



Arbitration CAS 2012/A/2762 Bayer 04 Leverkusen v. Union of European Football Associations (UEFA), award of 15 March 2013

Panel: Mr Lars Halgreen (Denmark), President; Prof. Martin Schimke (Germany); Mr Graeme Mew, (Canada)

Football

Doping (whereabouts information)

Importance of an effective and credibly functioning anti-doping system

Definition of “immediately” from a legal perspective

Events not attributed to force majeure and responsibility of a club to report the change of the whereabouts of its players

CAS power of review with regard to the measure of a sanction imposed by a disciplinary body at first instance

- 1. It is of paramount importance today that an effective and credibly functioning anti-doping system is in place in order that the sports community together with WADA and the national anti-doping agencies around the world may fight one of the greatest challenges to modern international sports, namely the use of illegal performance enhancing drugs. Such anti-doping regimes and control systems should, however, always be carried out with appropriate consideration for athletes’, and in this case the club’s, expectations that they will be treated fairly.**
- 2. The definition of the term “immediately” means “without any delay or lapse of time; instantly, directly, straightway; at once” and “without intermediary, intervening agency, or medium”. While in legal usage (under English law) it does not mean instantaneous, it nevertheless connotes proximity in time and proximity in causation. In addition, a CAS panel is obliged to interpret the rules in question in keeping with the perceived intention of the rule maker and not in a way that frustrates it. Having regard not only to the aforementioned definitions, but in particular to the scope and purpose of the UEFA ADR, the term “immediately” from a legal perspective entails that the taking of action must be within a short time at some speed and without intervening time or space and without delay or intervention.**
- 3. Events preventing a club from making the report of the changes of the whereabouts on time that cannot be attributed to Acts of God or force majeure but solely to administrative confusion, are insufficient to relieve such club from its responsibilities to report the change of the whereabouts of its players immediately as “at once” or “instantly”.**
- 4. Even though a CAS panel has full power of review of the disputed facts and law in the exercise of its jurisdiction, the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.**

I. THE PARTIES

1. Bayer 04 Leverkusen (the “Appellant”) is a German football club playing in the Bundesliga and is situated in Leverkusen, Germany.
2. The Union of European Football Associations (“UEFA” or the “Respondent”) is the governing body of European football. UEFA has its headquarters in Nyon, Switzerland.

II. THE RELEVANT FACTS RELATING TO THE DISPUTE

3. The circumstances stated below in this section are a summary of the main relevant facts, which the Panel has identified, based on the parties’ written and oral submissions and the evidence offered in the course of these proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion, which follows below.
4. The present matter concerns the Appellant’s appeal filed against a part of a decision of the Appeals Body of the UEFA dated 23 March 2012, in which the Appeals Body upheld the decision of the UEFA Control and Disciplinary Board dated 26 January 2012 to impose a fine of EUR 25,000 on the Appellant for an infringement of the UEFA Anti-Doping Regulations (the “UEFA ADR”).
5. The decisions of the Control and Disciplinary Body and the Appeals Body concerned two cases of “non-compliance” by the Appellant with the UEFA Whereabouts Rules, which are contained in Appendix E of the UEFA Anti-Doping Regulations (hereinafter the “Whereabouts Rules”). The first non-compliance by the Appellant occurred on 23 September 2011, and notification of this first non-compliance was sent to the Appellant on 5 October 2011. The second non-compliance by the club occurred on 2 December 2011, and notification of this second non-compliance was sent to the club on 5 December 2011. In the Appellant’s Appeal Brief, the Appellant has stated that the Appeal only concerns that part of the Appeal’s Body’s decision which ruled that the Appellant had not complied with the Whereabouts Rules on 23 September 2011. Thus, the Panel will only focus on the relevant facts relating to the incident which took place on that date.
6. On 26 August 2011, at the UEFA Champions League meeting in Monaco, a presentation regarding UEFA’s Whereabouts Rules was given to the representatives of all 32 clubs qualified for the group stage, including the Appellant.
7. On the same day a letter was sent by email to the designated contact persons of all 32 clubs in the Champions League, including to Mr Stephan Rehm from the Appellant. The letter described UEFA’s Whereabouts Program and outlined the club’s various responsibilities. Each club was asked to nominate the person or people responsible for sending whereabouts information and also the person or people who would act as liaison officers during out-of-competition doping controls. Contact details were requested for these club officials.

8. At the end of August 2011, a “Whereabouts Guide 2011/12” was also made available in three languages (English, French and German) in the Anti-Doping section of the UEFA website. The Appellant was sent a German version of that document.
9. On 2 September 2011, a copy of the email and accompanying documents already sent to the Champions League participants on 26 August 2011 was re-sent directly to all the nominated whereabouts contact persons and out-of-competition doping control liaisons, in order to ensure that the appropriate people had received all relevant information. This email was sent directly to both Mr Czarniecki and Mr Dittmar, representing the Appellant.
10. According to Article 9 – 11 of the UEFA Whereabouts Rules, the following obligations on all teams and/or players in the testing pool were outlined:
 9. *All teams and/or players in the UEFA Testing Pool must send their whereabouts information to UEFA on forms provided by UEFA, specifying where the teams and/or players will be on a daily basis, and where they will be training and competing.*
 10. *Teams and/or players must be present and available for testing at the times and locations indicated in the whereabouts information provided to UEFA.*
 11. *Should a team’s and/or player’s plans change from those originally submitted in their whereabouts information, the team and/or player must immediately send updates of all information required on the form so that it remains accurate at all times.*
11. Furthermore, the UEFA Whereabouts Rules prescribed that the clubs had to ensure that the details concerning the whereabouts of all players for the upcoming week were collected and submitted to UEFA on a weekly basis each Friday before 12 p.m. (CET).
12. The Appellant’s whereabouts report for week 38 (September 19 – 25, 2011) included the attendance of the player M. at the training sessions. However, M. was ill (apparently with flu symptoms) and was not able to participate at the training sessions of Tuesday the 20th and Wednesday the 21st of September 2011. These changes in the whereabouts of M. were sent to the Respondent accordingly. M. was expected to return for the training session between noon and 13.30 on Friday the 23rd, which was the last scheduled training session before an important away match against FC Bayern München in the German Bundesliga on 24 September 2011.
13. At 11.55 a.m. on 23rd September 2011, M. telephoned Dr Karl-Heinrich Dittmar, who was the team doctor and head of the club’s medical department, at his private practice and informed him that he was unsure whether he should attend the training session that day due to his health condition. Dr. Dittmar advised him to stay at home in order to fully recover and not to risk infecting other players on the team.
14. Immediately following the call from M., Dr Dittmar telephoned the “team area”, which is the area of the club, where the training and medical staff were situated, and spoke with his assistant, Dr Gregor Hencke. He requested that the information about M. be passed on to Slawomir Czarniecki, who was the club’s responsible whereabouts contact person. Apparently, Dr

Dittmar did not call Mr Czarniecki directly himself because he needed to go back again to his patients in his private practice.

15. At 12:05 p.m., Dr Hencke was on his way to his office in order to call Mr Czarniecki when he was informed that an inspector from the German National Anti-Doping Agentur (NADA) had arrived at the site to conduct a doping test and that he needed to meet the inspector.
16. The NADA inspector, Mr Strassburg, wished to select the player André Schürrle for doping control. Dr Hencke accompanied the NADA inspector to the training area in order to select the player for the doping control, and at 12:20 p.m. he returned to his office to make the call to Mr Czarniecki.
17. However, before Dr Hencke was able to make the telephone call to Mr Czarniecki, he was interrupted again and was informed that doping inspectors had arrived at the site. At first, Dr Hencke was confused, because he thought he was being informed once more about the ongoing NADA doping control. He then realized that the two inspectors (Dr Hans Scholtz and Dr Paul Lenhart), who had arrived at 12.25 p.m., were from UEFA. Dr Hencke met with these doping control officers, who informed him that they would like to select 10 players for doping control. Among the 10 players selected were both André Schürrle and M.
18. Dr Hencke informed the doping inspectors that M. was not present at training due to illness and that André Schürrle was already undergoing doping control by the NADA.
19. Due to the ongoing NADA doping control, Dr Hencke was asked by the UEFA doping officers to confer with the NADA doping inspector about the appropriate procedure in a situation where two doping authorities wanted to test the same player at the same time. At approximately 12.35 p.m., the doping inspectors of NADA and UEFA discussed the situation. In the meanwhile, Dr Hencke called Dr Dittmar to get instructions on how to handle the two ongoing doping controls, especially regarding the selection of André Schürrle.
20. The deliberations between the two teams of doping officers ended with NADA proceeding with the doping control of André Schürrle, and UEFA selecting two other players for the doping test in place of André Schürrle and M. It is disputed by UEFA whether the UEFA doping officers refused to wait for the arrival of M. because they were in a hurry, as claimed by the Appellant.
21. After the two new players were selected for the doping control around 12.47 p.m., Dr Hencke went back into his office to inform Mr Czarniecki about the changes in the whereabouts of M. At 12.59 p.m., Mr Czarniecki wrote an email to UEFA stating that M. was unable to participate at the training the same day.
22. On 5 October 2011 a First Player Non-Compliance Warning was sent to M. by the Respondent. It stated the following:

On 16th September 2011, UEFA received from your club whereabouts information for the following week. Based on this information, UEFA organised an out-of-competition test of your club's players on

23rd September 2011. You were not present at this training session and UEFA had not been notified of your absence in advance. You were drawn for a doping control but were unable to present yourself at the doping control station within 60 minutes.

23. On 26 January 2012, the UEFA Control and Disciplinary Body (CDB) held a hearing about the Appellant's non-compliance.

24. The CDB placed emphasis on the letter sent by UEFA on the 26th of August, 2011, which made reference to the partnership between UEFA and the national associations and clubs in the area of doping, regulated by Article 6 of the UEFA Doping Regulations (UDR), and stated the following:

...UEFA did not receive information about the whereabouts of the Bayer 04 Leverkusen players for calendar week 49, starting on 05/02/2011, until Friday, 12/2/2011 at 2:09 P.M. (CET).

This was the third time that Bayer 04 Leverkusen failed to observe the deadlines set by UEFA for submitting the information about players' whereabouts. Together with the non-compliance on 9/23/2011 (absence of M. from the doping control), the association has committed two instances of non-compliance with the reporting obligation.

25. The CDB noted that the Appellant disputed the first alleged non-compliance relating to the absence of the player M. from training on 23 September 2011, but did not dispute the second non-compliance relating to the failing to submit the players' whereabouts to UEFA before 12:00 p.m. on Friday on three separate occasions.

26. The CDB rejected the Appellant's claims and stated that it had had 30 minutes before the UEFA doping inspectors arrived in order to call and report the changes:

It can be assumed here that the association only provided UEFA with the (delayed) notice after the failure to provide timely notice was discovered...an absence must be reported to UEFA immediately...the player's absence should have been noted by the team itself and reported at the start of training. In order to simplify and expedite the transmission of such notices, all of the associations were also given a number in the letter dated 8/26/2011 to which a text message could be sent with any updates or changes to the whereabouts information. In light of this, it is absolutely unacceptable that the notice of M.'s absence was not sent to UEFA until an hour after the start of training and after his call to the team doctor.

Finally, it should also be noted that the fact that the player could have come to the doping control does not excuse the association's failure to provide timely notification, nor does it in any way alter the legal circumstances of the violation.

27. Consequently, the CDB decided that the Appellant should be fined €25,000.

28. The Club appealed the decision taken by the CDB and on 23 March 2012, the Appeals Body of UEFA rendered its judgment ("the Appealed Decision").

29. The Appeals Body recognized that the Appellant was not disputing the first non-compliance relating to the delay of the players' whereabouts. With regards to the second non-compliance (the late reporting of M.'s non-attendance on 23 September 2011), which the Appellant was disputing, the Appeals Body stated the following (at pages 6-7):

Whereas it is questionable already whether and why the player only reported sick five minutes before the decisive final training, the Appeals Body finds that the notification about the sick report to UEFA at 12:59 P.M., more than one hour after the player called the team doctor, can no longer be deemed as immediate.

The Appeals Body acknowledges that on the day of the UEFA doping control a NADA doping control also took place at the same time. However, this cannot justify that the transmission of the information about M.'s sick report took more than one hour, particularly given the possibilities which are available for information transmission (SMS, e-mail, fax, etc.) ...it should have been noticed just after the start of training that M. was absent and such absence is to be reported to UEFA.

An immediateness can not be assumed in this case already solely because the sick report was only notified to UEFA when the doping controllers had already arrived at the training location.

30. With regards to the fine imposed, the Appeals Body decided that, given the circumstances and pursuant to Article 17 of the UEFA Disciplinary Regulations, the amount the Club received for taking part in the UEFA Champions League 2011/12 (€28 million), and the prevailing case law of the UEFA disciplinary authorities, the fine imposed was reasonable.
31. Consequently, the appeal was rejected and the decision from the CDB was affirmed.

III. THE ARBITRAL PROCEEDINGS

A. The CAS Proceedings

32. The Appellant filed its Statement of Appeal before CAS on 2 April 2012 in accordance with Articles R47 and R48 of the CAS Code ("the CAS Code").
33. The Appellant nominated Dr Martin Schimke as arbitrator.
34. On 16 April 2012, following an extension of the deadline granted by the CAS Court Office and in agreement with the Respondent, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.
35. On 19 April 2012, the Respondent nominated Mr François Alaphilippe as arbitrator. However, the arbitrator declined the nomination.
36. On 3 May 2012, the Respondent instead nominated Mr Graeme Mew as arbitrator.
37. On 22 May 2012, the parties informed the CAS Court Office that they had agreed to suspend the Respondent's deadline to file its Answer until further notice.

38. On 31 May 2012, the CAS Court Office notified the parties of the composition of the Panel pursuant to Article 54 of the CAS Code. The Panel was constituted as follows: Mr Lars Halgreen as President, Dr Martin Schimke and Mr Graeme Mew as Arbitrators.
39. On 11 June 2012, the parties informed the CAS Court Office that they had agreed that the Respondent should file its Answer within three weeks.
40. On 22 July 2012, the parties informed the CAS Court Office that they had agreed to suspend the Respondent's deadline to file its Answer pending the submission by the Appellant of two additional witness statements.
41. On 12 July 2012, the Appellant filed the two witness statements and the deadline for the Respondent to file its Answer resumed.
42. On 3 August 2012, the parties informed the CAS Court Office that they had agreed to that the Respondent should file its answer by 6 August 2012.
43. On this day, 6 August 2012, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.
44. On 7 August 2012, the Respondent filed the original copies of its Answer. Exhibits 5 and 6 were not filed until the next day, i.e. 8 August 2012.
45. On 17 October 2012, the CAS Court Office sent out an Order of Procedure to the parties, which was subsequently signed by each party without reservations or objections and returned to the CAS Court Office.

B. The Hearing

46. On 30 November 2012, a hearing was held at the CAS headquarters. The Panel was assisted at the hearing by the Counsel to the CAS, Ms Andrea Zimmermann.
47. The following persons were present for the Appellant:
 - Ms Christine Bernard, Lawyer

The following persons were present for the Respondent:

- Mr David Casserly, Barrister
 - Mr Mike Earl, UEFA Anti-Doping Unit
 - Mr Véron Mosengo-Omba, UEFA Disciplinary Unit
48. The parties wished to call the following witnesses:

For the Appellant:

- Dr Karl-Heinrich Dittmar, head of medical staff at the club
- Dr Gregor Hencke, second team doctor
- Mr Ralf Strassburg, NADA Doping Control Officer (via telephone)

For the Respondent:

- Dr Hans Schultz, UEFA Doping Control Officer (via telephone)
- Dr Paul Lenhart, UEFA Doping Control Officer (via telephone)
- Mr Richard Grisdale, UEFA Anti-Doping Unit

49. Following the opening statements of the parties, which in essence summarized the parties' position and arguments submitted in the written submissions, the Panel went on to hear the testimonies of the witnesses.

(i) The Testimony of Mr Strassburg, NADA Doping Officer (via telephone):

50. Mr Strassburg was the NADA Doping Control Officer on duty at the Bayer Leverkusen training facilities on 23 September 2011. He explained that the doping control was planned in the sense that NADA had already selected the player (André Schürrle) whom they wanted to test beforehand, but it was unannounced to the player and the club that NADA would conduct the test on the particular day. All NADA doping controls, which take place out of competition, are unannounced.

51. Mr Strassburg confirmed that the doping control officers of UEFA arrived before he could begin his test of the player. He explained to the UEFA doping control officers that he needed to test the selected player, André Schürrle, and that no other player could be drawn as his replacement. After some deliberations with the UEFA doping control officers, he went on with his control as planned without informing the NADA administration. At the end of the training session at which the doping control was carried out, the player signed the doping report.

(ii) The testimony of Dr Dittmer (head of the medical department of the club):

52. Dr Dittmar explained that for ten years he had been the head of the medical department of the club, but that he was not a full-time employee and had his own private medical practice.

53. He explained that in week 38 he had attended M. twice, on Tuesday and Wednesday, because of his illness (the flu) and was hopeful that he could attend the training session on Friday 23rd.

54. On that day, the player was reportedly on his way to the training facility, when, at 11:55 a.m., he called Dr Dittmar to inform him that he was still feeling too sick to attend the training. Dr Dittmar advised him to stay at home to recover and to avoid infecting other players.
55. According to the internal procedures of the club, it was important for Dr Dittmar to first inform the coach that M. would not be attending training, because he was a key player for the upcoming match against Bayern Munich. Accordingly, he telephoned “the team area” at the football club and spoke with his assistant Dr Hencke. He told Dr Hencke that UEFA had to be notified that M. would not be attending the training session as scheduled. However, Dr Dittmar made no attempt personally to call Mr Czarniecki, since he had to attend his patients. After having informed Dr Hencke of the sickness of M., he believed everything would be taken care of from then on.
56. He further explained that the practice of informing the team area in case of short term changes in whereabouts was in accordance with the club’s usual internal procedure. After he finished his next patient examination, he received another phone call from Dr Hencke, who told him about the arrival of doping control inspectors from both NADA and UEFA at the same time. They discussed that the UEFA and NADA inspectors should decide on the procedure and the handling of two doping control at the same time and that the club should try to accommodate both doping controls in the best possible way. They did not discuss during that conversation the notification of M.’s status to UEFA.

(iii) The testimony of Dr Hencke (second team doctor of the club):

57. Dr Hencke confirmed that he is an orthopaedic specialist and second team doctor and full-time employed by the club.
58. He explained that around noon on 23 September 2012 he got a call from Dr Dittmar, who told him that M. was still sick. Dr Hencke first informed the coach that M. would not be training. He then intended to inform Mr Czarniecki, who was the Appellant’s whereabouts contact person. Before he had a chance to do so, he was approached by the club physiotherapist, who told him that a doping control officer of NADA was present in the team area in order to perform a doping test on the player, André Schürrle.
59. At around 12.25 p.m., after he had departed with the doping control officer of NADA, Dr Hencke was informed that another team of doping control officers, this time from UEFA, had arrived at the training facility. Both teams of doping control officers wanted to test André Schürrle, and he contacted Dr Dittmar by phone to discuss what procedures should be followed in such a case. At the same time, he informed the doping control officers of UEFA that M. would not be available for doping control because of his sickness, but that he could be called in to attend a doping control, if the doping control officers deemed it necessary. Dr Hencke stated that the doping officers appeared to be in a hurry and would therefore not wait for M. to show up for a doping control. Instead, another player was selected for testing. After the selection of players for the doping testing had been resolved, he finally called Mr Czarniecki at approximately 12.50pm on his mobile phone and told him about M.’s sickness.

(iv) The testimony of Dr Schultz (UEFA Doping Control Officer) (via telephone):

60. Dr Schultz confirmed that he had been a doping control officer in the Netherlands since 1985 and worked for UEFA since 1992. He considered himself a very experienced doping control officer with more than fifty controls a year since 1993.
61. He refuted the statement made by Dr Hencke that he was in a hurry and had to leave on 23 September 2011. He said that this was not the case, since he had driven to the site from his home in Holland and had no plane to catch. When he arrived around noon with his colleague, Dr Lenhart, they had to wait for approx. 20 minutes. He was then informed by Dr Hencke that Mr M. was at home sick. He and his colleague chose another player, since he saw no need to call in M. He explained that he usually receives lists of available players 1 - 3 days before the control takes place. Any other changes are sent out by email or phone.

(v) The testimony of Dr Lenhart (Doping Control Officer) (via telephone)

62. Dr Lenhart stated that he was also an experienced doping control officer and had been performing tests since 1974 and still performed two to three controls per week. Dr Lenhart also refuted Dr Hencke's statement and said that they were in no hurry. They had contacted UEFA about the André Schürrle situation, and selected two other players, because M. was ill.

(vi) The testimony of Mr Grisdale (UEFA Anti-Doping Unit):

63. Mr Grisdale stated that he worked as a member of the UEFA Anti-Doping Unit and was in charge of the whereabouts control visits. He explained in more general terms about the purpose of the whereabouts system, which he pointed out was necessary in order to implement a more efficient means of performing doping controls.
64. The UEFA system was designed to be a less onerous way for clubs to submit to doping controls than the stricter requirements of the FIFA and WADA Doping Whereabouts Systems. The Appellant's record was poor. Only one club other than the Appellant had been in a similar situation. Most clubs participating in the Champions League had committed no violations of the Whereabouts Rules. The vast majority of clubs that had breached the rules had only done so once. UEFA's intention with the system was to help clubs and instruct them on how they should comply with the rules. UEFA offered to help clubs by initiating a warning system of non-compliance before escalating the sanctions to a fine. This case is the first in which UEFA has sanctioned a club for its fourth non-compliance of the rules.
65. At the conclusion of the hearing, the parties confirmed that they had no objection in respect to the right to be heard and to be treated equally in these proceedings, and that they had been given the full opportunity to present their case. They also confirmed that they had no objection to the composition of the Panel.

IV. THE POSITION OF THE PARTIES

66. The following outline of the parties' respective positions is illustrative only and is not intended necessarily to provide a comprehensive account of every contention put forward by the parties. The Panel has indeed carefully considered all the submissions and deliberations made by the parties during these proceedings, even if no special reference to such submissions has been made in the following summary.

(i) *The Position of the Appellant*

67. The Appellant's requests for relief stated in the Appeal Brief are the following:

Appellant asks the Court to follow its request and to [bold] that Appellant did not commit the non-compliance 1 by sending the change in whereabouts to Respondent on September 23, 2011 and to set aside the fine of EUR 25,000 or, secondarily, to adequately reduce the fine of EUR 25,000, accordingly.

68. The Appellant's legal arguments can be summarized as follows:

69. Based on the wording of the Whereabouts Rules of the UEFA ADR, the relevant criteria for submitting changes to the Respondent is "immediately". "Immediately" is a legal term, which is not defined within the UEFA ADR, nor is it given a specific fixed time frame. Therefore, the term must be open for interpretation. The German word for immediately in the UEFA ADR is "unverzüglich". Under German law, this legal term means "ohne schuldhaftes Verzögern", which may be translated into English as "without culpable delay". Thus, one needs to look at the specific context to decide what delay has been caused with negligence. Not any delay would automatically lead to the assumption that an information was not passed "immediately" within the meaning of that word or term in the Whereabouts Rules. Hence, the main question is whether the information was forwarded to the Respondent with a delay, for which the Appellant is responsible or for which it can be excused.

70. The unique coincidence of two doping control officers from different federations showing up at the same day at more or less the same time is indeed very unusual and would most definitely be determined as a reasonable excuse for the timely delay. The events on 23 September 2011 were extraordinary, and the Appellant cannot be deemed to have acted negligently with respect to the Whereabouts Rules in prioritizing the resolution of the confusion created by the two teams of doping control officers wishing to select the same player (André Schürrle).

71. According to the Appeal Decision, the non-compliance of the Appellant was based on two elements: the absence of the player and the non-reporting of the player's absence to the Respondent within approximately one hour. However, the second element could not be established, because the player was in fact able to report to the doping control within 30 minutes. Accordingly, it was wrong to conclude that the Appellant had been non-compliant based solely on the delay in reporting the changes in the whereabouts of M.

72. Furthermore, once Dr Hencke informed the UEFA doping inspectors about the change in the whereabouts of M. at approximately 12.30 p.m., the necessity to make changes in the system would logically have been redundant, because the Respondent, through its doping inspectors, had already been informed at the site about the absence of the player. The specific need to forward the changes in the whereabouts of a player to the Respondent should be regarded as a mere formality. Hence, the notification of the changes in the whereabouts situation of M. took place within approximately 30 minutes from the sick report and not one hour as stated in the appealed decision, and that would under the circumstances satisfy the requirements for an “immediate” response.

(ii) *The position of the Respondent*

73. In its Answer the Respondent made the following request for relief:

The Respondent respectfully requests the CAS to

- i) Dismiss the appeal of Bayer 04 Leverkusen;*
- ii) Confirm the fine of EUR 25,000 imposed upon Bayer 04 Leverkusen*
- iii) Order Bayer 04 Leverkusen to pay a significant contribution towards the legal costs of UEFA, in the amount of at least CHF 10,000.*

74. The Respondent makes the following main submissions in its Answer:

75. First of all, the supposed “second element” regarding a player’s inability to present within sixty minutes is irrelevant to the finding that the club has failed to update its whereabouts information. That is all that is necessary to establish an infraction.

76. The Respondent’s own main submission is that the club did not “immediately send updates of all information required on the [whereabouts] form so that it maintained accurate at all times” as required by Article 11 of the Whereabouts Rules. Therefore, the club was “non-compliant” for the purposes of the Whereabouts Rules, as Article 16 provides that “teams are considered to have committed a non-compliance, if they submit late, incomplete or inaccurate team whereabouts, or if one or more of the players are absent without advance notice from a doping control”.

77. The Respondent refutes the Appellant’s submission that a visit of more than one doping control at the same time should constitute an exceptional circumstance that would exempt the club from its duty to immediately update its whereabouts information.

78. Furthermore, the Respondent argues that despite its obvious importance, which has been repeatedly communicated to the Appellant by UEFA, there is no evidence or indication that the Appellant had put an appropriate system in place for the reporting of whereabouts information. Instead, the Appellant appears to have regarded the Whereabouts Rules as being of very little importance. Indeed, in addition to the four breaches of the Whereabouts Rules in

four months already referred to, the club has continued to breach the Whereabouts Rules despite being involved in the present case and is currently involved in separate proceedings for additional and identical breaches of the Whereabouts Rules before the UEFA Appeals Body. These circumstances should, the Respondent submits, also be taken into account by the Panel when considering the Appellant's negligence.

79. The Respondent also disputes the Appellant's claim that the failure to report the changes in the whereabouts of M. was due to an exceptional set of events on the particular day in question. The Appellant is not a small club playing in a lower division, but is an experienced veteran of both the German Bundesliga and the UEFA European competitions. It has competed in UEFA elite competitions for 12 of the last 15 seasons, including an appearance in the Champion's League Final. The club is also a past winner of the UEFA Cup, and indeed during the 2011/2012 season, the club reached the last 16 phase of the tournament. A certain level of professionalism should, accordingly, be expected from one of the top 16 teams in Europe, but this has simply not been evident in the club's approach to the UEFA Whereabouts Rules.
80. The UEFA Whereabouts procedures are "not particularly onerous, particularly when compared with certain other sports". The club is not required to indicate the whereabouts of its players at a specific time designated by UEFA, nor to provide whereabouts information for a minimum period of time each day. Instead, the club is only required to submit the team's training times and venues with the length and time of training and hence availability, and the club is able of change this schedule, whenever it chooses to do so, as long as it immediately
81. With respect to the specific occurrences on Friday 23rd September, 2011, the Respondent submits that both Dr Dittmar and Dr Hencke had ample time and opportunity to convey the message of M.'s continued sickness to Mr Czarniecki, had they chosen to prioritize this task. The fact that Mr Czarniecki did not communicate the changes in the whereabouts of M. to UEFA until more than an hour after M. talked to Dr Dittmar can only be regarded as negligent behaviour of the club. In addition, and despite having been provided with a very clear and user-friendly contact page with an email, fax and SMS number, apparently neither the player nor anybody at the club who was aware of the player's absence, updated the whereabouts information, even though they were all permitted to do so by UEFA.
82. Finally, the Respondent submits that if this Panel upholds the Appellant's appeal, it would be regarded by other clubs as an endorsement of the Appellant's approach to the anti-doping system and its rules. Such a decision would undoubtedly, according to the Respondent, encourage other clubs to allow problems to arise and to seek to address them through legal proceedings rather than taking simple steps to ensure that such problems would not arise in the first place, as most European clubs have done and continue to do.
83. As regards the appropriate sanction for infringement of the Whereabouts Rules, the Respondent has referred to Article 17.1 of the UEFA Disciplinary Regulations ("DR"), which provides that the competent disciplinary body shall determine the type and extent of the disciplinary measures to be imposed according to the objective and subjective elements of the offense, taking account of both aggravating and mistaking circumstances. There is a large degree of discretion as to the appropriate sanction to be imposed upon the club pursuant to the DR.

84. It is provided on page 7 of the Whereabouts guide that a fine may be imposed on a club for a second non-compliance. Pursuant to Article 14.2 DR, “a fine shall be no less than EUR 100 and no more than EUR 1,000,000”. A fine of €25,000 is lenient in nature and the CDB could reasonably have imposed a fine of much greater value on the club, given the fact that the fine only represents 0.08% of the €28,100,000 that the Appellant received from UEFA for its participation in the previous Champions League tournament.

V. LEGAL ANALYSIS

A. Jurisdiction

85. 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.

86. No objections have been raised by the Respondent as to the jurisdiction of the CAS, and both parties have signed the Order of Procedure without reservations in this respect.
87. Accordingly, the Panel has jurisdiction to resolve this dispute.

B. Admissibility of the Appeal

88. No objection to the admissibility of the appeal has been raised by the Respondent, and both parties have signed the Order of Procedure without reservations in this respect.
89. The Statement of Appeal was filed by the Appellant on 2 April 2012. Pursuant to Article R49 of the CAS Code, in the absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be 21 (twenty one) days from the receipt of the decision appealed against. The Appealed Decision was communicated on 23 March 2012.
90. Accordingly, the Panel concludes that the appeal has been filed within the 21 days deadline in Article 47 of the CAS Code, and that the appeal therefore is admissible.

C. Applicable Law

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

The Panel shall decide a 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.

92. As a result of this provision in the CAS Code, the Panel considers that the 2011 edition of the UEFA ADR is applicable to these proceedings. In particular, the UEFA Whereabouts Rules are set out as Appendix E of the UEFA ADR (a 2012 edition of the UEFA ADR has been published, but it applies only to anti-doping rule violations committed after 20 May 2012).

93. The provisions in the 2011 edition of the UEFA ADR, which were in force in September 2011, and which are relevant in this arbitration, include the following:

94. Article 201 (b) UEFA ADR states:

The following constitutes anti-doping rule violations:

Violation of applicable requirements regarding player or team availability for out-of-competition testing, including failure to file required whereabouts information and missed tests as set out in Appendix E.

95. According to Article 23.05 UEFA ADR:

All appendixes to these regulations form an integral part thereof.

96. Article 9-11 of the UEFA Whereabouts Rules (which is an Appendix to the ADR) provide as follows:

All teams and/or players in the UEFA Testing Pool must send their whereabouts information to UEFA on forms provided by UEFA, specifying where the teams and/or players will be on a daily basis, and when they will be training and competing.

Teams and/or players must be present and available to testing at the times and locations indicated in the whereabouts information provided to UEFA.

Should a team and/or players plans change from those originally submitted in their whereabouts information, the team and/or player must immediately send updates of all information required on the form so that it remains accurate at all times.

97. Article 15 of the Whereabouts Rules provides the following explanation of the term “non-compliance”:

UEFA operates a system of non-compliances and whereabouts failures to categorize and punish breaches of UEFA’s whereabouts requirements by teams and players. Initial breaches of the requirements are termed non-compliances and are subject to an escalation process whereby the more non-compliances are committed, the more stringent the sanctions become.

Non-compliances are not subject to the Code. The following four categories of non-compliance have been defined:

- a) *Late, incomplete or inaccurate whereabouts information from a team;*
- b) *Unannounced absence of a player from a doping control;*
- c) *Unannounced absence of six or more players from a doping control;*
- d) *Late, incomplete or inaccurate partial individual whereabouts information from a player.*

98. The pertinent anti-doping obligations of the clubs concerning out-of-competition testing and whereabouts requirements were sent in a letter by UEFA dated 26 August 2011. The circular letter stated the following:

If a player will not be present for the full time period of the team's training session or should a team's plans change from those originally submitted on the whereabouts information form, the club must immediately send updates of all required information so that it remains current at all times. The reason for a player's absence must be provided.

Whereabouts updates can be sent to the above fax number and email address as well as by SMS to [number provided] (please note that this number only works for SMS and not for phone calls).

[...]

In conformity with subparagraph 2.01d of the UEFA Anti-Doping Regulations, Edition 2011, "violation of applicable requirements regarding player or team availability for out-of-competition testing, including failure to file required whereabouts information and missed tests as set out in Appendix E" (in particular points 7-11) constitutes an anti-doping rule violation.

Violation of subparagraph 2.01d of the UEFA Anti-Doping regulations, Edition 2011, may lead to suspension for between a minimum of one year and a maximum of two years in conformity with subparagraph 18.02c of the 2011 UEFA Anti-Doping regulations.

[...]

In order to guarantee successful implementation of out-of-competition testing and whereabouts rules, clubs are required to undertake the following steps:

- *Organize an information session for all players concerned to advise them of their responsibilities and provide each with a copy of this letter and its enclosures.*
- *Appoint a Whereabouts Key Contact Person who is responsible for ensuring that the team whereabouts information is sent to UEFA on time and is kept up-to-date (see closed questionnaire). Please return the questionnaire by 31st August 2011 to the fax number [number provided] or by email to [email address provided].*
- *Make sure that everyone involved in planning the team's activities and managing player absences always informs and updates the Whereabouts Key Contact Person, and that everyone is aware of the consequences of whereabouts violations.*

[...].

D. Scope of the Panel's Review

99. According to Article R57 of the CAS Code *“The Panel shall have full power to review the facts and the law. It may issue a new decision, which replaces the decision challenged or annul the decision and refer the case back to the previous instance ...”*.

E. The Merits

100. The following issues fall to be determined by the Panel in these proceedings.

Question 1:

Did the Appellant violate the pertinent UEFA ADR (2011 Edition), in particular the UEFA Whereabouts Rules (Exhibit E of the UEFA ADR) by submitting the changing of the whereabouts of M. to the Respondent at 12.59 p.m. on Friday 23rd September 2011

Question 2:

If the answer to question 1 is affirmative, what is the appropriate sanction for such a violation?

(i) Analyzing Question 1

101. In order to resolve the first question at hand in these proceedings, it is important that the Panel outlines the context, in which this matter has to be put.
102. To this Panel, it is of paramount importance today that an effective and credibly functioning anti-doping system is in place in order that the sports community together with WADA and the national anti-doping agencies around the world may fight one of the greatest challenges to modern international sports, namely the use of illegal performance enhancing drugs. Such anti-doping regimes and control systems should, however, always be carried out with appropriate consideration for athletes, and in this case the club's, expectations that they will be treated fairly. These principles have been established in a number of CAS cases. See for example 2011/A/2499 and 2011/A/2671.
103. The Panel is satisfied that the evidence shows that UEFA has invested considerable resources in its efforts to design an out-of-competition anti-doping system, entailing Whereabouts Rules, which are relatively easy for both clubs and players to comply with (especially when compared to the whereabouts requirements of WADA and other sports federations).
104. In the opinion of this Panel, not only are the UEFA ADR not unduly onerous, in a relative perspective, but they also appear to be flexible in terms of the reporting requirements of the clubs and easy to handle in administrative terms by enabling changes to be made by the affected parties by fax transmission, email correspondence or by text messaging. It is apparent from the evidence submitted during these proceedings that the system that the Respondent has incorporated, does not create significant problems for other clubs governed by the UEFA ADR.

Whereas the evidence suggests that some other clubs have committed one violation of the rules, it is only the Appellant that has committed multiple non-compliances of the Whereabouts Rules.

105. It is in this context and under these circumstances that the Panel wishes to evaluate the alleged non-compliance of the Appellant based on the events that took place on Friday 23 September 2011.
106. As stated in both parties' submissions during these proceedings, the critical legal issue is first and foremost to decide, how the requirement in Article 9-11 of the Whereabouts Rules, that changes to the originally submitted information should be immediately passed on to UEFA, should be interpreted.
107. In support of its request for relief, the Appellant has pointed out that the English translation of the German version of the Whereabouts Rules would indicate that the term "immediately" should be interpreted as "without culpable delay", whereas the Respondent has claimed that the term should be understood as "at once" or "without delay".
108. According to the *Oxford English Dictionary* (2nd ed, 1989, Clarendon Press, Oxford), the definition of the term "immediately" means "*without any delay or lapse of time; instantly, directly, straightway; at once*" and "*without intermediary, intervening agency, or medium*". While in legal usage (under English law) "*[i]t does not mean instantaneous*" it nevertheless "*connotes proximity in time and proximity in causation*" (*R v. Horseferry Road Stipendiary Magistrate ex. p. Siadatan* [1991] 1 All E.R. 324). In addition, according to applicable CAS case law, the Panel is obliged to interpret the rules in question in keeping with the perceived intention of the rule maker and not in a way that frustrates it (see CAS 2001/A/354 & CAS 2001/A/355 para 68 with further references and most recently CAS OG 12/02 para 6.4).
109. Having regard not only to the aforementioned definitions, but in particular to the scope and purpose of the UEFA ADR, the Panel is of the opinion that the term "immediately" from a legal perspective entails that the taking of action must be within a short time at some speed and without intervening time or space and without delay or intervention. Whether the contextual circumstances would alleviate the Appellant's responsibility to act "immediately" is another and separate matter, which does not influence on the proper understanding of the term at its core meaning. However, it goes without saying that such circumstances would be of importance in the determination of a possible non-compliance committed by the Appellant. If, for example, the Appellant's stadium was on fire, or all lines of communication had broken down due to a power failure, such circumstances would for obvious reasons be taken into consideration, if such events had prevented the Appellant from reporting the changes in the whereabouts of M.
110. The events, which prevented the Appellant from making the report of the changes of the whereabouts before 12.59 p.m., cannot be attributed to Acts of God or *force majeure*, but solely to the administrative confusion, which occurred around noon on the 23rd of September 2011, when two different teams of doping control officers appeared at the club.
111. Based on the evidence submitted during these proceedings and the witness testimonies given at the hearing, the Panel has concluded that none of the arguments brought forward by the

Appellant are sufficient to relieve the Appellant from its responsibilities to report the change of the whereabouts of M. immediately, understood as “at once” or “instantly”.

112. In reaching this conclusion, the Panel has put particular emphasis on the following facts:
113. Once Dr Dittmar, who had personally received UEFA’s follow-up email on September 2nd, 2011 explaining about the Whereabouts Rules implemented by UEFA, decided not to send the message directly to UEFA personally or to directly inform Mr Czarniecki (the club’s whereabouts contact person), the chances of error in the proper and timely communication to UEFA were significantly enhanced. The fact that Dr Dittmar during his testimony explained that the most important person to inform about M.’s sickness was the coach, also emphasizes the misplaced order of priorities in the club’s communications.
114. Secondly, calling the “team area” is not, to this Panel, the most satisfactory way to ensure that the changes of the whereabouts of M. would be sent on to UEFA. Given the evidence of Dr Hencke, it appears obvious that he was not aware of the fact that he himself could send a text message, email or a fax to UEFA in order to convey the message in a timely way. Furthermore, he did not straightway pass on the information to Mr Czarniecki, which could also have been done by text messaging or an email or a telephone call. Instead, Dr Hencke made it his priority to deal first with the NADA doping control inspectors and, thereafter, to address the competing requests of the two teams of doping control officers from the NADA and UEFA respectively to test André Schürle.
115. Given the flexibility of the reporting system of UEFA, it would have taken Dr Hencke no more than a minute or two to notify either Mr Czarniecki or UEFA directly that M.’s whereabouts had changed. There is no valid reason why this could not have been accomplished within 10–15 minutes after the sick report was received at 11.55 a.m. This would in the Panel’s view have met the requirement of notifying the changed whereabouts ‘immediately’.
116. Instead of ensuring that UEFA was notified “immediately” of the change in M.’s whereabouts, Dr Hencke’s interactions with, initially the NADA testing team and then with both the NADA and UEFA testing teams intervened. Only following those events did Dr Hencke contact Mr Czarniecki, and did he, in turn, notify UEFA. That cannot on any reasonable interpretation amount to compliance with the duty to immediately notify a change of whereabouts.
117. The Panel wishes to stress that the above considerations and conclusion are not the result of any aggravating elements due to the fact that this was the second non-compliance of the club. The assessment of the facts and the considerations based upon here would be the same, even if it had been the club’s first non-compliance.
118. As for the Appellant’s argument that the untimely reporting to UEFA should not be measured from the time Mr Czarniecki reported at 12.59 p.m., but approx. 12.25 p.m., when Dr Hencke told the UEFA doping officers about M.’s sickness, the Panel does not recognize that this reporting would be in compliance with UEFA ADR. As pointed out by the Appeals Body of UEFA, it is important that all clubs comply with the UEFA doping regulations and the instructions of UEFA and apply due care and attention when implementing these in order to

guarantee a functioning anti-doping system. In the opinion of this Panel it would go against the requirement of a well-functioning system if a club could circumvent the reporting guidelines by simply informing the doping officers at the time they appeared to perform testing. Such a system of reporting would undermine the purpose of the Whereabouts Rules and the efficacy of unannounced out of competition testing.

119. Finally, the Panel also dismisses the Appellant's submission that "two requirements" ought to be fulfilled in order for the club to have committed a non-compliance. The Panel rejects this notion. On the contrary, the CDB of UEFA considered the submission of the Appellant and correctly rejected it in the following terms in the final page of its decision:

Finally, it should also be noted that the fact, that the player could have come to the doping control, does not excuse the association's failure to provide timely notification, nor does it in any way alter the legal circumstances of the violation. The regulatory violation had already been committed at this point, and it is important to the controllers, for organizational reasons, that all of the players be present and/or reported absent in a timely manner by the start of training. This is the only way to ensure a smooth, complication-free doping control.

120. The Panel fully concurs with this reasoning, and the compliance or non-compliance of M. of the Whereabouts Rules for players does not influence the legal requirements under the UEFA ADR of the Appellant.
121. Therefore, the Panel finds that the Appellant has committed a non-compliance of the UEFA ADR, including Exhibit E, by failing to report the changes of the whereabouts of M. before 12.59 p.m. on Friday 23rd September, 2011, more than one hour after M. reported that due to sickness he was unable to attend the training.

(ii) Analyzing Question 2

122. Articles 17.1 DR and 17.2 DR provide the legal basis for sanctioning a club for violating the UEFA ADR. The Panel concurs with the Respondent that the CDB and the Appeals Body of UEFA had a large degree of discretion as to the appropriate sanction to be imposed upon the club pursuant to DR. It is well established in the CAS case law that even though a CAS Panel has full power of review of the disputed facts and law in the exercise of its jurisdiction, "the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence" (see CAS 2011/A/2645 para 94 with numerous references therein). The Panel does not regard a fine of €25,000 under these circumstances to be unreasonable or disproportionate given the negligence of the club, the amount which the club received for taking part in the UEFA Champions League season 2011/2012 and the fact that the club is a long-standing member of the German Bundesliga.
123. Accordingly, the appealed decision as regards the amount of the fine will be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Bayer 04 Leverkusen on 2 April 2012 is dismissed.
2. (...).
3. (...).
4. Any other requests, motions or prayers for relief shall be dismissed.