Parties further confirmed that they had no objection as to the manner in which the hearing had been conducted and, in particular, that their right to be heard had been respected.

2. Parties' positions and prayers for relief

23. While the Panel has carefully reviewed all of the Parties' submissions, the following section will only summarize the Parties' main arguments in support of their respective prayers for relief to the extent relevant for the Panel's findings. Further reference to the Parties' submissions may be made, where appropriate, in the section on merits below.

a. The Appellant

24. The Appellant argues that he never knowingly took a prohibited substance and, further, that the source of the prohibited substance found must have been a contaminated Explosin. Moreover, he argues that he bore no significant fault or negligence in connection with his anti-doping rule violation. Therefore, his sanction must be reduced pursuant to Article 10.5.1.2 of the Respondent's Anti-Doping Rules.

25. According to the Appellant the sequence of events, some of which have been already noted, was as follows:

- in April 2015, he started using Explosin together with his older brother with whom he trained and competed; he bought his first supply at a licensed Nutrend (the manufacturer of Explosin) store in Prague; he consulted both the salesperson in the store and the Internet as to safety from a doping perspective; the Olympic rings and the "no doping" logo on the bottle gave him additional comfort;

- in April 2016, Dr. Buza became the doctor of the Moldova canoe team; he approved the use of Explosin by him;

- on 16 May 2016, he bought two new bottles of Explosin at the Nutrend store in Prague; it is sold in plastic bottles of 420 grams;

- on 17 June 2016, he was tested for doping in Latvia; the test was negative;

- on 27 June 2016, he started to use one of the bottles bought on 16 May;

- on 1 July 2016, he left for training camp in Racice, Czech Republic and took the opened bottle of Explosin with him; he used it every day until 31 July 2016;

- on 8 July 2016, he was again tested for doping at the training camp in Racice; this test was positive for GHRP-2 and is the subject matter of these proceedings;

- on 31 July 2016, he poured what was left of the Explosin into a smaller bottle for ease of travel; it was a very small quantity which barely covered the bottom of the bottle;

- on 1 August 2016, he returned to Moldova from the training camp;

- on 4 August 2016, the IOC, WADA and the Respondent were informed that the analysis of the 8 July sample showed an AAF; the Appellant was not informed about this until 18 August;

- on 5 August 2016, he left for the Rio Olympic Games; he took no food supplements with him;

- on 16 August 2016, he won the bronze medal in the C 1 1000 race in Rio; his post-competition doping test was negative;

- on 18 August 2016, he was informed of the AAF in connection with his doping test on 8 July; the name of the detected substance was not disclosed to him;

- on 26 August 2016, he arrived back from Rio in Moldova;

- on 31 August 2016, the Secretary General of the Moldova National Olympic Committee asked him to bring the Explosin and the Glutamine to the office; upon arrival, the bottle with the rest of the Explosin was labelled by hand "Explosin"; the other bottles were labelled as well;

- on 1 September 2016, two bottles each of Explosin and Glutamine (one opened and one sealed) were couriered to AEGIS for testing; the residual quantity of Explosin (15.988 grams) in the open smaller bottle tested positive for GHRP-2 at a concentration of approximately 357 ppm, *"a sealed container of Explosin in the same blueberry flavour that was purchased specifically in contemplation of AEGIS testing"* was negative, as was the Glutamine;

- on 8 September 2916, he learned about the name of the substance found in his 8 July sample.

26. The Appellant submits that on the basis of the above sequence of events he has produced sufficient concrete evidence to demonstrate that contamination of the "Explosin" was the likely source of GHRP-2.

27. According to the Appellant's expert's opinion, manipulation of the Explosin with GHRP-2 would have required sophisticated scientific knowledge and laboratory equipment. Hence, it was very unlikely that the Appellant manipulated the Explosin.

28. The Appellant submits that he should accordingly be sanctioned at the low end of the two-year range as his degree of fault remained light under the well-established degree of fault factors, including the criteria defined by the CAS in *CAS 2013/A/3327*. In the Appellant's opinion he did everything he could to avoid an anti-doping rule violation. *Inter alia*, the Appellant compared the ingredients mentioned on Nutrend's homepage with WADA's list of prohibited substances without finding any indication that they contained suspicious ingredients.

29. Finally, the Appellant argues that he is entitled to keep his bronze medal from the 2016 Olympic Games in Rio. The so-called fairness provision in 10.8 ADR permits an athlete to keep his results and any medals if he has a light degree of fault regarding the anti-doping rule violation and if he tested negative subsequent to his positive test. According to the Appellant, these requirements were met. Further, the Appellant argues that his achievements in the Rio competitions were unaffected by any doping practice and that it was the Respondent's fault that he was allowed to participate in the 2016 Olympic Games in Rio and win the bronze medal on 16 August 2016 despite his positive doping test more than one month earlier. The Respondent failed to inform the Appellant timeously of the positive test result from 8 July 2016 although the Respondent had been notified as early as 4 August 2016.

30. In the light of the above the Appellant requests CAS to rule as follows:

> *"A. Determine that Article 10.5.1.2 of the Code applies;*
>
> *B. Determine that his degree of fault is light and that he be assessed a standard sanction of 4 months;*
>
> *C. Determine the Code's Article 10.8 fairness provision requires he keep his Olympic bronze medal and results earned at the Rio Olympics;*
>
> *D. Order any other relief for Mr. Tranovschi that this Panel deems to be just and equitable".*

b. The Respondent

31. The Respondent argues that the imposed sanction cannot be reduced pursuant to 10.5.1.2 ADR as the Appellant failed to prove both that the Explosin which he ingested was contaminated and that he bore a low degree of fault.

32. The Respondent submits that the Panel cannot conclude, on a balance of probability, that contamination of Explosin was the source of the prohibited substance GHRP-2. *Inter alia*, there was no evidence that the substance sent to AEGIS was the Explosin the Appellant had bought at the official Nutrend store in Czech Republic. There was also no evidence as to what product had been in the smaller bottle before the Appellant allegedly poured the Explosin into it. In

essence, according to the Respondent *"anything can happen between the opening of the container and the shipment of the remainder to AEGIS"*.

33. According to the Respondent's expert's opinion, it is very simple to manipulate a supplement with GHRP-2. The substance is readily available on the Internet and can easily be added in small doses to the appropriate amount of a supplement. Hence, no chemist or scientist is required to effect this kind of manipulation. According to the Respondent it is no coincidence that AEGIS in their analysis of the content of the opened bottle found approximately the very quantity of GHRP-2 which is sold in small vials over the Internet.

34. The Respondent argues that, considering the totality of circumstances, the Appellant cannot identify a low degree of fault on his part. First, the Appellant took a very large number of supplements. Thirteen of those were controlled and supplied by the Moldova Olympic team. Yet, the Appellant consumed two additional supplements, Explosin and Glutamine, which he started using in April 2015 without any medical advice. Second, despite his youth, the Appellant is not inexperienced. He has participated in numerous European and World Championships and been subject to many doping controls. Therefore, he must have known the nature of his obligations in that context. Third, if the Appellant was aware of *"the well-known epidemic of supplement contamination"* then why - the Respondent asks - did he expose himself to the risk of contamination by taking fifteen different supplements instead of trying to minimize it by taking as few supplements as possible.

35. Finally, the Respondent argues that the Appellant did not meet the prerequisites for the application of the principle of fairness stated in Article 10.8 ADR. The Appellant does not have a light degree of fault and his anti-doping rule violation is serious since he took the GHRP-2 intentionally. Further, the prohibited substance could have enhanced the Appellant's sporting performance as GHRP-2 promotes muscle and skeletal growth, as well as enhancing human metabolism and in consequence energy. Finally, the Respondent notes that the email from WADA notifying the Respondent of the AAF in the Appellant's sample of 8 July 2016 was stuck in the "spam" folder until it was found on 18 August 2016. The consequent delay in notifying the Appellant was therefore unintentional and cannot justify engagement of the fairness principle.

36. In the light of the above the Respondent requests CAS to rule as follows:

"I. The appeal filed on 3 March 2017 by Serghei Tarnovschi is dismissed.

II. The decision passed by the International Canoe Federation Doping Control Panel on 30 January 2017 is upheld.

III. Serghei Tarnovschi is sanctioned with a four –year period of ineligibility.

IV. All results obtained from 8 July 2016, including the result obtained in the Rio 2016 Olympic Games, are disqualified".

III. JURISDICTION

37. Article R47 of the Code of Sports-related Arbitration (the "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".

38. The jurisdiction of the CAS results from Articles 13.1 and 13.2 ADR. Additionally the Appellant is an International Level Athlete (Article 13.2.1 ADR).

39. By letter agreement of 17 February 2017 the Parties agreed to *"bypass the ICF Court of Arbitration and go directly to the Court of Arbitration in Lausanne".*

40. Moreover, the Parties confirmed CAS jurisdiction by signing of the Order of Procedure.

41. The Panel agrees that for those reasons the CAS has jurisdiction in this appeal.

IV. ADMISSIBILITY

42. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

43. Article 13.7.1 ADR provides that *"[t]he time to file an appeal to the ICF Court of Arbitration or to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party".*

44. In the letter agreement of 17 February 2017 the Parties agreed *"that the ICF can accept that Mr Tarnovschi has 21 days as from today to submit an appeal to the court of Arbitration in Lausanne".* The Appellant timely filed his Statement of Appeal on 3 March 2017. The Respondent does not dispute that the appeal is therefore admissible.

45. The Panel agrees that for those reasons the appeal is admissible.

V. APPLICABLE LAW

46. Article R58 of the 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

47. Moreover, Article 20 ADR provides the following:

"20.2 These Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.

(…)

20.4 The Code and the International Standards shall be considered integral parts of these Anti-Doping Rules and shall prevail in case of conflict".

48. Therefore, the applicable regulations and rules of law, according to which the Panel must decide the present appeal, consist of the ICF Anti-Doping Rules (including the WADA Code and the Definitions appended to it). Given the Respondent's domicile in Switzerland, Swiss law applies subsidiarily.

VI. THE RELEVANT PROVISIONS OF THE ICF ANTI-DOPING RULES ("ADR")

*"**ARTICLE 2 ANTI-DOPING RULE VIOLATIONS***

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated. Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

***2.1.1** It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes 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 Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*

(…)

ARTICLE 3 PROOF OF DOPING

3.1 Burden and Standards of Proof

(…) Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

(…)

ARTICLE 4 PROHIBITED LIST

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code.

4.2 Prohibited Substances and Prohibited Methods Identified on the Prohibited List

(…)

4.2.2 Specified Substances

For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. The category of Specified Substances shall not include Prohibited Methods.

(…)

ARTICLE 10 SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

(…)

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances or Prohibited Methods

10.2.1 The period of Ineligibility imposed for a violation of Article 2.1, (Presence of Prohibited Substances or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided in Article 10.6 are met:

10.2.1 The period of Ineligibility shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the WSF can establish that the anti-doping rule violation was intentional.

(…)

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

(…)

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.

(…)

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish no Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

(…)

10.8 Disqualification of Results in Competitions subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

(…)

APPENDIX 1 – DEFINITIONS

(…)

No Fault or Negligence: The Athlete or other Persons establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence: The Athlete or other Persons establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".

VII. THE ANTI-DOPING RULE VIOLATION ("ADRV")

49. The presence of a prohibited substance in an athlete's sample constitutes an ADRV (Article 2.1 ADR).

50. The Sample provided by the Appellant on 8 July 2016 showed the presence of GHRP-2, a prohibited (non-specified) substance under the ADR.

51. As a result, the Appellant committed an ADRV on 8 July 2016. This has been acknowledged by the Appellant.

VIII. THE SANCTION

52. Because of the Appellant's ADRV coupled with the fact that the substance present in the Appellant's system on 8 July 2016 was not a specified substance, in order for the Appellant to avoid the standard four-year period of ineligibility provided for in Article 10.2.1 ADR:

- he must establish on a balance of probability (Article 3.1 ADR) that his ADRV was not intentional (Article 10.2.1.1 ADR, cf. 1. below);

- if he is unsuccessful in so establishing the absence of intent, he can still have his four-year period of ineligibility eliminated or reduced if he can establish, on a balance of probability, how the prohibited substance entered his system and if he can further establish

  (a) that he bears no fault or negligence (elimination of the sanction, Articles 10.2, 10.4 ADR; cf. 2. below), or

  (b) that he bears no significant fault or negligence and that the detected prohibited substance *"came from a Contaminated Product"* (reduction of the sanction, Article 10.5.1.2 ADR, cf. 2. below).

1. No intent?

53. As has been explained above, in order to avoid the standard four-year period of ineligibility the Appellant must establish, on a balance of probability, that his ADRV was not intentional. The burden of proof thus lies on the Appellant.

a. Proof of the source of the prohibited substance

54. Various CAS panels have addressed the question whether in order to prove absence of intent within the meaning of Article 10.2.1.1 ADR it is imperative for the athlete to prove how the prohibited substance entered his system and given different answers. This Panel notes that in contrast to the Definitions to the WADA Code (and the ADR) of no or no significant fault or negligence where proof of the source of the prohibited substance is required, no such requirement is found in Article 10.2.1.1 ADR or the Definitions for establishment of the absence of intent. It therefore concludes that the "legislator" of the WADA Code intended to leave the door open for an athlete to prove absence of intent even if he does not know, and therefore cannot show, how the prohibited substance entered his system. The Panel thus follows the view expressed in CAS 2016/A/4534 where the rival answers were fully considered but wishes to emphasise that in its opinion it is unlikely in the extreme that in a doping case under Article 2.1 ADR (presence of a prohibited substance) an athlete will be successful in proving that he acted unintentionally, without establishing the source of the prohibited substance.

55. This said, the Panel will now examine whether the Appellant was successful in showing, on a balance of probability, the source of the prohibited substance in his sample (cf. (b) to (f) below). In the ensuing section 2. the Panel will briefly address the question whether in the absence of such proof, the Appellant was able to otherwise establish that he is entitled to an elimination or reduction of his sanction.

b. The "Decision"

56. According to the Decision *"(T)he manipulation of the product was obvious"*.

57. The Decision bases this conclusion on the fact that there was *"no known case of supplement contamination with Nutrend brand" and further that "it does seem peculiar that an eighteen-years old athlete that had National Federation and Olympic Committee support decided to buy two other products of different brands without any medical consultation and after an exhaustive personal internet research"*.

58. In conclusion, the Decision was of the opinion that the athlete *"has not met the burden to prove based on the balance of probabilities that the violation was not intentional"*.

c. The experts

(1) On behalf of the Appellant, Dennis Crouch submitted an Affidavit dated 15 November 2016 and a statement dated 16 March 2017. He also testified via telephone at the hearing on 23 May 2017.

Mr Crouch confirmed that GHRP-2 has potential performance enhancing effects such as skeletal and muscle growth and that *"the production, formulation and marketing of these products [the supplement industry] are at the discretion of the manufacturer and product quality is unpredictable"*.

As to the merits of the case in hand, Mr Crouch concludes that *"given Mr Tarnovschi's sworn statements, the chronology of events and the fact that he declared using Explosin, it is likely that the supplement was the source of the GHRP-2 and metabolites reported in his urine. Also, given the facts of this case, contamination of the supplement with the GHRP-2 is more likely than "manipulation" by Mr Tarnovschi"*.

(2) Melinda Shelby from AEGIS in essence confirmed in her testimony via telephone that the testing at her company was properly performed. This was uncontested.

(3) Professor Martial Saugy provided an opinion letter dated 7 April 2017 on behalf of the Respondent. He also testified before this Panel on 23 May 2017.

According to Professor Saugy the concentrations of GHRP-2 and its metabolite *"can be present in the urine of the athlete more than 24 hours after the intake of a normal dose (late excretion) or less than 24 hours after the intake of a small dose. The analytical result does not allow making any choice between these two hypotheses"*.

Professor Saugy further states that *"nothing in the urine result could demonstrate that GHRP-2 has been taken orally, by injection or by inhalation. Moreover, nothing in this result can show that the adverse analytical finding can be due to the intake of a contaminated supplement (voluntary or accidentally)"*.

Professor Saugy also states *"that it is clear that the dosage found in the supplement is very close to a normal oral dose. It is thus very difficult to think that it is the accidental contamination of a supplement.*

It would be very surprising for an accidental contamination (which is generally understood to be in smaller quantities than the usual dosage of the substance) to provide approximately the same dosage as a normal oral intake".

Finally, Professor Saugy reports that doses between 2 - 5 mg of GHRP-2 in small vials are sold in their dehydrated form and that spiking a supplement *"with small amounts of GHRP (2 - 5 mg) is quite easy, because it is only necessary to pour one or two vials of dehydrated powder into the appropriate amount of supplement. It is not a complex manipulation process for a non-professional in chemistry or science".*

In conclusion, according to Professor Saugy *"the likelihood of an accidental contamination of supplement is in my opinion very low".*

(4) The Panel's conclusion on the experts' testimony

Mr Crouch and Professor Saugy come to opposing conclusions as to the plausibility of the Appellant's story - did he or did he not manipulate the Explosin before it was sent to AEGIS? - and focussed on the evidence thought by each material to that issue. The Panel does not, in its view, have to carry out such an exercise at all. Rather it need do no more than determine whether, through expert testimony adduced on his behalf, the Appellant has succeeded in proving, on a balance of probability, that he acted without intent. The Panel does not find Mr Crouch's view more convincing than that of Prof. Saugy. That being so Mr Crouch's testimony does not enable the Appellant to discharge the burden of proving absence of intent, which lies upon him.

d. The parties' respective positions

59. The Panel reminds itself of the respective Parties' positions. The Appellant's case is that the bottle of Explosin which he had bought on 16 May 2016 and which he started using on 27 June 2016 must have been contaminated with GHRP-2 as is evidenced by the AEGIS analysis which showed the presence of that substance in the product remaining in the open bottle sent to AEGIS for testing. The Respondent's case is that the Appellant has proved no such thing and that the Appellant's case is concocted, it implies that the product sent to AEGIS for testing was intentionally spiked with GHRP-2 by or for the Appellant.

60. Given, the Panel repeats, that the burden of proof falls upon the Appellant pursuant to Article 3.1 ADR, the question which needs to be answered is whether the Appellant can successfully prove absence of intent in connection with his ADRV simply by proffering the above theory without any corroborating evidence.

61. In the Panel's view the Appellant cannot do so:

62. As a starting point, in the Panel's opinion it would be all too easy for an athlete to spike an open container of a food supplement with the prohibited substance for which he had tested positive, send such "mix" to a testing institute which would obviously return a positive for that very

substance, and then claim that this proves that it was contamination of a product which he took in all innocence, which was responsible for the AAF.

63. The Panel does not say, indeed cannot say, that this is actually what happened in the case in hand. What it both can and does say is that the Appellant must fail to discharge his burden of proving absence of intent, unless he comes forward with corroborating evidence to support his theory. Without such corroborating evidence, when deconstructed, the Appellant's theory is nothing other than a more sophisticated way of saying "I do not know how the prohibited substance entered my system but I did not knowingly take it." It is common ground that a statement of this kind does not suffice to disprove an assumed intentional anti-doping rule violation.

e. Corroborating evidence?

64. In his submissions, both in the Appeal Brief and in oral argument, the Appellant brings forward a number of arguments to which the Panel has the following comments:

(1) The Appellant argues that he *"delivered the unused portion of Explosin (…) to the NOC of Moldova"*.

The Panel's comment: This does of course presuppose that the *"portion"* was, as the Appellant says, in fact from one of the bottles of Explosin he had bought on 16 May 2016, an assertion whose correctness depends exclusively on his own word.

(2) The Appellant further argues that the NOC *"sent the unused portion of Explosin directly to AEGIS"*.

The Panel's comment is the same as in the previous subparagraph (1). In addition, even if it was the *"unused portion"* there is no evidence that the GHRP-2 was not added to the Explosin. It also has to be borne in mind that the Explosin in the sealed bottle tested negative at AEGIS, which suggests an absence of contamination in the supplement rather than the reverse.

(3) The Appellant also contends that *"(T)o manipulate the Explosin with GHRP-2 would have required sophisticated scientific knowledge and laboratory equipment"*.

The Panel's comment: This argument was rejected by the Respondent's expert, Professor Saugy, who opined that *"GHRP-2 in dehydrated form is readily available on the Internet in small vials (…). Therefore, spiking a container with small amounts of GHRP-2 is quite easy because all that is required is pouring one or two vials of dehydrated powder into the appropriate amount of the supplement. Consequently, complex manipulation is not required"*. Faced with this argument at the expert conferencing at the hearing, the Appellant's expert fairly and realistically conceded that it was easy to buy GHRP-2 via the Internet and pour it into a container in which a small amount of Explosin remains.

(4) In oral argument the Appellant's side indicated that the fact that the name of the substance detected in the Appellant's sample was not disclosed to him until 8 September 2016, made manipulation even more unlikely.

The Panel's comment: First of all, according to Christina Vasilianov's (Secretary General of the Moldova NOC) Affidavit of 26 October 2016 *"the Secretary General of the ICF, Mr Simon Toulson, notified me that the sample 3999349 belonging to Mr Serghei Tarnovschi from Moldova contained an adverse analytical finding recorded by the laboratory. It indicated the presence of a banned substance by under* [sic] *S2 Peptided hormones growth factors, related substances and mimetics/GH-releasing Peptides (GHRPs) and its metabolite GHRP-2 (aminoacid 1 - 3)"*. While this does not necessarily mean that the Appellant personally learned about the name of the detected substance at that time, it needs to be borne in mind that nonetheless he would necessarily know that name if he in fact manipulated the Explosin.

(5) Finally, the Appellant relies on his own sworn statement in which, in essence, he asked the Panel to believe his story. But as has been said above such a plea to the decision-making body is not sufficient to discharge the athlete's burden to prove the absence of intent in connection with his ADRV.

f. The Panel's conclusion

65. As has been shown above, the Panel cannot accept that through any or all of the above arguments the Appellant succeeded in proving, on a balance of probabilities, that his ADRV was unintentional. Consequently, the standard four-year sanction pursuant to Article 10.2.1 ADR is presumptively engaged.

2. Elimination or reduction of the sanction

66. According to Article 10.2 ADR, the sanctions provided for in this article for a violation of Article 2.1 ADR (presence of a prohibited substance) are *"subject to potential reductions pursuant to articles 10.4, 10.5"*.

67. In order to benefit from an elimination (Article 10.4 ADR) or reduction (Article 10.5 ADR) of his otherwise applicable four-year period of ineligibility the Appellant must establish that he bore no or no significant fault or negligence. In either case he must also *"establish how the prohibited substance entered his system"* (Appendix 1 Definitions to the ADR).

68. The Appellant's submissions relative to the issue of the absence of intent were exclusively focused on attempting to establish the source of his ADRV. In the Panel's view, for reasons already given, these attempts were unsuccessful. Consequently there is no scope for application of Articles 10.4 ADR and 10.5 ADR in his case.

IX. THE PANEL'S DECISION

69. Based on the above the Panel decides that the Appellant failed to establish that his ADRV was not intentional. The Decision of the Respondent and the period of ineligibility of four years must thus be confirmed.

70. As the Appellant has been suspended since 18 August 2016 he shall receive a credit from that date forward (Article 10.11.3.1 ADR) so that his period of eligibility shall start on that date and shall expire on 17 August 2020.

71. Finally, in accordance with Article 10.8 ADR all results achieved by the Appellant from 8 July 2016 forward (date of the collection of the Appellant's positive sample) are disqualified as no elements of *"fairness"* can be invoked given the Appellant's failure to disprove the legal presumption of intent in Article 10.2.1 ADR.

72. The Panel is not insensitive to the impact of its decision on the athlete, and indeed on the state of Moldova, of which he was the only Olympian who had ever been assessed as a prospective Olympic medalist in the Rio games. It can simply note that such considerations are in law irrelevant to its treatment of the appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Mr Serghei Tarnovschi against the decision of the International Canoe Federation of 30 January 2017 is dismissed.

2. The Decision of the International Canoe Federation imposing a four-year period of ineligibility on Mr Serghei Tarnovschi and disqualifying all his results obtained from 8 July 2016, is upheld.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.