



Arbitration CAS 2012/A/2895 Tomáš Enge v. Fédération Internationale de l'Automobile (FIA), award of 15 April 2013

Panel: Mr Hans Nater (Switzerland), Sole arbitrator

Automobile

Doping (levmetamfetamine, amphetamine)

Conditions to benefit from a reduction of the period of ineligibility for a specified substance

Assessment of the reduction of the period of ineligibility in light of the athlete's degree of fault

Distinction between a specified substance and a non-specified substance

Conditions to benefit from an elimination or a reduction of the period of ineligibility for a non-specified substance

Determination of the sanction

- 1. To benefit from an elimination or reduction of the Period of Ineligibility for a Specified Substance under Specific Circumstances according to article 10.4 of the FIA Anti-Doping Regulations (ADR), the following conditions should be met: (i) the substance detected in the athlete sample must be a specified substance, (ii) the athlete should establish how the specified substance entered his body and (iii) his absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance to the comfortable satisfaction of the panel.**
- 2. The fact that article's 10.4 ADR prerequisites are met does not automatically lead to an athlete's exoneration. It still has to be determined to what extent the athlete is eligible for a reduction of the normal period of ineligibility. According to article 10.4 ADR the athlete's degree of fault is the decisive criterion in assessing the appropriate period of ineligibility. In this respect, an experienced professional athlete therefore familiar with the anti-doping system cannot not ignore that it is each athlete's personal duty to ensure that no Prohibited Substance enters his/her body. The only circumstance that can speak in favour of a reduction of the standard period of ineligibility for an experienced athlete under the circumstances is the obtaining of a medical recommendation for a product similar to the one containing the prohibited substance and a cooperative attitude.**
- 3. The fact that levmetamfetamine, a specified stimulant, breaks down into amphetamine, a non-specified substance, cannot reasonably lead to an athlete's exoneration. First of all, amphetamine is distinct from levmetamfetamine. Both substances are governed by different rules. Then, one cannot rule out that the presence of amphetamine in an athlete's sample might have been caused by sources other than levmetamfetamine. Finally, article 10.4 ADR which provides for milder sanctions is only applicable in the presence of specified substances and should not benefit to any athlete tempted to mask the use of a non-specified substance such as amphetamine with an apparently harmless product.**

4. **With regard to the presence of a non-specified substance such as amphetamine in an athlete's bodily fluid, the elimination of the sanction under No Fault or Negligence is excluded under 10.5.1 ADR for any careless athlete i.e. at fault. A reduction of the period of ineligibility can therefore only be based on "No significant Fault or Negligence" as provided by article 10.5.2 ADR.**
5. **Considering that the presence of amphetamine, a non-specified substance, cannot benefit from the minimum sanctions of article 10.4 ADR, a sanction of 12 months will be the minimum period of ineligibility that is one half of the two years period otherwise applicable according to article 10.5.2 ADR. The minimum only stands where there is a very low degree of significant fault on the part of the athlete. Where there is more than the minimum lack of significant fault, the penalty should exceed 12 months. Regarding the measure of the sanction, under CAS jurisprudence, a CAS panel can decide, in specific circumstances, not to exercise the power it has, and to defer to the discretion exercised by the internal body of a federation.**

I. PARTIES

1. Mr Tomáš Enge (hereinafter "Mr Enge") is born on 11 September 1976 and is of Czech nationality. He is a professional motor racing driver, competing at international level and is the holder of a licence issued by the Autoclub of the Czech Republic (ACCR), i.e. the Czech Motor Sports Association affiliated to the Fédération Internationale de l'Automobile.
2. The Fédération Internationale de l'Automobile (hereinafter "FIA") is an international association of Automobile Clubs, Automobile Associations, Touring Clubs and National Federations for motor sports, and is the world governing body for auto racing. The FIA has its seat in Paris and enjoys legal personality under French law.

II. FACTUAL BACKGROUND

A. Background Facts

3. Mr Enge is an experienced motor racing driver, holder of an international licence since 1992, i.e. as he was sixteen years of age. He took part in numerous international championships, won several titles and competed in many classes of motorsport, including Formula One and IndyCar.
4. On 1 October 2002, Mr Enge was sanctioned with a 12-month period of ineligibility in relation with an adverse analytical finding for cannabis arising out of an in-competition drug test carried out on 17 August 2002, during the F3000 event at the Hungaroring circuit, in Hungary.

5. In 2010, Mr Enge was living in the United Kingdom, where he was suffering from chronic nasal congestion, attributed to his treatment for high blood pressure. He would overcome the discomfort of his stuffed nose by using the English version of the Vicks Inhaler, a nasal stick (hereinafter the “UK Vicks stick”). Before using this medication, he sought for professional advice to make sure that it was free from any banned substance. He would even have tested negative in an anti-doping control conducted on him while using the Vicks Inhaler. At that time, Mr Enge would consult with his doctor on a regular basis in order to find the most appropriate medication for his high blood pressure.
6. In summer 2011, the FIA handed out to each driver and co-driver participating in FIA events, the World Anti-Doping Agency (WADA) 2011 Prohibited List as well as a one-page document, entitled “*FIA “Race True” anti-doping campaign*”, which provides so far as material as follows:

“Do not forget that:

You are responsible for any substance that enters your body, regardless of whether or not the substance has been taken or administered intentionally.

(...)

The content of a specific drug can vary from one country to another, so try to bring with you any drugs you need to use while you are abroad.

Even apparently benign drugs such as eyes drops, nose drops or throat pastilles can contain prohibited substances”.
7. At the hearing held in Lausanne on 4 March 2013 (see section III below), M. Enge confirmed to the Sole Arbitrator that he had received, read and understood the above-mentioned document.
8. In 2012, Mr Enge was living in Czech Republic, where the “UK Vicks stick” was not sold.
9. On 26 May 2012, Mr Enge underwent an in-competition anti-doping control, while participating in the FIA GT1 World Championship, which took place in the Spanish city of Navarra.
10. On the anti-doping control form filled out on the occasion of the urine sample collection, Mr Enge confirmed having taken “*MICARDIS 40 mg/day*”. No other product was declared and no comment was made on the sample collection procedure.
11. On 27 May 2012, Mr Enge sent to the FIA a Therapeutic Use Exemption (TUE) application for Telmisartan (a non-prohibited substance contained in the product Micardis) and Betaxolol, i.e. the drugs prescribed to treat his high blood pressure. At the hearing held in Lausanne on 4 March 2013 (see section III below), M. Enge explained that his TUE application had actually been ready for several days but delayed because it still required the endorsement of an expert before its filing. However and after the anti-doping test, Mr Enge decided not to wait any longer and to immediately request a TUE in anticipation of the fact that Telmisartan might be among the banned substances of the new WADA 2012 Prohibited

List. He was indeed aware of the fact that the WADA prohibited substances list was updated annually and his doctor gleaned from the Internet indications according to which Telmisartan could be considered as a prohibited substance.

12. The WADA-accredited "*Laboratorio de control del Dopaje*" in Madrid, Spain, was instructed to conduct the analysis of Mr Enge's urine sample. In its certificate of analysis dated 8 June 2012, it confirmed that it had identified in Mr Enge's A sample the presence of amphetamine and levmetamfetamine (hereinafter the "Prohibited Substances").
13. By letter dated 13 June 2012, FIA informed Mr Enge of the adverse analytical findings and of his provisional suspension until further notice.
14. At the request of Mr Enge, a confirmatory analysis was carried out on his B sample. It corroborated the results of the analyses conducted on the A sample.

The following facts are undisputed:

- Amphetamine is a non-specified substance included in the category S6 a (stimulants) under the WADA 2012 Prohibited List and levmetamfetamine is a specified stimulant classified under S6 b (stimulants) on the WADA 2012 Prohibited List.
- Amphetamine and levmetamfetamine are non-threshold prohibited substances.
- Mr Enge is not challenging the laboratory results and accepts that an anti-doping rule violation occurred.
- The English version of the Vicks Inhaler does not contain any prohibited substance.
- Mr Enge had established the origin of the Prohibited Substances:
 - The levmetamfetamine was the result of the use of an American version of the Vicks Inhaler, called Vicks VapoInhaler (hereinafter the "US Vicks stick"). His mother gave him this product a few days before the FIA GT1 World Championship in Navarra, to relieve a sudden nasal congestion. His mother bought the stick during one of her regular visits to the United States of America and had kept it in her medicine cabinet at home, used and unpacked.
 - The amphetamine was a metabolite of the levmetamfetamine.
- The adverse analytical finding resulting from the anti-doping control carried out on 26 May 2012 must be sanctioned as a first anti-doping rule violation.

B. Summary of the proceedings before the FIA Anti-Doping Disciplinary Committee

15. On 20 July 2012, the FIA Anti-Doping Disciplinary Committee (hereinafter "ADC") held a hearing at the FIA premises in Paris, France. Mr Enge and his attorney, Mr Matěj Vácha, were present.
16. On the merits, the ADC found that the FIA had met the burden of establishing that an anti-doping violation had occurred. Given the time that had elapsed since the 2002 positive test results, the ADC held that the adverse analytical findings resulting from the anti-doping

control carried out on 26 May 2012 could not be regarded as “multiple” in the sense of the applicable regulations. The ADC accepted that levmetamfetamine entered Mr Enge’s body through the inhalation of a US version of Vicks VapoInhaler and that *“the presence of amphetamine in the urine samples is a possible consequence of levmethamphetamine entering the body when the organism had sufficient time to metabolise at least part of it”*. The ADC considered that Mr Enge failed to ensure that no prohibited substance entered his body and that he had to take the responsibility for any prohibited substance or its metabolites found to be present in his samples. In this regard, it stated that *“he committed at least a gross and unforgivable negligence. Therefore, as far as levmethamphetamine is concerned, [the ADC] does not see any exceptional circumstances in the sense of Art. 10.05 other than exceptional negligence on the part of [Mr Enge]. Exceptional circumstances could only be considered concerning amphetamine, but only to a certain extent, as [Mr Enge] cannot establish to the satisfaction of the [ADC] that he has committed no fault or negligence”*.

17. With regard to the sanction, the ADC was of the view that Mr Enge *“received more than a personal warning in connection with the use of Prohibited Substances in 2002, and that he was personally reached by the FLA ANTI-DOPING CAMPAIGN of 2011 which provided him with specific advice and warning (especially that a specific drug can vary from one country to another). He nonetheless carelessly resorted to a medication coming from another country (albeit comparable in its effects to the one he usually used and similar in appearance, but impossible to be confused with it had he paid the slightest attention)”*.
18. As a result, on 27 July 2012, the ADC decided the following:
“THE FLA ANTI-DOPING DISCIPLINARY COMMITTEE
 1. *Imposes on the Driver – Mr Tomáš Enge – the sanction of Ineligibility for a period of eighteen months, starting on 14 June 2012 and expiring on 14 December 2013.*
 2. *Disqualifies the results obtained by the Driver in the Event, as well as any competitive result possibly achieved as from 14 June 2012, with all resulting consequences, including forfeiture of any trophies, medals, points and prizes”*.
19. On 27 July 2012, Mr Enge was notified of the decision issued by the ADC (hereinafter the “Appealed Decision”).

III. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 17 August 2012, Mr Enge filed a statement of appeal with the Court of Arbitration for Sport (hereinafter “CAS”).
21. On 21 August 2012, the CAS Court Office acknowledged receipt of the appeal and invited Mr Enge to complete his statement of appeal.
22. On 27 August 2012, Mr Enge duly completed his statement of appeal and lodged his appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents.
23. On 28 August 2012, the CAS Court Office acknowledged receipt of Mr Enge’s appeal brief

and of its payment of the CAS Court Office fee and initiated the present proceedings.

24. On 18 September 2012, the FIA filed its answer accompanied by supporting documents.
25. On 30 November 2012, the CAS Court Office took good note of the fact that the parties have agreed to a Panel composed of a sole arbitrator.
26. On 15 January 2013, the parties were informed that the Panel to hear the appeal had been constituted as follows: Sole Arbitrator: Mr Hans Nater, attorney-at-law, Zurich, Switzerland.
27. On 5 February 2013, the CAS Court Office informed the parties that a hearing would be held on 4 March 2013 at the CAS Headquarter. The date was fixed with the agreement of all the parties to the present proceedings and was confirmed in the Order of Procedure.
28. On 25, respectively, 27 February 2013, Mr Enge as well as the FIA returned to the CAS Court Office a signed copy of the Order of Procedure.
29. A hearing was held on 4 March 2013 at the CAS premises in Lausanne, Switzerland. The Sole Arbitrator was assisted by Mr Fabien Cagneux, Counsel to the CAS, and Mr Patrick Grandjean, ad hoc Clerk.
30. The attending parties did not raise any objection as to the appointment of the Sole Arbitrator.
31. The following persons attended the hearing:
 - Mr Enge was present. He was accompanied by Mr Jan Krabec, attorney-at-law, and assisted by Mr Libor Nekula, interpreter.
 - The FIA was represented by its Head of Medical Affairs, Mrs Sandra Silveira Camargo, its in-house legal counsel, Mr Pierre Ketterer, assisted by Mr Xavier Favre-Bulle and Mrs Marjolaine Viret, attorneys-at-law.
32. The Sole Arbitrator heard evidence from the following experts:
 - Dr Patrick Schamasch, expert for the FIA;
 - Mr Jaroslav Zikmund, expert for Mr Enge;
 - Dr Ladislav Těšínský, expert for Mr Enge, who was heard via Skype, with the agreement of the Sole Arbitrator and pursuant to article R44.2 par. 4 of the Code of Sports-related Arbitration (hereinafter referred to as “Code”).
33. Each expert was invited by the Sole Arbitrator to tell the truth subject to the consequences provided by the law; each expert was examined and cross-examined by the parties and questioned by the Sole Arbitrator.
34. During the hearing and with the agreement of the FIA, Mr Enge produced the English version of the Vicks Inhaler as well as the American version of the Vicks VapoInhaler, both in their unopened original packaging. In view of the FIA’s agreement and pursuant to article

R56 of the Code, the production of the submitted evidence was deemed admissible by the Sole Arbitrator.

35. After the parties' final arguments, the Sole Arbitrator closed the hearing and announced that his award would be rendered in due course. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV. THE PARTIES' WRITTEN SUBMISSIONS

36. This section of the award does not contain an exhaustive list of the parties' contentions, its aim being to provide a summary of the substance of the parties' main arguments. In considering and deciding upon the parties' claims in this award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the parties, including allegations, witnesses' statements and arguments not mentioned in this section of the award or in the discussion of the claims below.

A. The Appeal

37. Mr Enge submitted the following requests for relief:

"I thus politely ask the court to revise the degree of my negligence and to mitigate the sanction imposed on me by the Decision of the FLA Anti-doping Disciplinary Committee (ADC) in accordance with articles 10.4 and 10.4.1 of the FLA Anti-doping Code".

38. Mr Enge's submissions, in essence, may be summarized as follows:

- He does not contest the accuracy of the testing methods or the test results and positive findings. He admits that, technically, he committed an anti-doping rule violation as laid down in the applicable regulations. However, he submits that in view of the specific circumstances of his case, the ADC failed to comply with the principle of proportionality when determining the period of ineligibility. A 18-month long period of suspension is excessive, given the degree and the nature of his fault, his age, the impact on his career and the sanctions imposed for comparable offences in previous CAS decisions.
- When evaluating the degree of his fault and proportionality, the ADC should have taken into account the following factors:
- He has never had the intention to use any substance or method that has the potential to enhance his sporting performance. Furthermore, the *"presence of both substances objectively was not capable to give [him] ANY advantage"*. Mr Enge was just trying to clear his congested nose and therefore the ADC wrongly asserted that he *"experienced a very slight advantage through regular use of that product"*.
- In spite of the fact that there is no cut-off value below which the test could have been negative, one cannot ignore that the concentration of the Prohibited Substances in Mr

Enge's urine is very low and, therefore, could not have possibly enhanced his sporting performance. In view of the technological and scientific evolution of the laboratory tests, quantitative threshold levels will need to be implemented or adverse analytical findings will be systematic.

- One must not lose the sight of the fact that the anti-doping rule violation occurred following the use of a harmless and ordinary nose stick, sold over the counter. Mr Enge did not engage in some form of doping practices involving syringes, infusion devices or other prohibited methods.
- He mistakenly used the "US Vicks stick" in place of the "UK Vicks stick", which indisputably does not contain any banned substances. This unfortunate amalgam is quite excusable and certainly does not amount to "*gross and unforgivable negligence*" given that a) he took the necessary measures to make sure that the "UK Vicks stick" was free from banned substances, b) he was not aware that he was actually using an American version of his stick and that the US Vicks stick could contain prohibited substances, c) the two sticks are identical in size and look similar, d) the distinctions between the two sticks did not strike him as several months went by since he last used the "UK Vicks stick", e) "*a reasonable professional driver cannot expect that freely sold medicament (i.e. with no restriction on its sell) could lead into positive tests, especially under the circumstance that the medicament was recommended by the doctor*". Under these circumstances, he could "*not be expected to pay any special attention to the marketing layouts of the medicaments*".
- The "US Vicks stick" contains levmetamfetamine and not amphetamine. It has been established that the presence of the second substance in Mr Enge's urine was a "*metabolite that derived from levmethamphetamine in [his] body. Thus, the presence of this substance (...) absolutely cannot be considered as any fault or negligence since no one could affect the chemical and physiological processes in his body. (...) [Mr Enge] could not prevent that the levmethamphetamine metabolized in [his] body into amphetamine*".
- He has always taken appropriate precautions in order to prevent the intake of prohibited substances, in particular since his first anti-doping rule violation, which occurred in 2002 and which served him as a lesson.
- As a consequence, Mr Enge deserves a lower sanction for levmetamfetamine and should benefit from a finding of no fault / negligence for amphetamine.

B. The Answer

39. On 18 September 2012, the FIA filed an answer, with the following requests for relief:

- "The Fédération Internationale de l'Automobile respectfully requests the CAS Panel to make an Award to:*
- *dismiss the appeal filed by Mr Tomáš Enge in its entirety;*
 - *order Mr Tomáš Enge to pay any and all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the Fédération Internationale de l'Automobile;*
 - *dismiss any other relief sought by Mr Tomáš Enge*".

40. The FIA's submissions, in essence, may be summarized as follows:

- *"The ADC explicitly stated that it had disregarded any doubts it may have had regarding the sincerity of Mr Enge's explanations. Irrespective of the legal foundation applied, the ADC imposed the sanction it considered proportionate based on the factual background put forward by Mr Enge himself".*
- The Appealed Decision is fair, appropriate and well-reasoned. The Sole Arbitrator should recognize the conclusions of the ADC, considering the fact that its hearing panel was composed of distinguished and qualified persons, who were knowledgeable of anti-doping, the FIA's policy and the idiosyncrasies of motorsport in this respect.
- Age, impact of the sanction on the career, the concentration values of the Prohibited Substances in Mr Enge's urine and their potential performance-enhancing effect are irrelevant factors when assessing the period of ineligibility to be imposed.
- The absence of intent to enhance performance has a very limited impact on the degree to which a sanction may be reduced. It is only a prerequisite to trigger the application of article 10.4 of the FIA anti-doping Regulation.
- The only relevant criterion to assess the measure of reduction is Mr Enge's degree of fault and negligence, which is very high, considering a) his experience as a professional motorsport driver, b) his previous positive finding for cannabis in 2002, c) the specific warnings recently issued by the FIA, d) the fact that the "US" and "UK" Vicks sticks are clearly distinguishable, e) the presence of levmetamfetamine is explicitly specified on the "US Vicks stick" itself, in broad letters and is highlighted as the primary active ingredient under the mention "*drug facts*" contained on the stick, f) the simple term "levmetamfetamine" should have raised Mr Enge's suspicion about the actual content of the nasal stick as it contains the unambiguous term "amfetamine" and g) the absence of disclosure of the use of the Vicks VapoInhaler on the doping control form.
- *"In sum, Mr Enge failed to apply the most basic precautions for a professional and experienced athlete competing in a foreign country, who is provided with a product of unknown origin from a non-medical source".*

V. ADMISSIBILITY

41. The appeal is admissible as Mr Enge submitted it within the deadline provided by article R49 of the Code as well as by article 13 of the FIA anti-doping regulations. It complies with all the other requirements set forth by article R48 of the Code.

VI. JURISDICTION

42. The jurisdiction of CAS, which is not disputed, derives from articles 13 of the FIA anti-doping regulations and article R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.

43. It follows that the CAS has jurisdiction to decide on the present dispute.
44. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law. Even if they were well founded, Mr Enge's criticisms against the procedure before the previous instance would therefore in any event be cured by the appeal before CAS. These criticisms will therefore not be addressed in application of the principle of judicial economy.

VII. APPLICABLE LAW

45. Article R58 of the Code provides the following:
"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
46. The Sole Arbitrator finds that in this case the applicable regulations are all pertinent FIA rules and regulations. In view of the fact that the FIA has its seat in Paris (France), the Sole Arbitrator holds that, in principle, French law shall apply on a subsidiary basis.
47. The relevant facts at the basis of the present case arose after 1 January 2011 and 9 January 2012, which are the dates when, respectively, the FIA anti-doping regulations (hereinafter "ADR") came into force and were amended. In accordance with the principle of non-retroactivity, these are the editions of the regulations under which the case shall be assessed (see article 19.7 ADR).
48. The WADA 2012 Prohibited list came into effect on 1 January 2012 and is an integral part of the ADR (see article 4.1 ADR).

VIII. MERITS

49. It is undisputed that FIA successfully established the presence of amphetamine and levmetamfetamine in Mr Enge's urine samples.
50. The Parties agree that a) Mr Enge's offence must be sanctioned as a first anti-doping rule violation, b) the standard sanction for an anti-doping rule violation according to article 10.2 ADR is a two-year period of ineligibility and c) Mr Enge is entitled to a reduction of the standard period of ineligibility.
51. Hence, the only issue at stake is the length of the period of ineligibility.

A. The Applicable rules related to the issue to be resolved by the Sole Arbitrator

52. The ADR provide so far as material as follows:

“ARTICLE 2 – ANTI-DOPING RULE VIOLATIONS

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 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.

(...)

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample shall constitute an anti-doping rule violation.

(...)

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his body. 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 rule violation for Use of a Prohibited Substance or a Prohibited Method.

(...)

ARTICLE 10 – SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in an 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 FLA or the ASN ruling the Event, lead to Disqualification of all of the results obtained by the Athlete in that Event, with all resulting Consequences, including forfeiture of all trophies, medals, points and prizes, except as provided in Article 10.1.1.

(...)

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

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances or 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: First violation: two years' Ineligibility.

(...)

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility provided for in Article 10.2 shall be replaced with the following:

First violation: at least, a reprimand and no period of Ineligibility from future Events, and at most, two years of Ineligibility.

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

10.5 Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample), the Athlete must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event that this article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this article may be no less than eight years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample), the Athlete must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced”.

B. The possible reduction of the standard period of ineligibility

53. In the present case, a specified prohibited substance (levmetamfetamine) as well as a non-specified prohibited substance (amphetamine) was detected in Mr Enge's samples. Hence and for the reasons exposed hereafter, the reduction of the standard period of ineligibility will be governed by article 10.4 ADR for the presence of levmetamfetamine and by articles 10.5.1 or 10.5.2 for the presence of amphetamine.

a) *Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances – article 10.4 ADR*

54. Article 10.4 ADR is only applicable if:

- a) the substance detected in Mr Enge's bodily specimen is a specified substance;
- b) Mr Enge established how the specified substance entered his body;
- c) Mr Enge established the "*absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance*".

55. In the case at hand, it is undisputed that the first two prerequisites are fulfilled. Levmetamfetamine is a specified substance and it entered into Mr Enge's body through the use of the "US Vicks Stick".

56. With respect to the third condition, Mr Enge insisted repeatedly on his absence of intent to enhance his sporting performance as well as on the absence of performance-enhancing effect of the nasal stick. He firmly contested the ADC's contention according to which the substance reducing his nasal congestion gave him "*a very slight advantage*". He claimed that his only intention was to clear a stuffed nose.

57. In regard to the third condition, the FIA's approach is somewhat peculiar. On the one hand, it is reluctant to explicitly concede Mr Enge's absence of intent to enhance sport performance and put forward that "*even assuming that Mr Enge had no conscious intent to enhance his performance illegitimately, the use of Vick VapoInhaler in the particular case had an influence on the Appellant's performance. Without such assistance, Mr Enge may not have been in a position to compete at all*". In spite of this and on the other hand, the ADC accepted to reduce the standard period of ineligibility, on the basis of article 10.4 (see par. 4.15 of the Appealed Decision).

58. In view of the above, it appears that the Parties actually accepted the fact that Mr Enge established the absence of intent to enhance performance to the ADC's comfortable satisfaction. Considering Mr Enge's position on this issue, the facts that the FIA did not file an appeal against the Appealed Decision, is asking the Sole Arbitrator to confirm the Appealed Decision, and, by doing so, does not call into question the fact that the requirement of article 10.4 ADR are met, the Sole Arbitrator finds that this provision is applicable to the case at hand.

59. The fact that Mr Enge did not have intent within the meaning of article 10.4 ADR does however not automatically lead to his exoneration. It still has to be determined - in a second step - to what extent Mr Enge is eligible for a reduction of the normal period of ineligibility. The sanction according to article 10.4 ADR ranges between a reprimand and no period of ineligibility as a minimum, to a period of two years of ineligibility as a maximum. According to article 10.4 ADR Mr Enge's degree of fault is the decisive criterion in assessing the appropriate period of ineligibility.
60. In the Sole Arbitrator's view, the following findings speak in favour of a rather high degree of fault of Mr Enge:
- Mr Enge is an experienced professional driver. He has been the holder of an international license for more than 20 years and was therefore familiar with the anti-doping system as he had been tested on numerous occasions. His level of awareness of anti-doping issues was particularly high as he had already been sanctioned for an anti-doping rule violation in 2002.
 - With his experience, he could not ignore that according to articles 2.1.1 and 2.2.1 ADR it is *"each Athlete's personal duty to ensure that no Prohibited Substance enters his body"*. Athletes have to be particularly cautious in order to satisfy their duty of care and, therefore, must inquire whether a product contains a prohibited substance or not. In FIFA & WADA, CAS 2005/C/976 & 986 (par. 73 and 74), the panel offered the following opinion: *"The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marijuana). Further case law is likely to continue to identify other situations where there is an increased risk of contamination, and, thus, constantly specify and intensify the athlete's duty of care. The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the comment to art. 10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence". It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care. This does not exclude that there may still be a positive finding but such finding will not lead to a sanction other than disqualification"* (see also CAS 2012/A/2701, par. 5.5.12).
 - In the case at hand, Mr Enge was fully aware of said duty. This is particularly true as he received a specific warning from the FIA ("FLA "Race True" anti-doping campaign") just a few months before the in-competition anti-doping control of 26 May 2012. In the summer 2011, the FIA Medical Commission drew the attention of all the drivers and

co-drivers competing in FIA events namely on the following three fundamental aspects which were entirely disregarded by Mr Enge: a) an athlete is responsible for any substance that enters his body, b) the content of a specific drug can vary from one country to another and c) even apparently benign drugs such as eyes drops, nose drops or throat pastilles can contain prohibited substances.

- The degree of prudence and caution required from a motor racing driver must be even greater as he is behind the wheel of powerful racing cars. The departure to the expected standard of care could result to considerable damages caused to the driver himself as well as to the other competitors or bystanders. The dangers of driving under influence are a well-known fact and many countries have a zero tolerance stance for it.
- Between 2010 and 2012, Mr Enge was consulting his personal doctor on a regular basis in order to find the best high blood pressure drugs, which would cause as little side effects as possible. In other words, Mr Enge was in constant contact with a professional who could have easily checked the status of his medications. In particular, on 23 May 2012 (i.e. when he was suffering from nasal congestion and three days before the in-competition anti-doping control of 26 May 2012), Mr Enge met with his doctor to fill and sign a TUE application. On this occasion, Mr Enge had ample opportunity to satisfy his duty of care, by asking for a “clean” decongestant or by submitting the “US Vicks stick” to his doctor’s review and/or approval.
- At the hearing held in Lausanne on 4 March 2013, Mr Enge explained that he did not consider the situation serious enough to bother his doctor with his insignificant discomfort. The fact that his condition did not need medical attention seems at odds with Mr Enge’s own declarations, according to which he only resorted to use the nasal stick given by his mom because after a week of long nights of sleep and drinking tea, he could not get any nasal congestion relief. In any event, Mr Enge’s attitude and management of his health problem, illustrate his disregard for FIA’s recommendations contained in its “*FLA “Race True” anti-doping campaign*” and are viewed by the Sole Arbitrator as negligent behaviour.
- It is Mr Enge’s case that the “UK Vicks stick” and the “US Vicks stick” are identical in size and look similar. The distinctions between the two sticks did not strike him as several months went by since he last used the “UK Vicks stick”. He claims that his “*good faith was strong and legitimate as [he] consulted the use of such medicament with [his] doctor and was not aware at all that there is any US version of the medicament that contains prohibited substance*”.

The Sole Arbitrator observes that the two sticks have indeed the same size, carry the brand “Vicks” and have the same purpose. But the analogy ends there. The colour and design printed on the sticks are different, as well as the names written in broad letters (“Inhaler” for the “UK Vicks stick” and “VapoInhaler” for the “US Vicks stick”). In addition, the presence of levmetamfetamine is indicated in large fonts on the “US Vicks sticks” itself, just under the name “VapoInhaler”. Finally, the Sole Arbitrator agrees with FIA’s submission that the term of “levmetamfetamine”, which jumps out at the user, should have raised Mr Enge’s suspicion about the actual content of the stick, as “amphetamine” is a widely known stimulant.

Furthermore, Mr Enge admittedly could not find the “UK Vicks stick” on the Czech market. The fact that his mother had such a stick in her medical cabinet ought reasonably to have prompted questions about the origin of the nasal stick.

Mr Enge relied on the fact that the stick came from a trustworthy source, i.e. his mom and that he genuinely believed that he was using the “UK Vicks stick”, which he made sure that it was free from banned substances in 2010.

The Sole Arbitrator observes that Mr Enge’s mom is not a doctor and does not have any particular knowledge in anti-doping matters. The fact that she handed him some medication could not be blindly trusted. Mr Enge should have been all the more careful to ensure that the stick was “safe” as a) he had not used it for several months, and b) the researches he made on the “UK Vicks” took place as he was living in another country, two years earlier (In the CAS case, CAS 2011/A/2645 the panel held as a circumstance adverse to the athlete the fact that he relied upon a two-year old medical recommendation). In this regard, Mr Enge did not ignore that the WADA prohibited substances list was updated annually. He actually filed a TUE application for Telmisartan, out of fear that this product could contain banned substances as provided in the new WADA 2012 Prohibited List.

- Contrary to Mr Enge’s submissions, the fact that he established to the satisfaction of the hearing panel that he did not intend to enhance his sport performance through the use of his nasal stick is without impact on the assessment of his “*degree of fault*”. This aspect was indeed considered in Mr Enge’s favour when assessing whether or not article 10.4 ADR was applicable at all. It cannot be taken into account twice.
- Mr Enge also is of the opinion that his advanced age and the impact of the sanction on his career should be taken into account when assessing the period of ineligibility to be imposed.

The Sole Arbitrator observes that the rules contained in the ADR do not specifically deal with the issue of age. Numerous CAS precedents have confirmed that the issue of age is in principle of no relevance (CAS 2010/A/2268, par. 110 ff). In this connection, the Sole Arbitrator finds no reasons to depart from the position expressed in the CAS award issued in the case CAS 2006/A/1032, par. 139 – 141 “(...) *in order to achieve the goals of equality, fairness and promotion of health the anti-doping rules are pursuing, the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective of the participant’s age. (...) In these circumstances the panel considers that there is no automatic exception based on age. Such an exception is not spelled out in the rules and would not only potentially cause unequal treatment of athletes, but could also put in peril the whole framework and logic of anti-doping rules*”. As a matter of fact, Mr Enge’s argument does not appear to take into account the need to protect the other athletes’ fundamental right to compete in a clean sport. In order to protect this fundamental right, it is indispensable that all athletes be subjected to the same rules, particularly those aiming at protecting equality of arms and, thus, at avoiding that some competitors may benefit from an unfair advantage over other competitors (CAS 2010/A/2268, par. 114). Hence, Mr Enge’s age does not justify to treat him any differently from all the other competitors.

- Mr Enge's submissions according to which the concentration of the Prohibited Substances in his urine is very low and, therefore, could not have possibly enhanced his sporting performance must be disregarded. As a matter of fact, amphetamine and levmetamfetamine are prohibited substances without a lower threshold for a positive test (see article 2.1.3 ADR).
 - In a similar vein, one may recall that the cyclist Alberto Contador was sanctioned with a two-year period of ineligibility despite the fact that he insisted on the minuscule level of the drug in the positive samples - clenbuterol in a concentration of 50 pg/mL, i.e. an amount allegedly 400 times lower than the required detection level - and argued that it was not intentional doping and at too low a level to be performance enhancing. It is true, however, that, unlike Mr Enge, Mr Contador failed to establish the exact contaminated supplement as well as the circumstances surrounding its ingestion (CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC / CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC).
 - The circumstances of the use of the "US Vicks stick" are not extraordinary and did not lead to a time constraint. Mr Enge had time to calmly make substantial controls and research with respect to the litigious nasal stick.
 - Mr Enge does not have a clean personal anti-doping history and record.
 - Finally, Mr Enge failed to disclose the litigious product on his anti-doping control form whilst he disclosed "MICARDIS 40 mg/day".
61. Having regard to the above mentioned findings, it appears that Mr Enge was particularly careless, and the Sole Arbitrator does not really see circumstances that speak in favour of a reduction of the standard period of ineligibility other than the facts that he did obtain a medical recommendation for a similar product, used the litigious stick to clear an apparent banal stuffed nose and during the hearing held on 4 March 2013, was cooperative, honest and frank about the circumstances resulting in the violation.
- b) *The reduction of the period of ineligibility based on "no Fault or Negligence" and/or "No significant Fault or Negligence" – articles 10.5.1, respectively 10.5.2***
62. As regards the presence of amphetamine in Mr Enge's bodily specimen, the Sole Arbitrator has to resolve whether he committed the offence with "No Fault or Negligence" and / or "No Significant Fault or Negligence".
63. The definition of "No Fault or Negligence" is as follows:
- "The Athlete's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance or Prohibited Method"* (Appendix A to the ADR; Definitions).
64. The definition of "No Significant Fault or Negligence" is the following:

“The Athlete’s establishing that his 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” (Appendix A to the ADR; Definitions).

65. Mr Enge has established – and it has been accepted by the ADC - that the amphetamine was a metabolite of the levmetamfetamine. Under these circumstances and with respect to the presence of amphetamine in his body, Mr Enge submits that he bears *“No Fault or Negligence”* as he *“could not prevent that the levmethamphetamine metabolized in [his] body into amphetamine”*.
66. The Sole Arbitrator finds that the presence of amphetamine was a direct consequence of his use of the “US Vicks stick”. The fact that levmetamfetamine, a prohibited substance, breaks down into amphetamine cannot reasonably lead to Mr Enge’s exoneration. First of all, amphetamine is distinct from levmetamfetamine, which is a non-specified stimulant and governed by different rules. Then, and as explained during the hearing held on 4 March 2013 by Dr Patrick Schamasch, one cannot rule out that the presence of amphetamine in Mr Enge’s sample might have been caused by sources other than levmetamfetamine. Finally, if Mr Enge were to be followed, it could open the doors to all sorts of abuse, as some competitors could be tempted to mask the use of amphetamine, with an apparently harmless nose stick and/or could try to enjoy the benefit of a milder sanction as provided under article 10.4 ADR (which is only applicable in the presence of specified substances) when the requirements of article 10.5.1 ADR are not met.
67. Under such circumstances, the Sole Arbitrator finds that he cannot claim *“No Fault or Negligence”* according to article 10.5.1 ADR for the adverse analytical finding for amphetamine. Had he paid the expected care before using the nasal stick, he would not have tested positive for any banned substances, let alone for amphetamine.
68. With regard to the presence of amphetamine in Mr Enge’s bodily fluid, the reduction of the period of ineligibility can only be based on *“No significant Fault or Negligence”*, as provided by article 10.5.2 ADR (cf. para 70 et seq.).

c) *The sanction to be imposed upon Mr Enge*

69. The sanction according to article 10.4 ADR ranges between a reprimand and no period of ineligibility as a minimum, to a period of two years of ineligibility as a maximum. This provision is only applicable to the adverse analytical finding for levmetamfetamine.
70. For the reasons explained above, Mr Enge does not bear *“No Fault or Negligence”* for the presence of amphetamine in his urine sample. Consequently, article 10.5.1 ADR cannot come into play and the period of ineligibility cannot be eliminated. A 24-month sanction would be at the upper end of the range of sanctions to be imposed in a case falling within article 10.5.2 ADR. A 12-month sanction is the mandatory minimum. This provision permits a reduction of the period of ineligibility but sets as the minimum allowable period of ineligibility in cases of *“No Significant Fault or Negligence”* to be one half of the period otherwise applicable, in this case one half of two years.

71. In setting the sanction, it is necessary to take into account the range of the applicable measures. Considering that the presence of amphetamine cannot benefit from the minimum sanctions of article 10.4 ADR, the Sole Arbitrator holds that a sanction of 12 months will be the minimum but only stands where there is a very low degree of significant fault on the part of the athlete. In Mr Enge's case, the Sole Arbitrator has determined that there is more than the minimum lack of significant fault and therefore the penalty should exceed 12 months.
72. The ADC imposed upon Mr Enge *"the sanction of Ineligibility for a period of eighteen months"*.
73. Having regard to all of the circumstances of the case, the Sole Arbitrator has come to the conclusion that the sanction imposed by the ADC is just, fair and in line with recent jurisprudence with comparable facts. Even though each case is and should be treated on its own merits and based on its own facts, the Sole Arbitrator considers that the following cases prove Mr Enge's sanction to be proportionate as other athletes were suspended for similar period of time, in spite of the fact that they either showed (unlike Mr Enge) some kind of care or had favourable circumstances (e.g. the prohibited substance was not mentioned on the label of the product used).
- CAS 2012/A/2701: the panel made the following statement (par. 5.5.16 and 5.5.17): *"Generally speaking, if an athlete ingests a product failing to inquire or ascertain whether the product contains a prohibited substance, such athlete's conduct constitutes a significant fault or negligence, which excludes any reduction of the applicable period of ineligibility (see e.g. CAS OG 04/003, par. 5.11 et seq.; CAS 2005/A/847, par. 7.3.6; CAS 2006/A/1032, par. 146 et seq.; CAS 2006/A/1067, par. 6.13 et seq.). In the case [CAS 2007/A/1284 & CAS 2007/A/1308], the Panel considered that the athlete could not pretend to a reduction of the sanction for "no significant fault or negligence" because she "did not apply the standard of care to be expected of a top-level athlete, i.e. obtain assurances from her physician, pharmacist or team doctor that supplements did not contain a prohibited substance (CAS 2007/A/1284 & CAS 2007/A/1308, par. 118). A similar consideration was made by the Panel in the case CAS 2008/A/1510, par. 7.9 a)"*.
 - CAS 2010/A/2107, dated 6 December 2010: Mrs Oliveira, born in Brazil, is a cyclist licensed by USA cycling. On 19 June 2009 she competed in the Giro del Trentino Donne in Italy and was selected for a doping control. Her urine sample tested positive for the specified prohibited substance oxilofrine, a stimulant. Mrs Oliveira established the origin of the prohibited substance, i.e. a dietary supplement called Hyperdrive which she obtained from a U.S. based online store called Vitamaker. The purpose was to combat fatigue related to her treatment against severe allergies. It was established that Mrs Oliveira did not know that Hyperdrive contained the specified substance in question, as it was not listed as an ingredient on the product.
 - However, the panel found that she was not wilfully ignorant regarding the risks that a nutrition supplement may be mislabelled because she took some steps to ensure Hyperdrive did not contain a banned substance. Before initially taking this product, in an effort to determine whether it contained any banned substances, she checked its label and conducted internet research, which included checking the on-line retailer's website, WADA's prohibited substances list, and USADA's Global Drug Reference Online. She also consulted with her professional cycling

team's physician, regarding the nutrition supplements and vitamins she was taking. These steps constitute the exercise of at least some degree of care to ensure she did not take any banned substances.

- The panel also found that sufficient weight must be given to Mrs Oliveira's relatively short experience as an elite cyclist and lack of any formal anti-doping education in evaluating her degree of fault under the totality of the circumstances. In particular, it took into account the fact that she did not receive any formal drug education from any sports organisation prior to her first in-competition drug test that resulted in a positive test for stimulant.
- The panel made the following comparison with the case CAS 2005/A/847: *"Because Oliveira was an elite level athlete and a professional cyclist at the time of her first positive test rather than an intercollegiate or high school athlete, the Panel concludes that her period of ineligibility should be more than 50% of the maximum for her first doping offence; specifically, it should be 75% of the maximum sanction (i.e., 18 months). The Panel finds that the facts relevant to Ms. Oliveira's degree of fault are similar but not identical to those in Knauss v. FIS, CAS 2005/A/847, in which a CAS panel imposed an eighteen month period of ineligibility on a professional skier who tested positive for the prohibited substance norandrosterone from ingesting a contaminated nutrition supplement. In Knauss, a skier with seventeen years of professional experience, admittedly took a nutritional supplement "over a lengthy period of time" (§7.3) despite several "warnings which clearly and repeatedly over the past years have emphasized the risk of contamination and/or mislabelling in nutritional supplements" (§7.3.2), which "a professional athlete, who has competed at the highest levels for many years, with great success could not and should not" have remained ignorant. (§7.3.3). The panel found "no doubt" the skier "acted with 'fault and negligence' with regard to the anti-doping rule violation". (§7.3.2) (...). It also found he did not take the supplement for the purpose of benefiting from the prohibited substance, did not know it contained a prohibited substance because it was not disclosed on the product's packet or accompanying leaflet, and "did not acquire the product illegally on the 'grey market' or in some other dubious manner". (§7.3.7). Although he could have had the supplement tested before taking it, or simply not have taken it, he did take the precautions of reading its label and inquiring with the distributor of the product. The panel found that his conduct "give(s) rise to ordinary fault or negligence at most, but [does] not fit the category of "significant fault or negligence". (§7.3.7) (...). The panel concluded "[i]n light of the particularities of the present case and the principle of proportionality . . . the penalty of 18 months imposed by [the FIS] is fair and reasonable".*

The panel accepted to reduce to 18 months the standard period of illegibility of Mrs Oliveira.

The Sole Arbitrator observes that, unlike Mr Enge, Mrs Oliveira showed a certain level of care and the label of the product she used did not mention the existence of the banned substance. Nevertheless, she received an identical sanction as Mr Enge.

The Sole Arbitrator finds that Mr Enge's case displays many similarities with the situation dealt with by the CAS panel in the CAS 2005/A/847. Here too and unlike Mr Enge, Mr Knauss *"did not know it contained a prohibited substance because it was not disclosed on the product's packet"*.

- CAS 2010/A/2268 dated 15 September 2011: The Appellant was a 12-year-old karting driver, holder of a karting driver license of the Polish Motor Racing Federation. Between 16 and 18 July 2010, he took part in a race in the framework of the German Junior Karting Championship and achieved second place. On 18 July 2010 he underwent an in-competition anti-doping control and tested positive for the specified prohibited substance Nikethamide. He failed to prove the objective element of the route of ingestion preventing the panel from evaluate his degree of fault. However, the panel found the two-year standard period of ineligibility disproportionate given the exceptional facts of the case: a) *“The Appellant is a young child, now thirteen years old, whose capability to fully grasp the meaning and purpose – in terms of both retribution and education – of his sanction can be doubted”*, b) *“The karting category in which [the Appellant] competed is a youth category, where the competitors may not be older than fifteen; therefore, he has not been competing together with adults at top level”* and c) *“To apply to a child of twelve years competing in a youth category reserved to under-fifteen athletes exactly the same sanction as it would be applied to an adult (or even to an older kid) competing at top level contradicts the sense of fairness and justice”*. After having insisted on the exceptional aspects of the case, the panel accepted to reduce to 18 months the standard period of illegibility on the basis of the principle of proportionality.

In Mr Enge’s case there are no exceptional circumstances in his favour. Yet, the same sanction of 18 month period of ineligibility was imposed upon him.

- CAS 2012/A/2701 dated 21 November 2012: the athlete involved in that matter is a Canadian International wakeboarder. While competing in the XVI Pan American Games in Guadalajara in 2011 on 22 October, he provided a urine sample during an in-competition test and tested positive for “methylhexaneamine”, a specified banned substance. The athlete successfully established a) how the prohibited substance entered his body (he purchased a fat burner to lose weight in order to reduce the physical stress on his recently operated knee) and b) that he did not intend to enhance his performance. As regards to the Athlete’s degree of fault, it appeared that he did not obtain any assurance from a specialist but relied on the explanations received by a store salesman. He also claimed to have made some researches in connection with the litigious product he purchased. The panel found these explanations unconvincing as a very basic research on the Internet would have told him that the fat burner he purchased did contain a prohibited specified substance. The panel accepted to reduce to 15 months the standard period of illegibility. It namely took into account the fact that a) Waterski and wakeboard are small sports with not much money involved, b) the representative for Waterski and Wakeboard Canada expressed concern about the need to attract and retain athletes in the sport and c) the athlete expressed regret for what had happened, including the issuance of an apology immediately following his positive test result.
- CAS 2012/A/2804 dated on 3 October 2012: Mr Kutrovsky was a 25-year-old professional tennis player from Bulgaria. On 14 February 2012, he provided a urine sample at the SAP Open tournament held in San José, California, U.S.A.. He tested positive for “methylhexaneamine”, a specified banned substance, after having ingested Jack3d, a supplement designed to assist with energy and recovery and described to him

by the salesman as a “*Red Bull, but stronger*”. However, Mr Kutrovsky failed to establish to the comfortable satisfaction of the panel the absence of intent to enhance his sport performance. “*In Kutrovsky’s case, the Panel has determined that there is more than the minimum lack of significant fault present so it must assess a penalty, greater than 12 months but, since the fault was not egregious, one substantially less than 24 months*”. The panel accepted to reduce to 15 months the standard period of illegibility considering that a) Mr Kutrovsky actually did some research and that research was directed precisely to comparing the Jack3d label to the WADA Prohibited List, b) no matter what he did in this respect, he would have never found the specified substance on the WADA Prohibited List as it is not on the list as labelled, c) he was provided with no anti-doping education by his international federation or any National Anti-Doping Organization, and virtually no antidoping education by his university (For example, contrary to other tennis athletes, he was never provided with an anti-doping wallet card) and d) he has only recently reached a top-level event and therefore had very limited experience with anti-doping literature and processes.

74. Mr Enge tries to rely on several CAS precedents to mitigate the sanction to be imposed upon him:

- CAS 2002/A/376 dated 15 October 2002 where a 3-month period of ineligibility was imposed upon the Athlete. First and foremost it must be stressed that the World Anti-doping code was not implemented at the time of the positive test and the three-month sanction corresponded to the then-applicable standard sanction for a first offence of “inadvertent use of doping”. Finally and over the years, there have been many and significant developments in doping prevention, fight and punishment. As explained in the case CAS 2009/A/1870, par. 50: “*Much information has been given and stringent warnings have been issued in this respect. As a result, this Panel finds that the level of diligence due by an athlete rose over the years; and the athlete’s behaviour should be considered with care, when assessing the measure of the sanction he or she should receive*”.

The above comment can be applied by analogy to another case referred to by Mr Enge (Arbitration CAS ad hoc Division (OG Sydney) 2000/011, award of 28 September 2000).

- CAS 2009/A/1918 dated 21 January 2010: The Appellant was a professional football player of Polish nationality, born on 7 July 1983. On 5 April 2009, he underwent an in-competition doping control and tested positive for Methylhexanamine. The panel found that this substance was not explicitly included in Appendix A of the applicable anti-doping regulations in force in April 2009. Furthermore, the Appellant had established that the substance entered his body through the ingestion of TightXtreme (for weight loss), that he did not intend to enhance sporting performance and that he had informed his doctor before using the litigious substance.

In Mr Enge’s case, the substance Levmetafetamine was on the applicable prohibited list and its presence was explicitly mentioned on the nasal stick itself. Furthermore, he did not make any mention of its use to his doctor. The Sole Arbitrator finds that there is

too little common ground between Mr Enge's situation and Mr Jakub Wawrzyniak's situation to take the latter's case into account.

- The same can be said with another case cited by Mr Enge (CAS 2006/A/1175), where the Appellant tested positive for Sibutramine, which is a prohibited substance of the category "S6: Stimulants". She established that the positive test was caused by her ingestion of an herbal slimming remedy, which she had bought for beauty purposes and the label of which did not mention the presence of the litigious prohibited substance.
- CAS 2009/A/1926 & 1930. The Player was a 23 year-old professional tennis player. On 28 March 2009, he underwent a doping control and tested positive for cocaine. Mr Gasquet successfully established that the contamination with cocaine resulted from kissing a girl (named Pamela) he met the previous night. The panel came to the conclusion that *"by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence"*.

The Sole Arbitrator does not see any analogy between Mr Enge's situation and Mr Gasquet's case, which does not need to be addressed any further.

- Arbitration CAS 2004/A/726, dated 19 October 2005. In this case, the panel found that it had not been established that the Athlete had ingested a prohibited substance included in the then-applicable prohibited list. In spite of the fact that the product used by the Athlete metabolized into a prohibited substance, the Panel set aside the decision sanctioning the Athlete, without addressing any of the issues related to circumstances regarding the ingestion of the litigious substance or the athlete's degree of fault.

This case is fundamentally different from Mr Enge's, who used a prohibited substance, which partially broke down into another banned substance.

75. It appears that all the cases put forward by Mr Enge are irrelevant as they have nothing or very little in common with his situation.
76. The Sole Arbitrator finds the Appealed Decision to be well reasoned, and based on a careful examination of the evidence submitted. Even though the Sole Arbitrator has full power of review of the disputed facts and law in the exercise of its jurisdiction, accepts the dictum in the award of 21 May 2010, CAS 2009/A/1870, at § 125), under which *"the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4)"*. Far from excluding, or limiting, the power of a CAS panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), this means only that a CAS panel can decide, in specific circumstances, not to exercise the power it has, and to defer to the discretion exercised by the internal body of an association.
77. Having regard to all of the circumstances, the Sole Arbitrator has come to the conclusion that the 18-month sanction imposed upon Mr Enge by the ADC in its Appealed Decision must be

confirmed.

78. With reference to the commencement of ineligibility period, article 10.9 ADR has the following content:
- “Except as provided below, the period of Ineligibility shall start on the date set out in the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed”.*
79. In the present case, Mr Enge was provisionally suspended as of 14 June 2012. That is the date set in the Appealed Decision for the beginning of the period of ineligibility. The Sole Arbitrator sees no reason to decide otherwise.
80. Furthermore, the Appealed Decision also complies with article 10.1 ADR related to *“Disqualification of Results in an Event during which an Anti-Doping Rule Violation occurs”*.
81. Based on the foregoing, the Sole Arbitrator holds that the Appealed Decision must be upheld in its entirety, without any modification.
82. This conclusion makes it unnecessary for the Sole Arbitrator to consider the other requests on the merits submitted by the parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Tomáš Enge against the decision issued by the FIA Anti-Doping Disciplinary Committee on 27 July 2012 is dismissed.
 2. The decision issued by the FIA Anti-Doping Disciplinary Committee on 27 July 2012 is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.