

AWARD DELIVERED BY THE EXECUTIVE COMMITTEE OF FISA

sitting in the following composition

President	Denis Oswald
Members	Anita DeFrantz Mike Sweeney Tricia Smith Denis Masseglia

In the case

Helfried JURTSCHITSCH, Martin KOBAU and Norbert LAMBING

In Frankfurt, Germany on 25th January 2004

I. The Facts

The Executive Committee of FISA considers that the facts have been satisfactorily established by the Commission of Enquiry. The athletes concerned agree with the description of the facts with a few additions which have been incorporated.

The Executive Committee of FISA therefore bases its judgement on the following facts:

1.1 1st August 2003 – The World Anti-Doping Agency (WADA) conducted out-of-competition testing on eight Austrian athletes at a training camp.

1.2 19th August 2003 – Dr Günter Gmeiner of the Austrian Research Center, Seibersdorf, wrote to Mr Rune Andersen of WADA, reporting that 3 of the samples: 269562 (Martin Kobau), 269564 (Helfried Jurtschitsch) and 265498 (Norbert Lambing) contained norandrosterone in concentrations higher than 2ng/ml. These sample codes were matched with the names on an interim report sent to FISA by the Drug Free Sports Consortium (DFSC) working in conjunction with WADA.

1.3 21st August 2003 – Matt Smith wrote to the President of the Austrian Rowing Federation informing him of the positive A samples, asking if they wanted a control analysis of the “B” sample to be made and whether the athletes or their representatives would be present at the “B” sample. He also informed the athletes of their provisional suspension from international competition until the completion of the procedure.

1.4 27th August 2003 – Mr Peter Pointner, President of the Federation, wrote back to request that the “B” samples of all 3 samples be tested.

1.5 17th September 2003 – Dr Günter Gmeiner wrote to Mr Rune Andersen of WADA reporting that the “B” samples had been tested and that they confirmed in all 3 samples that the concentration of norandrosterone, a metabolite of nandrolone was higher than 2 ng/ml.

1.6 19th September 2003 – Matt Smith wrote to Mr Pointner informing him that the analysis of the “B” samples had confirmed the results of the “A” samples. He also informed Mr Pointner that a Commission of Enquiry would take place and that the athletes would be invited to meet with the Commission. Matt Smith also wrote that he had asked the Laboratory to provide Mr Pointner with the complete records of the analysis of the samples.

1.7 20th November 2003 – FISA convened a Commission of Enquiry in Lausanne. The two athletes not present gave Martin Kobau personal statements to submit on their behalf to the Commission. It was confirmed that the three cases would be treated the same and would go to the Executive Committee on 25th January 2004 for a decision.

1.8 25th January 2004 – Martin Kobau appeared before the Executive Committee of FISA in Frankfurt. He was accompanied by Martin Kessler, the Coach and Dr Karlheinz Demel, Chairman and CEO of the Austrian Anti-Doping Committee.

Martin Kobau indicated that he was also representing his two team-mates.

1.9 Martin Kessler, coach of the athletes had told them that they should take creatine following a good experience in 2001 with the product. It helped to avoid feeling tired and dehydrated in the muscles. It was better for rehydration. He did not indicate a specific product. The athletes had to buy it themselves. The one taken by the rowers was not just creatine. It was an all in one product with other substances like carbohydrates.

1.10 Martin Kessler has a university education. He is certified by the Austrian Government to be a physical education teacher / coach. He took courses in physiology.

1.11 The athletes consulted the official website of their National Anti-Doping Agency which has a direct link to the list on the site of the Seibersdorf Laboratory which is accredited by the IOC and WADA and is a part of the Academy of Sciences.

This list was supposed to help the Austrian athletes determine which products they can take safely. They are regularly advised to consult that list and they do so because they are aware that some products may contain prohibited substances which are not labelled.

1.12 Mega Ribosyn had been tested negative twice by the Seibersdorf Laboratory, the last test being done on 7th July, one month before the positive tests of the athletes. In addition, the manufacturer had provided a letter guaranteeing the safety of the product. The web site also indicated in which shop it should be bought and the lot number which had been tested. However the athletes did not pay attention to the lot number when they purchased the product.

1.13 Martin Kobau had heard it was dangerous to take food supplements but also that there was a list he could check to make sure that a certain product was not contaminated.

1.14 Mega Ribosyn has been re-tested after this adverse result. Some capsules in the same box contained 0.02 ng/ml of norandrosterone and others 20 ng. The product was removed from the Seibersdorf website on 12th August 2004. The complete list was also removed from the website.

1.15 The athletes have not been able to train normally since they tested positive. They lost some grants and have not been to training camps. In addition the sponsors have rejected them and they have received a lot of criticism in newspapers.

II. Applicable law

2.1 The applicable rules are the ones in force at the time of the offence. This means in this case the Olympic Movement Anti-Doping Code and the corresponding FISA rules. However there is an exception regarding sanctions because the principle of *lex mitior* is applicable. Under *lex mitior*, the sanctions which are more favourable for the athletes must be applied even if they were not in force at the time of the offence. The Court for Arbitration of Sport (CAS) in Lausanne has recognised this principle in many different awards.

The 2003 FISA Ordinary Congress adopted the World Anti-Doping Code (WADC) effective on 1st January 2004. The WADC contains sanctions which are less severe than the FISA rules and therefore that part of the WADC will apply to this case.

III Merits

- 3.1 It is clear for the Executive Committee of FISA, from the file and from the hearing with the athlete, that Martin Kobau, Helfried Jurtschitsch and Norbert Lambing did not act intentionally with the goal of enhancing their performance by prohibited means.
- 3.2 The Executive Committee of FISA must therefore determine whether the athletes concerned were negligent and, if yes, whether this negligence is significant or not.

The athletes concerned do not have permanent medical supervision and therefore have to rely on different sources for medical care and advice.

There is no doubt that the adverse finding established by the laboratory comes from the intake of Mega Ribosyn. The athletes concerned were aware of warnings given regarding possible mislabelling and, to a certain extent, regarding contamination of food supplements. It is why they did not buy any supplement but first consulted the website of their National Anti-Doping Agency. They claim correctly that the IOC has not forbidden the intake of food supplements but just warned the athletes to be especially careful.

Dr Demel explained that a regularly updated list of products tested by the IOC accredited Laboratory of Seibersdorf was published specifically to protect the athletes. This list included the lot number tested and the shop where it had been obtained.

The product Mega Ribosyn had been on this list for some time with different lot numbers.

The coach of Martin Kobau, Helfried Jurtschitsch and Norbert Lambing recommended that they take supplements containing creatine. After checking on the above mentioned website, they chose Mega Ribosyn. They started to take this product in 2001 and used to take it 3-4 times a year for periods of approximately 4 weeks. They have never had a positive doping test in the past when taking creatine.

They took the product mainly for regeneration when they were tired or had particularly intensive training periods. In order to determine if the athletes concerned were negligent, it is important to establish the level of care one can expect from an athlete. CAS has considered in several awards that an athlete cannot just rely on advice or recommendation from a personal doctor. Here the situation is different as the athletes went to the highest authority they had in their country in the fight against doping. They consulted a list which had been specifically published to protect them and one wonders what else they could have done to avoid a positive case as long as food supplements are not prohibited.

Therefore the Executive Committee of FISA considers that Helfried Jurtschitsch, Martin Kobau and Norbert Lambing did everything possible to avoid using prohibited

substances (i.e., not to be negligent). However any sports person is responsible for any substance being in his or her body. In addition, athletes taking food supplements know or should know that they take a certain risk even if they take the maximum of precautions. They also took the product containing creatine based on recommendations from a person, in this case their coach, who is not a medical doctor and they did not pay attention to the lot number. This leads the Executive Committee of FISA to consider that they have been negligent but that this negligence is not significant.

The sanction to be applied is therefore the one in article 10.5.2 of the WADC which allows for the reduction of the ineligibility period by up to half of the period otherwise applicable.

For norandrosterone, the sanction in the WADC is an ineligibility period of normally two years which means that the reduction would lead to a minimum sanction of one year. The Executive Committee of FISA considers that a one year ineligibility period in this case would not be proportionate to the negligence committed and so would not be appropriate. In particular one must keep in mind the following elements.

- the negligence is very small.
- the athletes have already lost sponsors, grants and salaries because of the case.
- they have been criticised and attacked in the media and their reputation and image have suffered.
- they received the result of the lab only a few days before the opening of the 2003 World Rowing Championships in Milan and could therefore not participate in that competition.
- A one year ineligibility would deprive them from participating also in the 2004 Olympic games. Rowing being a seasonal sport, a one year ineligibility period could have the effect of a two year ineligibility period.

FISA has always been very serious in the fight against doping and has never hesitated to apply the most severe sanctions when appropriate. Before the adoption of the WADC it had a life ban penalty for the first offence whereas nearly all other International Federations had two years. It is therefore not to be regarded as a weakness if in this case the Executive Committee decide to apply a sanction which is less than the ineligibility period prescribed in the WADC. The sanction indeed has to be fair and proportionate. And if the choice were only one year or no penalty at all, the Executive Committee of FISA in that case would opt for no penalty, but it considers that six months is the most appropriate sanction.

FOR THESE REASONS

The FISA Executive Committee finds:

1. Helfried Jurtschitsch, Martin Kobau and Nobert Lambing are ineligible to participate in any rowing competition for six months.
2. The ineligibility period of six months began with the provisional suspensions applied on the athletes on 21st August 2003 and will therefore end on 20th February 2004.
3. This award is rendered without costs.

Frankfurt, 25th January 2004

For the FISA Executive Committee:

Denis Oswald
President

Mike Sweeney
Member