



Arbitration CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet, award of 19 April 2012

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr François-Charles Bernard (France); Mr Beat Hodler (Switzerland)

Short track speed skating

Doping (Tuaminoheptane)

CAS power of review and right to be heard

Conditions to benefit from a reduced sanction

CAS scope of review of the applicable sanction

Degree of fault

Starting date of the ineligibility period

Disqualification of the results

- 1. According to Article R57 of the Code of Sports-related Arbitration, the panel has full power to review the facts and the law applicable to a case. As a result, even if a violation of the principle of due process or of the right to be heard occurred in prior proceedings, it may be alleviated by an appeal to the CAS. The virtue of an appeal system which allows for a rehearing before an appealed body is that issues relating to the fairness of the hearing before the tribunal of first instance “fade to the periphery”.**
- 2. To benefit from the elimination or reduction of the period of ineligibility with regard to Specified Substances, an athlete must establish a) how a Specified Substance entered his or her body or came into his or her possession; and b) that such Specified Substance was not intended to enhance the athlete’s sporting performance or mask the use of a performance-enhancing substance. Regarding the first condition, a panel should simply find the explanation of the athlete concerning the presence of a Specified Substance more probable than not. With respect to the second condition, an athlete only needs to prove that he/she did not knowingly take the specified substance, rather than the product, with an intent to enhance his sporting performance.**
- 3. The discretion of a disciplinary body in setting the appropriate sanction cannot be invoked as a matter of law and principle, even if CAS panels may consider that the circumstances warrant it following a disciplinary body’s judgment and if in certain cases CAS has considered that the sanction should only be reviewed if it is evidently and grossly disproportionate to the offence. Indeed, in determining, as an international appellate body, the correct and proportionate sanction, CAS panels must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. Moreover, a panel has full power to review the matter in dispute**

pursuant to Article R57 of the Code of Sports-related Arbitration.

- 4. Even if accepted, the good character evidence submitted by an athlete cannot mitigate his/her culpability so as to reduce his/her sanction. The absence of past anti-doping offences and the athlete's cooperation is solely relevant for determining the applicable range of sanctions, not to reduce the sanction given for a first offence.**
- 5. If, despite the athlete's cooperative attitude, it took almost ten months from the date of the sample collection for a first instance decision to be rendered, it is fair to apply the principle set forth in the applicable anti-doping rules and start the period of ineligibility at an earlier date than the day of notification of the CAS award.**
- 6. Ineligibility cannot be severed from disqualification in the absence of a clear provision in the applicable rules supporting such severance, which might plausibly have been justified in cases in which the period of ineligibility begins before the date of the award and where the nature of the violation of the applicable rules is such that it can be presumed that the violation has not affected the results in other competitions in which the athlete has participated during the period of ineligibility prior to the award.**

Thibaut Fauconnet ("Fauconnet", the "Athlete" or the "Skater") is an international level short track skater, who was 26 at the time of the in-competition doping control that gave rise to this case. He is a member of the Fédération Française des Sports de Glace (FFSG) and is registered as an "elite" athlete in the list of high level athletes of the French Ministry of Sports. Thibaut Fauconnet has competed in international competitions as a member of the French short-track team.

The International Skating Union (ISU) is the international governing body of speed skating, short track speed skating, figure skating, and synchronized skating based in Lausanne, Switzerland. The ISU oversees competitive winter sports events internationally, including administration of the ISU Short Track World Cup in Shanghai, China.

Fauconnet and the ISU are collectively referred to as the "Parties".

In December 2010, Fauconnet competed in the Short Track World Cup held by the ISU in Shanghai, China. On December 12, 2010, Fauconnet was subject to a doping control. He signed the doping control form in which he declared that he was not taking any medication or other pharmaceutical substances at the time of the control. Following the test, the ISU received an adverse analytical finding for sample 1930429. Said sample was found to contain Tuaminoheptane, a substance that is listed as a Specified Substance under the 2010 World Anti-Doping Agency ("WADA") List of Prohibited Substances and Methods which forms an integral part of the ISU Anti-Doping Rules (the "ISU Rules") on the basis of Article 4.1 of these rules (the "Prohibited List").

Rhinofluimucil is a spray for intranasal application usually used to combat colds. One of its components is Tuaminoheptane, which is primarily used as a nasal decongestant drug, and which has featured in the Prohibited List as a Specified Substance since 2007, due to its stimulant properties.

On March 17, 2011, the ISU's Director General informed both the FFSG and the athlete of the positive finding and requested the FFSG and Fauconnet to submit their written explanations within fifteen days. The letter also reminded Fauconnet of his right to ask for an analysis of the B sample.

On March 23, 2011, Fauconnet explained, by letter, that he used Rhinofluimucil (the "Product") in order to solve his breathing problems due to a cold that occurred first in Changchun and then in Shanghai during World Cups 3 and 4. Fauconnet recognized that he should have known that the Product contained Tuaminoheptane, a prohibited substance according to the Prohibited List. The athlete also admitted that he had made a mistake. He acknowledged that he made another mistake by not notifying the use of the product to the ISU in order to obtain a therapeutic use exemption. In the same letter, Fauconnet waived his right to have the B sample examined and mentioned that he had had 8 urine tests during the season starting in October 2010 and 3 blood tests during the season starting in January 2011. Finally, Fauconnet apologized for his carelessness.

On April 1, 2011, the ISU's General Secretary requested, by letter, additional information concerning the circumstances in which Fauconnet acquired and used the Product.

On April 11, 2011, Fauconnet answered with a letter, explaining (i) that he took the Product only once in the morning, in Changchun, during the 3rd world cup, due to a cold; (ii) that he took the Product during the 4th world cup in Shanghai for the first 3 days with the same dosage; (iii) that he took the Product from his girlfriend's shelf and put it into his first aid box; (iv) that he had made a mistake by failing to check whether it was prohibited; (v) that he thought that it was an insignificant product; and (vi) that no team doctor accompanied the French delegation during the two world cups.

After the doping test of December 12, 2010, Fauconnet competed in the 2011 ISU European Championships in Heeren, in the 2010/2011 ISU World Cup in Moscow and Dresden and in the 2011 ISU World Track Championships in Sheffield. There has been no suggestion or evidence to indicate that Fauconnet has ever ingested performance-enhancing substances, or that his results were affected in any way by his anti-doping rule violation on December 12, 2010. On the contrary, Fauconnet was subject to multiple doping controls during these championships, which were all negative. Finally, at the time of these competitions, Fauconnet had no reason to believe that the ISU's investigation would lead to proceedings against him. The adverse analytical findings were notified to the athlete on March 17, 2011.

On May 5, 2011, the ISU filed a statement of complaint with the ISU Disciplinary Commission requesting a motion to declare Fauconnet guilty of an ISU Rules violation and to sanction him pursuant to article 10 of the ISU Rules.

By an order of May 9, 2011, the ISU Disciplinary Commission invited Fauconnet to file a statement of reply within 21 days and to inform the ISU Disciplinary Commission whether he wanted an oral hearing to be held pursuant to Article 8 of the ISU Rules.

On October 10, 2011, the ISU Disciplinary Commission issued a decision (the “ISU Decision”) in which Fauconnet was found to have committed an anti-doping offence contrary to Article 2.1 of the ISU Rules. Article 10.2 of the ISU Rules provides for a sanction of up to two years of ineligibility for such an offence. However, the Disciplinary Commission found that – taking into account the specific circumstances of the case – Fauconnet had explained how the substance had entered his body and had had no intention of enhancing his sporting performance. As a result, pursuant to Article 10.4 of the ISU Rules, the Disciplinary Commission sanctioned Fauconnet with a reduced suspension of eighteen months. The ISU Decision considered that, pursuant to Article 10.9.2 of the ISU Rules, the period of ineligibility would start as early as the date of sample collection, December 27, 2010 and would end on June 26, 2012.

Article 10.4 of the ISU Rules provides that:

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

Where a Skater or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Skater’s sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years’ Ineligibility.

To justify any elimination or reduction, the Skater or other Person must produce corroborating evidence in addition to his or her 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 Skater or other Person’s degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility.

On October 21, 2011, Fauconnet filed a Statement of Appeal against the ISU Decision (CAS 2011/A/2615) with the Court of Arbitration for Sport (CAS). Together with his Statement of Appeal, Fauconnet filed a request for a stay of the challenged decision. On November 23, 2011 Fauconnet sent a letter to the CAS insisting that exceptional circumstances justified the acceleration of the procedure. In that letter, Fauconnet insisted that he had already been excluded from the Korean Air ISU World Cup Short track held in Salt Lake City, USA from October 21-23, 2011 and from the Korean Air ISU World Cup Short Track held in Saguenay, in Canada, from October 28-30, 2011. In the letter, Fauconnet also insisted that, should he be excluded from the two world championships in Nagoya, Japan, December 2-4, 2011 and in China, December 9-11, 2011, his sports career would be definitively damaged. The President of the Appeals Arbitration Division granted the stay by Order of November 28, 2011.

On October 24, 2011, Fauconnet sent a letter with evidence of a medical prescription of the Product dated June, 17, 2008.

On October 31, 2011, the ISU filed its Statement of Appeal, which shall be considered as the Appeal Brief, against the ISU Decision (CAS 2011/A/2618). The ISU's Appeal Brief contains the following Request for Relief:

All competitive results obtained by Respondent from December 12, 2010, to date, including but not limited to:

- *his results obtained at the 2011 ISU European Championships in Heerenveen (14. – 16.01.2011);*
- *his results obtained at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011);*
- *his results obtained at the ISU World Cup 2010/2011 in Dresden (18. – 20.02.2011);*
- *his results obtained at the 2011 ISU World Short Track Championships in Sheffield (11. – 13.3.2011),*

are disqualified with all the resulting consequences including for feature of any medals, points and prizes.

All competitive results obtained by any Short Track Team in which the Respondent competed as a member of the team from December 12, 2010 to date, including but not limited to the 6th place reached by the French team at the ISU European Championships in Heerenveen (14. – 16.01.2011), in 5'000 meter relay, the second place reached by the French team at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011) in 5'000 meter relay and the 8th places reached by the French team at the ISU World Championships in Sheffield (11. – 13.3.2011) are disqualified with all the resulting consequences including for feature of any medals, points and prizes.

On November 30, 2011, Fauconnet filed his answer to the ISU's Appeal with his Appeal Brief pursuant to Rule 51 of the Code, which contains the following Request for Relief:

It is hereby asked to the Court of Arbitration for Sport

- *to reject the appeal lodged by the International Skate Union on October 31st, 2011, registered under the reference CAS 2011/A/2618*
- *to annul the challenged decision as having infringed the principles of fair hearing*

In the alternative, and in the event that the CAS does not annul the challenged decision, it is hereby asked of the Court of Arbitration for Sport:

- *to amend the decision of October 10th, 2011, rendered by the Disciplinary Commission of International Skate Union (case n°01/2011)*
- *to impose on Mister Thibaut Fauconnet the penalty of reprimand without period of ineligibility, under Article 10.4 of the ISU Anti-doping rules.*

In the alternative, and in the event that the CAS imposes on the athlete a period of ineligibility,

- *to take under consideration the period of effective ineligibility running from October 10th, 2011, until November 28th, 2011, and remove it from the total period of ineligibility imposed by the final award;*

- *to maintain the challenged decision inasmuch as it provided for the disqualification of the athlete only on December 12th, 2010, without cancelling the results obtained both individually and as a member of the French team since December 2010, in accordance with Article 10.8 of the ISU Anti-doping rules.*

On December 22, 2011, the ISU filed its Answer, which contained the following Request for Relief:

For all the above reasons, Appellant's appeal is to be dismissed, the 18 months' ineligibility period imposed on him by the attacked decision to be confirmed and supplemented according to point I.4 of Respondent's statement of appeal and appeal brief of October 31, 2011.

On December 26, 2011, Fauconnet sent a letter to the CAS inclosing a decision rendered by the International Ice Hockey Federation. On December 27, 2011, the CAS reminded Fauconnet that unless an agreement specifically provided for submission of a new document, the issue of admissibility would be decided by the Panel, once constituted.

In his Statement of Appeal dated October 21, 2011 Fauconnet requested that the language for his appeal be French. By letter of November 4, 2011, the ISU objected to the language of the procedure and requested the procedure to be conducted exclusively in English. By letter dated November 7, 2011 and November 8, 2011, Fauconnet disagreed. The President of the Appeals Arbitration Division declared English as the language of the procedure by Order of November 22, 2011.

In its letter of November 4, 2011, the ISU requested Fauconnet's appeal and the ISU appeal to be joined in the interest of procedural economy and of avoiding the risk of conflicting decisions. By letter of November 7, 2011, Fauconnet agreed to the joining of the two appeals.

Considering that in both appeal procedures CAS 2011/A/2615 and CAS 2011/A/2618, the ISU Decision is challenged, and taking into account furthermore that all parties reached an agreement to join these two procedures as one procedure, the two mentioned procedures are consolidated into one single procedure. The same Panel of arbitrators is thus in charge of both cases.

By letter of December 23, 2011 the Parties were invited to inform the CAS whether they wished a hearing to be held. On December 26, 2011, Fauconnet informed the CAS that no hearing was needed if the Panel considered itself sufficiently informed. On January 6, 2012, the ISU informed the CAS that its preference was for the Panel to issue a decision based on the parties' written submissions. The Panel agrees with the parties' submissions that no hearing is necessary in this case.

The additional document submitted by the Appellant on December 26, 2011 does not refer to the facts of this case but to a ruling of another Sports Federation, similar to those submitted with the Statement of Appeal dated October 21, 2011. The Panel therefore considers that there is no need to decide formally on the admissibility of such a document as evidence.

LAW

CAS jurisdiction, admissibility and applicable law

1. Article R47 of the Code of Sport-related Arbitration (the “Arbitration Code”) provides, in part, 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.

2. Article 24.12 and Article 25 of the ISU Constitution and General Regulations 2010 provide that Appeals against decisions of the Disciplinary Commission may be filed with the Appeals Arbitration Division of the CAS. The Panel therefore has jurisdiction to consider Fauconnet’s and the ISU’s appeal.
3. The appeals were filed within the deadlines provided by the ISU Rules. They complied with all other requirements of Article R48 of the Arbitration Code, including the payment of the CAS Court office fees. It follows that both appeals are admissible.
4. Article R58 of the Arbitration Code provides as follows:
This 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.
5. The ISU Decision, against which the appeal was brought, was issued under ISU Anti-Doping Rules 2010, and there is no dispute as to the applicability of the ISU Rules.

Violation of Anti-Doping Rule

6. Article 2.1.2 of the Rules provides, in part, as follows:
Sufficient proof of an Anti-Doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Skater’s A Sample where the Skater waives analysis of the B Sample and the B Sample is not analyzed (...).
7. By letter dated March, 23, 2011, Fauconnet waived his right to have the B Sample analysed.

8. Moreover, Fauconnet does not contest the fact that an ISU accredited laboratory identified Tuaminoheptane in his urine sample, nor that Tuaminoheptane is a substance appearing on the Prohibited List.
9. Fauconnet therefore admits to having committed a doping offence under Article 2.1 of the ISU Rules.

Legal Analysis

A: Right to be heard

10. Fauconnet alleges that the ISU Decision should be annulled, as his right to a fair hearing pursuant to Article 8.1 and 8.2.5 of the ISU Rules was violated.
11. The ISU submits that Article 8.1.7 is the applicable provision given that it governs hearings arising out of ISU Testing or Tests at International Events. It further alleges that Fauconnet had waived his rights to an oral hearing and to submit written submissions since he did not answer two explicit invitations of the ISU Disciplinary Commission to do so.
12. The Panel acknowledges that Article 8.1.7 is applicable. Article 8.1.7 of ISU Rules provides as follows:
A Skater or other Person may forego a hearing by acknowledging the Anti-Doping rule violation and accepting Consequences consistent with Articles 9 and 10 as proposed by the ISU. The right to a hearing may be waived either expressly or by the Skater's or other Person's failure to challenge the ISU's assertion that an Anti-Doping Rule violation has occurred within 15 days from receipt of notification of the positive A Sample or other apparent violation. Where no hearing occurs, the ISU Disciplinary Commission shall submit to the persons described in Article 13.2.3 a reasoned decision explaining the action taken.
13. The Panel takes into account the fact that, by an order of May 9, 2011, the ISU Disciplinary Commission invited Fauconnet to file a statement of reply within 21 days and to inform the ISU Disciplinary Commission whether he wanted an oral hearing to be held pursuant to Article 8 of the ISU Rules. The Panel takes the view that, by failing to answer this formal request, Fauconnet's attitude has been rightly interpreted as a waiver of his right to a hearing pursuant to Article 8.1.7 of the ISU Rules. The fact that some questions were addressed to Fauconnet by the director of the ISU and not by the Disciplinary Commission is irrelevant.
14. As to the reasoning of the decision taken by the ISU Disciplinary Commission, the Panel considers that the ISU Decision is sufficiently reasoned concerning the conditions that Fauconnet satisfied in order to benefit from the reduction of the usual two year ineligibility period, and in particular that, due to his negligence, that period could only be reduced by six months.

15. In any event, according to Article R57 of the Arbitration Code, the Panel has full power to review the facts and the law applicable to this case. As a result, even if a violation of the principle of due process or of the right to be heard occurred in prior proceedings, it may be alleviated by an appeal to the CAS¹. The virtue of an appeal system which allows for a rehearing before an appealed body is that issues relating to the fairness of the hearing before the Tribunal of First Instance “fade to the periphery”².
16. Therefore, regardless of whether the athlete’s fair hearing is admitted or not, the potential deficiency has been alleviated by the present appeal. Indeed, Fauconnet used the opportunity provided by the ISU Rules to bring the case before the CAS, where all of his fundamental rights have been duly respected. In the present proceedings, Fauconnet has presented extensive submissions, embracing every point on which the appeal is based, all of which have been duly heard and considered. Furthermore, by letter of December 26, 2011, he expressly explained to the CAS that no hearing should be held if the Panel considered itself sufficiently informed.

B. Existence of the Anti-Doping Rule Violation

17. It is undisputed that Fauconnet committed an anti-doping rule violation within the meaning of Article 2 of the ISU Rules.
18. According to Article 10.2 of the ISU Rules, such a violation is sanctioned with a two-year period of ineligibility, unless the conditions for eliminating, reducing or increasing this period are met.
19. The Disciplinary Commission decided that Fauconnet qualified for a reduction of the period of ineligibility on the basis of Article 10.4 of the ISU Rules, and it is against this finding that Fauconnet has appealed. The question that must therefore be decided is whether the conditions of Article 10.4 of the ISU Rules are met, and whether the appropriate sanction was imposed, given all the relevant circumstances.

C. Fulfilment of the Conditions to Benefit from a Reduced Sanction

20. As indicated above, Tuaminoheptane is a component of Rhinofluimucil, which appears in category S6(b) (Specified Stimulants) on the Prohibited List of the WADA Code (implemented by Article 4.1 of the ISU Rules). Tuaminoheptane is thus a Specified Substance.
21. The commentary to Article 4.2.2 of the WADA Code, which provides a definition of Specified Substances, (and which is implemented by Article 4.2.2 of the ISU Rules) explains the reason for providing specific rules for Specified Substances:

¹ See e.g. CAS 94/129, para. 59; CAS 2006/A/1177, para. 19-20 and references therein; CAS 2009/A/2018, para. 63-64 and references therein.

² See e.g. CAS 98/211, para. 8 and references therein.

In drafting the Code there was considerable debate among stakeholders over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an antidoping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances.

22. Article 4.2.2 of the WADA Code thus sought to introduce some flexibility when determining a sanction for an athlete that has ingested a Specified Substance.
23. Article 10.4 of the ISU Rules provides for more flexible sanction, and the commentary to Article 10.4 further explains why Specified Substances are treated differently to other Prohibited Substances:

[T]here is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.
24. Nevertheless, to benefit from the elimination or reduction of the period of ineligibility under article 10.4 of the ISU Rules, an athlete must establish:
 - a) How a Specified Substance entered his or her body or came into his or her possession; and
 - b) That such Specified Substance was not intended to enhance the athlete's sporting performance or mask the use of a performance-enhancing substance.
25. Regarding the first condition, the commentary to Article 10.4 of the ISU Rules provides that *"the Skater may establish how the Specified Substance entered the body by a balance of probability"*. In other words, a panel should simply find the explanation of a Skater concerning the presence of a Specified Substance more probable than not.
26. With respect to the second condition, a panel must be *"comfortably satisfied by the objective circumstances of the case that the Skater in taking or possessing a Prohibited Substance did not intend to enhance his or her sport performance"*. In case CAS 2010/A/2107, para. 9.14, the panel clarified that an athlete only needs to prove that he/she did not knowingly take the specified substance, rather than the product, with an intent to enhance his sporting performance.
27. It follows that the second condition is met when a skater can produce corroborating evidence in addition to his or her word, which establishes to the comfortable satisfaction of a panel that he or she ingested a specified substance unknowingly, e.g., by ingesting a contaminated product.

28. As already indicated, it is uncontested that Fauconnet meets the two foregoing conditions, *i.e.*, that he established how the Product entered his body and that he did not knowingly ingest the Specified Substance in question, *i.e.* Tuaminoheptane (contained in the Product), with the intent of enhancing his performance.
29. Consequently, the question that remains to be addressed is what sanction must be applied to the Athlete in the circumstances of this case.

D. *Applicable sanction*

a) Scope of review

30. The ISU requests that the period of ineligibility of eighteen months decided in the first instance be confirmed.
31. Furthermore, the ISU claims that the applicable sanction set by the Disciplinary Commission falls within its discretion.
32. The Panel disagrees that such discretion can be invoked as a matter of law and principle, even if CAS panels may consider that the circumstances warrant it following a disciplinary body's judgment and if in certain cases CAS has considered that the sanction should only be reviewed if it is evidently and grossly disproportionate to the offence³.
33. Indeed, in determining, as an international appellate body, the correct and proportionate sanction, CAS panels must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. In that connection the introduction to the WADA Code expressly states that two of its purposes are to promote equality for Athletes worldwide and to ensure harmonization of anti-doping programs. As the Panel in CAS 2010/A/2107 notes, a sanction must further comply with WADA's "*objective of proportionate and consistent sanctions for doping offences based on an athlete's level of fault under the totality of circumstances*".
34. Moreover, the Panel has full power to review the matter in dispute pursuant to Article R57 of the Arbitration Code.
35. The Panel will therefore examine with full powers what it deems the appropriate sanction.
36. As shall now be examined, in making that determination, the Panel must focus on the Skater's degree of fault.

³ See e.g. cases CAS 2009/A/1870, para. 48 and references therein; CAS 2009/A/1918, para. 59, and references therein.

b) The degree of fault

37. In keeping with Article 10.4 of the WADA Code, Article 10.4 of the ISU Rules provides that *“The Skater or other Person’s degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility”*.
38. The commentary to Article 10.4 of the ISU Code indicates that *“[i]n assessing the Skater’s or other Person’s degree of fault, the circumstances considered must be specific and relevant to explain the Skater’s or other Person’s departure from the expected standard of behaviour”*.
39. Fauconnet argues that the case shows significant overlap with six decisions from sports disciplinary commissions and the French Anti-doping Agency sanctioning athletes for using Tuaminoheptane through the use of Rhinofluimucil. Three of these decisions were first instance decisions and, as such, cannot be relied on. Regarding the two decisions of the French Anti-Doping Agency, the circumstances of these cases cannot be compared to the circumstances in the current case due to the substantial differences between the applicable anti-doping rules and the ISU Rules. As for the decision of the International Olympic Committee dated February 10, 2010, the circumstances of that case differed from the present case since it concerned an out-of-competition anti-doping test.
40. However, a large number of cases may usefully guide the Panel in determining the appropriate sanction. In general, the Panel distinguishes between three categories of cases.
41. The first category concerns cases in which circumstances are of such exceptional nature that a tribunal substantially lowered the period of ineligibility (often up to the date of the decision)⁴. In line with CAS jurisprudence, a reduction of a sanction is possible in extremely rare and unusual circumstances⁵. Such circumstances do not apply in the present case. For instance, in CAS 2006/A/1025, the athlete tested positive for etilefrene, a prohibited substance, after drinking water he had poured into a glass he believed to be his own, but which had in fact been used by his wife moments earlier to take a colorless, odorless, and tasteless liquid medication to ease hypertension and menstrual pain. Unlike this athlete, the Skater was not a victim of “an extraordinary and unpredictable sequence of events”. The Skater voluntarily took the Product.
42. The second category consists of cases where a tribunal finds that an athlete has exercised at least a certain degree of care or where other mitigating circumstances lead to a reduction in the sanction⁶. All concern cases whereby the panel took into consideration factors such as inexperience at the professional level, the lack of any formal drug education, the athlete’s age and the fact that the athlete made inquiries about the product with the distributor.

⁴ See e.g. CAS 2005/A/826.

⁵ See e.g. CAS 2010/A/2307.

⁶ See e.g. CAS 2005/A/847; CAS 2005/A/958; CAS 2008/A/1490.

43. The third category of cases concerns those in which a panel finds that a reduction to the period of ineligibility would not be appropriate. A number of these cases show similarities with the present case.
44. Case CAS 2003/A/484 concerned an athlete who had taken a contaminated vitamin supplement. The athlete had failed to make *“even the most rudimentary inquiry”* about the product and relied solely on the product labels and statements of friends. The panel found that the athlete’s conduct amounted to *“a total disregard of his positive duty to ensure that no prohibited substance enters his body”* and applied no reduction to the sanction.
45. Case CAS 2008/A/1489 also concerned an athlete, who had taken a contaminated supplement. According to the panel, the athlete – who had only conducted limited internet research – had failed to take *“clear and obvious precautions”*. The panel found that the circumstances were not truly exceptional, and applied no reduction to the sanction.
46. Cases CAS 2008/A/1588 and 1629 concerned an athlete who had ingested a contaminated supplement without making any enquiries about the nature of this product. The panel found that the athlete had *“committed gross negligence which does not justify that the period of suspension be reduced”*.
47. Case CAS 2010/A/2229 concerned an athlete who had ingested a contaminated supplement and merely conducted a limited internet search and relied on a health shop employee’s recommendation. The panel found that the athlete’s degree of negligence was quite significant and, as a result, refused to reduce the sanction below the one-year suspension that was requested by WADA.
48. Fauconnet’s *“unreasonable conduct”* – ingesting a nasal decongestant containing Tuaminoheptane, a Specified Substance, without making any enquiries – is comparable to the conduct of the athletes in the above-mentioned cases. In all of these cases, the panel decided not to reduce the period of ineligibility initially imposed. The Panel believes that these cases provide useful analogies for the present case, particularly the last case since it concerned a Specified Substance.
49. The Panel finds that Fauconnet has failed to exercise at least some degree of reasonable care, and finds, on the contrary, that he was grossly negligent, notably for the following reasons combined:
 - It is within the athletes’ responsibilities to take care to avoid the use of any doping products. Athletes in general must be on their guard when considering the ingestion of any medication.
 - As a very experienced international athlete required to be knowledgeable of doping issues and risks, Fauconnet had no excuse not to be very careful in that respect.
 - Fauconnet however overlooked even the most basic prudent steps, which he could easily and should have taken in the circumstances, particularly in the case of a pharmaceutical

product. He could have conducted research on the Internet, which would have warned him that the Product contained Tuaminoheptane, a substance that could induce positive results to an anti-doping test. Indeed, a simple internet search shows that Rhinofluimucil contains a substance that could register as positive to anti-doping controls and that athletes ought to be careful in using the Product.

- Fauconnet failed to follow another basic prudent step, which would have been to consult his doctor (or his team's medical staff), who could have warned him that the Product contained Tuaminoheptane. The circumstance that there was no team doctor present at the time Fauconnet used Rhinofluimucil did not prevent him from seeking advice from another physician present in Changchun or in Shanghai or from a doctor in France by any means of communication.
 - Fauconnet first stated that he took the medication from his girlfriend's shelf. He then explained that the Product was prescribed by a doctor in 2008. Regardless of whether Fauconnet actually took the medication from his girlfriend's shelf or whether he obtained it through an old medical prescription, by packing it into his first aid kit without making any enquiry as to the nature of such product, Fauconnet demonstrated a lack of the most basic care that can be expected from a high level athlete.
 - Fauconnet did not mention taking the medication during the doping control.
 - Fauconnet kept neither the box nor the leaflet of the Product. The leaflet of the Product specifically mentions that it contains Tuaminoheptane and warns athletes that it may lead to positive results in anti-doping controls.
50. Such carelessness is reinforced by Fauconnet's age, experience and drug education. Indeed, Fauconnet participated in ISU events since 2002 and was a member of the French Olympic team twice. Fauconnet is 26 years old and has already been submitted to various anti-doping controls. As such, it cannot be claimed that Fauconnet was not sufficiently aware of an athlete's duty to ensure that he did not ingest any prohibited substance.
51. In addition, the Panel does not accept Fauconnet's argument according to which the better the results before and after a doping test, the less the Athlete should be sanctioned. The Panel takes the view that good results reinforce the Athlete's responsibility to be extremely careful regarding doping offenses.
52. Moreover, the Panel finds that the good character evidence submitted by the Athlete, which the Panel accepts, cannot mitigate his culpability so as to reduce his sanction. The absence of past anti-doping offences and the athlete's cooperation is solely relevant for determining the applicable range of sanctions, not to reduce the sanction given for a first offence⁷.
53. Finally, the Respondent's submission that the sanction is disproportionate since it has caused Fauconnet to miss the first two World Cups of season 2011-2012 must be rejected. As the

⁷ See e.g. CAS 2005/A//847, at para. 30, CAS 2007/A/1364, at para. 19, CAS 2010/A/2307.

commentary to Article 10.4 of the ISU Rules explains, “[t]he fact that a Skater would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Skater only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article”. These facts can therefore not be taken into consideration by the Panel when determining the sanction.

54. Having found that Fauconnet’s degree of negligence is significant for the above reasons and in light of the above-mentioned cases, the Panel considers it was not disproportionate to reduce the period of ineligibility by one quarter of the maximum sanction of two years, as stipulated in Article 10.4 of the ISU Rules.

55. In conclusion, the Panel wishes to underline that it believes that Fauconnet did not intend to cheat or enhance his sporting performance. It is therefore unfortunate that he made this mistake that is inconsistent with his otherwise clean anti-doping record. To be in keeping with the applicable rules and to meet the need of promoting equality of athletes worldwide, the Panel must nevertheless apply a sanction that is proportionate to the quite significant lack of diligence Fauconnet demonstrated in ingesting the Product. Thus, for the reasons indicated above, Fauconnet is declared ineligible to compete in all sporting competitions for a period of eighteen months.

c) Start Date of Ineligibility Period

56. Article 10.9 of the ISU Rules determines that:

Except as provided below, the period of Ineligibility shall start on the date of the decision of the Hearing Panel 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 to be served.

57. Furthermore, Article 10.9.1 determines that:

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Skater or other Person, the ISU Disciplinary Commission or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date, commencing as early as the date of Sample collection or the date on which another Anti-Doping Rule violation last occurred.

58. Article 10.9.2 provides that:

Where the Skater promptly (which, in all events, means before the Skater competes again) admits the Anti-Doping Rule violation after being confronted with the alleged Anti-Doping Rule violation by the ISU, the period of Ineligibility may start as early as the date of Sample collection or the date on which another Anti-Doping Rule violation last occurred. In each case, however, where this Article is applied, the Skater or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Skater or other Person accepted the

imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

59. The Panel is of the opinion that Article 10.9.1 and 10.9.2 are both applicable in the present matter. The Panel takes note of the fact that when confronted with the results, Fauconnet waived his right to have the B sample tested, thereby acknowledging the anti-doping rule violation. Fauconnet responded promptly to all the ISU letters so as to obtain an explanation relating to the offence.
 60. Despite Fauconnet's cooperative attitude in advancing the process, it took almost ten months, from the date of the sample collection, for a decision to be rendered. Due to this duration of the adjudicating process, not attributable to the Athlete, the Panel deems it fair to apply the principle set forth in Article 10.9.1 of the ISU Rules and start the period of ineligibility at an earlier date than the day of notification of this award.
 61. Based on article 10.9.1 and 10.9.2 of the ISU Rules which enables to "(...) *start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection (...)*", the Panel determines that Fauconnet's suspension will run from December 12, 2010. The Panel does not find any element in the file justifying starting the ineligibility period on December 27, 2010. On the contrary, the Panel finds that evidence provided by the Athlete specifically state that the date of Sample collection was December 12, 2010. The Panel therefore considers December 12, 2010 as the starting date of the ineligibility period and amends the ISU Decision in that respect.
- d) Disqualification of the Results
62. In his answer, Fauconnet submits that it is abusive to request the disqualification of both the athlete and the French team results obtained from December 2010 until October 2011 because the delay in rendering a decision is attributable to the ISU Disciplinary Commission and the ISU are responsible for the delay. Fauconnet argues that, should the ISU Decision have been rendered earlier, the question of the results' disqualification would not have been an issue.
 63. The ISU submits that Article 11.4 and Article 10.8 clearly provide that the individual results and the team results obtained from December 12, 2010 must be disqualified.
 64. Article 10.8 provides that:

In addition to the automatic Disqualification of the results in the Competition, which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), and any Disqualification of results in the Event pursuant to Article 10.1 (Disqualification of Results in an Event during which an Anti-Doping Rule Violation occurs), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other Anti-Doping Rule violation occurred, through the

commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

65. Article 11.4 states as follows:

Article 10.8 applies to the subsequent results of Teams in which the Skater who committed a violation of the Anti-Doping Rules competed as a member of the Team.

66. The Panel considers that the considerations invoked by the Athlete do not apply in this case because he is in effect requesting that results obtained after the commencement of the ineligibility period be maintained.

67. According to CAS jurisprudence, “[t]hat would not only be in contradiction with the sanction of ineligibility itself, but would also be unfair compared to the treatment of the majority of athletes who are provisionally suspended from the outset due to non-contested positive anti-doping test and whose provisional sanction is never lifted, thereby never having the opportunity to enter any competitions and obtain results/prizes pending the final resolution of the anti-doping violations charges. For reasons of fairness, the Panel has decided above to start the Athlete’s ineligibility period at a much earlier date than what would in principle apply. The consequence of that cannot be that the results obtained after the beginning of such period would not be affected”⁸.

68. Moreover, the Panel considered whether it should refrain from disqualifying Fauconnet’s results during the period of ineligibility prior to this award (This issue does not arise with respect to prospective ineligibility because it implies disqualification by virtue of the bar on the athlete’s participation in competitions during the prospective period of ineligibility). The Panel has concluded that ineligibility cannot be severed from disqualification in the absence of a clear provision in the applicable rules supporting such severance, which might plausibly have been justified in cases, such as the present one, in which the period of ineligibility begins before the date of the award and where the nature of the violation of the applicable rules is such that it can be presumed that the violation has not affected the results in other competitions in which the athlete has participated during the period of ineligibility prior to the award.

69. For the above reasons, the Panel decides that the results obtained by Fauconnet from December 12, 2010, which is the date when, according to the Panel’s decision, the ineligibility period is deemed to have started, including the ones obtained from November 28, 2011 (date of the CAS Order for stay) are disqualified. Pursuant to Article 11.4 of the ISU Rules, the results of Fauconnet’s Team, when Fauconnet competed as a member of the Team, during the latter period shall be disqualified.

⁸ CAS 2011/A/2384-2386; CAS 2008/A/1744, para. 55; CAS 2008/A/1675, para. 47; CAS 2007/A/1362, para. 64.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Thibaut Fauconnet on 21 October 2011 is dismissed.
 2. The appeal filed by the International Skating Union on 31 October 2011 is upheld.
 3. Mr Thibaut Fauconnet is declared ineligible for a period of eighteen months, starting on December 12, 2010.
 4. Mr Thibaut Fauconnet's competitive results obtained from December 12, 2010, to date, including but not limited to, (i) his results obtained at the 2011 ISU European Championships in Heerenveen (14. – 16.01.2011); (ii) his results obtained at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011); (iii) his results obtained at the ISU World Cup 2010/2011 in Dresden (18. – 20.02.2011); and (iv) his results obtained at the 2011 ISU World Short Track Championships in Sheffield (11. – 13.3.2011), are disqualified with all the resulting consequences including forfeiture of any medals, points and prizes.
 5. Competitive results obtained by any Short Track Team in which Mr Thibaut Fauconnet competed as a member of the team from December 12, 2010 to date, including but not limited to, the 6th place reached by the French team at the ISU European Championships in Heerenveen (14. – 16.01.2011), in 5'000 meter relay, the second place reached by the French team at the ISU World Cup 2010/2011 in Moscow (11. – 13.2.2011) in 5'000 meter relay and the 8th places reached by the French team at the ISU World Championships in Sheffield (11. – 13.3.2011) are disqualified with all the resulting consequences including forfeiture of any medals, points and prizes.
- (...)
8. All other requests for relief are rejected.