CAS 2010/A/2268 I. v. Fédération Internationale de l'Automobile (FIA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Massimo **Coccia**, Professor and Attorney at Law, Rome, Italy

Arbitrator: Mr Ulrich **Haas**, Professor, Zurich, Switzerland

Arbitrator: Mr Quentin **Byrne-Sutton**, Attorney at Law, Geneva, Switzerland

Ad hoc Clerk: Mr Daniele **Boccucci**, Assistant at the University of Zurich, Switzerland

In the arbitral proceeding between

Mr I., Poland

Represented by Dr Michael Lehner, Attorney at law, Bornheim v. Rosenthal Rechtsanwälte Notar, Heidelberg, Germany

as Appellant

and

Fédération Internationale de l'Automobile (FIA), Paris, France

Represented by Dr Xavier Favre-Bulle and Ms Morjolaine Viret, Attorneys at Law, Lenz & Staehelin, Geneva, Switzerland

as Respondent

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I. PARTIES

1. Mr I. (hereinafter also the "Appellant" or the "Driver"), born on 12 September 1997, is a Polish kart driver competing with the Wallrav Racing Club which is, in turn, member of the Polish Motorsport Federation (hereinafter referred to as "PZM"). At the time of the facts discussed in the present arbitration, Mr I. was 12 years old and was competing in karting races of the class KF3.

2. The Fédération Internationale de l'Automobile (hereinafter also "FIA" or the "Respondent") 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. BACKGROUND FACTS

3. The background facts stated herein are a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the parties' factual and legal submissions.

4. The Appellant took part in his first karting race in 2007, when he was 10 years old. His first full season as a karting driver was in 2008, when he finished fourth in the Polish Kart Championship for the category "Bambini". In 2009 the Appellant participated in the Belgian Karting Championship – class KF 5 – finishing third. In 2010 he took part in several competitions, among which the Polish International Karting Championship (hereinafter "PIKC") – class KF 3 – and the German Junior Karting Championship (hereinafter "DKJM"). The Appellant won the PIKC in the KF 3 class and finished sixth in the DKJM. As a karting driver competing both at national and international level, the Appellant holds a national and an international licence, issued, respectively, by the PZM and by the FIA.

5. On 16-18 July 2010, at the age of 12, the Appellant participated in a competition in the context of the DKJM which took place in Ampfing (Germany), obtaining the second position.

6. On 18 July 2010, in the context of the said karting competition in Ampfing, the Appellant underwent an "in-competition" anti-doping control carried out by the German National Anti-Doping Agency (hereinafter "GNADA") at the request of the *Deutsche Motor Sport Bund* (hereinafter "DMSB"), the German Motor Sports Association, affiliated to FIA. The Appellant's father accompanied him throughout the anti-doping control process. At the end of the doping control both the Appellant and his father signed the doping control form.

7. On 4 August 2010, the GNADA notified the DMSB of the results of the analysis of the Appellant's A sample, which had revealed the presence of "Nikethamide", a Specified Substance included in the category S6 b (stimulants) of the WADA Prohibited List.

8. On 5 August 2010, the DMSB informed the PZM of the Appellant's adverse analytical finding and advised the PZM "to initiate the necessary proceeding".

9. On 16 August 2010, the PZM sent a communication to the Appellant and his parents informing them of the positive test result for the prohibited substance "Nikethamide".

10. On 17 August 2010, the PZM requested – on behalf of the Appellant – the DMSB to carry out the counter-analysis on the Appellant's B sample.

11. On 18 August 2010, the Polish Main Karting Commission ("PMKC") communicated to the Appellant its decision, dated 17 August 2010, to suspend him provisionally from any national and international competitions.

12. On 23 August 2010, the FIA sent a communication to the PZM and to the DMSB, informing them that, "according to Article 10.12.1 of Appendix A to the International Sporting Code", the FIA was the competent authority to conduct the results management process in the Appellant's case.

13. On 27 August 2010, the FIA sent to the PZM a communication, asking the latter to reconsider the provisional suspension imposed on the Appellant on 17 August 2010 in view of the fact that the FIA was the competent body to conduct the results management process.

14. On 31 August 2010, the WADA-accredited Laboratory of Cologne (Germany) carried out the analysis of the Appellant's "B sample" in the presence of the Appellant's father. The "B sample" analysis confirmed the presence of "Nikethamide".

15. On 3 September 2010, the PZM informed the FIA that the provisional suspension imposed on the Appellant had "ended" and that the Appellant was "entered to the 2010 CIK-FIA World Cup for KF 3" to be held on 9-12 September 2010 in Braga (Portugal).

16. On 8 September 2010, the FIA formally communicated to the Appellant the adverse analytical results of the B sample.

17. On 23 September 2010, the FIA informed the Appellant that a hearing for his case had been fixed on 11 October 2010 in Paris before the Anti-Doping Committee – FIA Medical Commission ("ACMC").

18. On 11 October 2010, the hearing took place in Paris, with the Appellant's father, attending on behalf of his son. The ACMC issued the Decision No. 2/2010 (the "Appealed Decision") which imposed on the Appellant a period of ineligibility of two years, starting on 18 July 2010 and ending on 18 July 2012. The ACMC, furthermore, decided to disqualify the Appellant and to strip the latter of his "individual result achieved in the 'ADAC Kartenrennen Ampfing', DKM Weekend event held in Ampfing, Germany, on 18 July 2010, as well as from any competitive results achieved as from 18 July 2010, with all resulting consequences including forfeiture of any trophies, point and prizes". In the grounds of the Appealed Decision, the ACMC stated, *inter alia*, as follows:

> «[*b*]*ased on* [*the Driver's*] *Adverse Analytical Finding, confirmed by both 'A' and 'B' Sample Analyses of* [*the Driver's*] *sample collected during the event in question, the ACMC concludes that an Anti-Doping Rule Violation according to Article 2.1 of the FIA Anti-Doping Regulations – 'Presence of Prohibited Substance or its Metabolites or Markers in a driver's sample' is established (...). According to Article 2.1.3 of the FIA Anti-Doping Regulations, the presence of any quantity of* [*Nikethamide*] *constitutes an anti-doping rule violation. According to Article 10.2 of the FIA Anti-Doping Regulations, the period of ineligibility imposed for a violation of Article 2.1 shall be 2 years for the first violation, unless the conditions for eliminating or reducing the period of ineligibility as provided in Articles 10.4 and 10.5 (…) are met.* [*the Driver, or his*] *legal representative and father (…), failed to establish (…) how the Prohibited Substance entered* [*the Driver's*] *body,*

despite being repeatedly invited to do so by the ACMC panel members and having had the possible legal consequences of this situation explained to him. However, establishing how the Prohibited Substance entered [*the Driver's*] *body is a* conditio sine qua non *for elimination or reduction of the ineligibility period according to Articles 10.4, 10.5.1 and 10.5.2 of the FIA Anti-Doping Regulations. Therefore, none of these Articles may be used to eliminate or reduce the ineligibility period for* [*the Driver*]. *Furthermore,* [*the Driver*] *did not provide any assistance to the ACMC in discovering or establishing an anti-doping rule violation as presumed under Article 10.5.3 of the FIA Anti-Doping Regulations, nor did* [*the Driver*] *admit the anti-doping rule violation as presumed in Article 10.5.4 of the FIA Anti-Doping Regulations. With regard to these facts, the ACMC had no legislative option to eliminate or reduce* [*the Driver's*] *ineligibility period*».

19. On 20 October 2010, the FIA communicated the decision to the Appellant.

III. CAS PROCEEDINGS

20. On 4 November 2010, the Appellant filed with the CAS a Statement of Appeal against the Appealed Decision.

21. In his Statement of Appeal dated 4 November 2010, the Appellant also requested an extension of the time-limit for filing his Appeal Brief until 23 November 2010. On 11 November 2010, the Statement of Appeal was communicated to the FIA which gave its express consent to the extension requested by the Appellant.

22. On 22 November 2010, the Appellant filed with the CAS his Appeal Brief.

23. On 16 December 2010, the CAS gave notice of the formation of the Panel for the present dispute. The Panel was constituted as follows: Mr Massimo Coccia as President, Mr Ulrich Haas as arbitrator appointed by the Appellant and Mr Quentin Byrne-Sutton as arbitrator appointed by the Respondent. No party, either at this or at any later stage, objected to the constitution and composition of the Panel.

24. By letter dated 21 December 2010, the CAS acknowledged receipt of the Respondent's Answer (dated 20 December 2010) and advised the parties that, in accordance with Art. R56 of the Code of Sports-related Arbitration Rules (hereinafter the "CAS Code"), they would in principle not be authorized to supplement their

arguments, produce new exhibits or specify further evidence not mentioned in the appeal briefs or in the answer.

25. By letter of 27 December 2010, the Panel requested the FIA to produce – in accordance with Article R57 of the CAS Code – its case file and the laboratory documentation concerning the Appellant. The CAS Court office further informed the parties that only after receipt of the complete case file and laboratory documentation the Panel would decide whether, according to exceptional circumstances, the parties would be authorized to file further written submission, pursuant to Article R56 of the CAS Code.

26. On 10 January 2011, the FIA submitted to the CAS the complete case file of the proceedings before the ACMC and the laboratory documentation concerning the Appellant's adverse analytical findings. By the same communication, however, the FIA draw the Panel's attention to the fact that the Appellant had already received the complete case file before 11 October 2010 and that the FIA had not considered the documentation on the laboratory analyses to be necessary, as the results were unambiguous and the Appellant had not challenged the accuracy of the laboratory findings. Furthermore, the Respondent submitted a recording of the hearing before the ACMC. Finally the Respondent held that none of the above-mentioned documents justified, in its opinion, a further exchange of submissions, since all the documents filed with the CAS were either already in the possession of the Appellant, or could have been requested by him when preparing his Appeal Brief.

27. By letter dated 17 January 2011, the President of the Panel advised the Appellant that he was given the opportunity to comment on the recording of the hearing before the ACMC and on the laboratory documentation package, which were not at his disposal at the time of the filing of the Appeal Brief.

28. On 31 January 2011, the Appellant filed with the CAS a brief containing legal submissions in reply to the arguments set forth by the FIA in its Answer. In the same brief the Appellant stated that there was "no further need to comment" on the recording of the hearing before the ACMC and on the laboratory documentation package.

29. On 1 February 2011, the FIA objected to the Appellant's submission, stating that he "had breached the directives of the Panel and acted in breach of Article R56 of the Code in filing an unauthorized reply submission containing legal arguments". The FIA consequently requested the Panel to reject the Appellant's submission as inadmissible.

30. By letter dated 2 February 2011, the CAS informed the parties that in the Panel's opinion the Appellant's submission dated 31 January 2011 violated the Panel's instructions and did not comply with the provision of Article R56 of the CAS Code, which does not allow additional factual and legal arguments, unless agreed between the parties or authorized by the President of the Panel in view of exceptional circumstances. As a consequence the Panel decided that the Appellant's submission of 31 January 2011 was inadmissible because it violated the Panel's instructions and was not in accordance with the CAS Code.

31. On 9 February 2011, the CAS issued an order of procedure which was duly signed by both parties.

32. A hearing took place in Lausanne on 31 March 2011. The Appellant was present and assisted by an interpreter, Mr Igor Wladika, and was represented by the attorneys at law Dr Michael Lehner and Ms Annabelle Möckesch. The FIA was represented by the attorneys at law Messrs Xavier Favre-Bulle and Pierre Ketterer as well as by the head of FIA medical affairs Mrs Sandra Silveira Camargo. The hearing was attended also by both Appellant's parents, who were heard as witnesses. In addition, an expert appointed by the Appellant, Dr Gary Hartstein, was heard by teleconference. The parties throughout the hearing did not raise any procedural objections and expressly confirmed at the end of the hearing that their right to be heard and to be treated equally had been respected, as they had been given ample opportunity to present their cases, submit their arguments and answer the questions posed by the Panel.

IV. OUTLINE OF THE PARTIES' POSITIONS

33. The following summaries of the parties' positions are only roughly illustrative and do not purport to include every contention put forward by the parties. However, the Panel has carefully considered and taken into account in its discussions and subsequent deliberations all of the evidence and arguments submitted by the parties, even if there

is no specific reference to those arguments in the following outline of their positions or in the ensuing analysis.

A) THE APPELLANT: MR I.

34. The Appellant submits that neither he nor his parents have ever submitted to the FIA Anti-Doping Regulations (hereinafter "FIA-ADR"). According to the Appellant, the application of anti-doping regulations requires an express recognition and/or a declaratory act, which is missing with regard to the FIA-ADR. The Appellant alleges that the FIA licence form was signed neither by him nor by his parents, so that a necessary prerequisite for the recognition of the mentioned rules is not met. The Appellant also contends that he and his parents were not put in a position to become actually aware of the anti-doping regulations, as they were not reported on the licence granted by the FIA and they had not been communicated to the Appellant or his parents by the PZM. The Appellant asserts that an implicit recognition of the FIA-ADR cannot be assumed by the mere participation in the race in Ampfing; on the one hand, the Appellant's behaviour could not imply any intent, for the recognition of anti-doping regulations is legally disadvantageous and would thus require the parent's consent; on the other hand, the mere participation in an international race is not equivalent to a concrete and sufficient declaration of the athlete's recognition of the anti-doping rules.

35. At the race in Ampfing, the Appellant was accompanied only by his father, who consented to the anti-doping control; however, according to the Appellant, a valid representation of a minor athlete in the context of an anti-doping control would require the joint presence and representation of both parents. It follows that, without the consent of both parents, the anti-doping test on the Appellant was not legitimately carried out. The Appellant reminds that this corresponds to the principle of joint parental representation, which is accepted all over Europe. The Appellant thus contends that his acceptance of an anti-doping control and his recognition of the anti-doping rules must come with the express consent of both parents, as they give raise to exceptional "real and legal" obligations. The recognition of the anti-doping regulations by the parents of a minor must be considered, therefore, to be a prerequisite for the participation of that minor in motor sports competitions, which imply considerable health risks (*e.g.* that of an accident). This must also apply to the

recognition of the anti-doping regulations and to the consent which the parents of a minor must give to a doping control carried out on the latter, considering that these controls can result in an "intimidating and stressful" experience for a child.

36. The Appellant further argues that, in any case, the FIA-ADR cannot be applied to a twelve-year old child, as was the Appellant at the time of the race in Ampfing. In the grounds of its decision, the ACMC did not even mention the fact that it had applied the FIA-ADR to a minor without any restriction. The circumstance that the issue of an adequate treatment of a minor has not been dealt with so far by the World Anti-Doping Agency (hereinafter "WADA") and other sports federations cannot be considered as a valid justification. However, even if the World Anti-Doping Code (hereinafter "WADC") does not contain specific provisions concerning minors, the comment to Article 10.5.2 states that the athlete's minor age has to be considered in some way. The mentioned comment, in fact, states that "[*w*]*hile minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's (…) fault under Article 10.5.2*". It is therefore clear that the decision issued by the ACMC on the Appellant's case is wrong, as it completely disregards the problem related to his minor age.

37. The Appellant argues that the imposition of a period of ineligibility for a doping offence must be compared with the imposition of sanctions under criminal law. Furthermore, establishing an age limit for criminal responsibility is a constitutional requirement. This age must be appropriate and adequate in consideration of the various interests at stake. If the rules issued by a federation contradict the determination of such an age limit, there is the possibility of not applying the rules. The Appellant contends that in the present case the FIA-ADR cannot be applied, as the Appellant had not attained the age of criminal responsibility. This holds true both under German and Polish law. The reference to these two countries is justified by the fact that it is either the law of the offender's home country or that of the country in which the offence was committed which must be applied.

38. The Appellant alleges that, in the interest of an efficient fight against doping, the imposition of a sanction on a child is less necessary than the sanctioning of adults and that the negative impact of a sanction for a doping offence is greater when a child is concerned, for the encroachment on personal rights connected to it are particularly

serious. It should also be taken into account that, due to the lack of capacity, there is no need for a federation – which aims at punishing responsible doping offences – to sanction a child.

39. The Appellant also contends that the FIA-ADR can be interpreted flexibly with regard to athletes who have not attained the age of criminal responsibility. This follows from Articles 10.5.1 and 10.5.2, which state that the athlete is given the possibility of establishing that he bears no significant fault or negligence in order to reduce or exclude the period of ineligibility. The Appellant remarks that, according to the WADC's comment on the corresponding provisions, the sanction can be avoided by demonstrating that the athlete was victim of an act of sabotage, which might have occurred in the present case. The WADC's comment also states that the youth and lack of experience of an athlete must be taken into account when deciding on the length of the period of ineligibility. According to the Appellant, therefore, there are no obstacles to a flexible interpretation of the FIA-ADR, in the sense that a period of ineligibility should not be imposed before an athlete attains a minimum age.

40. The Appellant also argues that, even assuming that a period of ineligibility for a child cannot be excluded in general, the presumption of fault established by the FIA-ADR – covering both fault and negligence – should not be applied in the present case, as such principle is based on the notion that the athlete is capable of acting responsibly in all respects and on the idea of a well-informed athlete. According to the Appellant, this logical frame – which should be put in question also when adults are involved – is absolutely inappropriate in the case of a child and should not be applied to the case at stake. The principle of presumption of fault cannot be maintained by a reference to the responsibility of the parents either; in fact, even if under the FIA-ADR the athlete is responsible also for his entourage, this idea is based on the assumption that the athlete himself was at fault because he failed to control the persons he trusts. Nevertheless, in the case of a twelve-year old boy it is exactly the capacity of evaluation and control which cannot be assumed.

41. The Appellant underscores that neither he nor his parents were aware of the existence of the substance "Nikethamide". They learned about the mentioned substance only by means of a research carried out after they were notified of the results of the doping test in Ampfing. The substance "Nikethamide" is contained in lozenges similar to normal candies and its use is common among young people, as the advertising campaigns of

pharmaceutical companies publicize the lozenges as harmless energizers, the effect of which is comparable with that of some well-known soft-drinks. Even if the Appellant allegedly ingested such a lozenge in the hope of enhancing his performances, it cannot be assumed that he knew, or should have known, about the prohibition of such substance. Considering that the lozenges are widely used and advertised without any warning, the Appellant – as a twelve-years old child – did not have to assume that by taking the lozenge he was committing an anti-doping rule violation. This is all the more so as he was never informed in an age-appropriate way about which substances are prohibited.

42. Therefore, the Appellant requests the Panel to grant the following relief:

> «*To set aside the judgement made by the FIA on 11.10.2010 and to acquit [him] of the charge of a doping offence*».

B) THE RESPONDENT: FIA

43. With regard to the Appellant's acceptance and knowledge of the FIA anti-doping rules and controls, the Respondent points out that the Driver has been competing with a racing club affiliated to the PZM, which is, in turn, member of the FIA. In order to take part in international competitions, the Appellant holds an International Driver Licence which he has duly signed. The back of the Licence reports a text (both in French and Polish) which clearly reads that the Holder declares, through his signature, to recognize and to abide by the sporting regulations of the FIA.

44. Most of all, the Respondent emphasizes that the Appellant and both his parents signed the application form to obtain the International Driver Licence 2010. By signing the application form (in Polish), they declared, in particular, to acknowledge the PZM and the FIA regulations and to accept the possible submission to disciplinary proceedings. The Respondent also remarks that a further declaration of acceptance of the FIA-ADR derives from the signing by the Appellant and his father of the entry form of the DMSB for the 2010 *Deutsche Junior Kart Meisterschaft* (i.e. German Junior Karting Championship, hereinafter "DJKM") in the karting category KF3.

45. The Respondent also contends that the general principle of joint representation of the minor by both parents does not imply that the parents must always act together each time that the minor deals with third parties. According to the Respondent, pursuant to French law – which is applicable to the present dispute, given that the FIA is based in

France – "*when one of the parents performs alone a usual act of parental responsibility concerning the person of the child, he or she shall be considered to be acting with the consent of the other with regard to the third parties in good faith*". Now, given the fact that the Appellant was participating for the fourth consecutive year in international competitions, the filling of an entry form for a race must be clearly considered as an "usual" act. This is all the more so, given that the consent of the Appellant's mother can be inferred by her signing of the Application for the 2010 International Driver Licence. For these reasons, the Respondent argues that it was perfectly logical to assume that the Appellant's father (who was the only parent present at the event in Ampfing and who registered the Driver for the race) could act alone as the Appellant's legal representative.

46. The Respondent contends that FIA implemented the provisions of the WADC bearing always in mind the issue of minors. According to the Respondent, this is demonstrated, *e.g.*, by the fact that the FIA-ADR provide special guidelines for sample collections on minors. The minor age of the Appellant was also carefully considered in the disciplinary proceedings before the ACMC, where he was given the possibility to answer in writing to the questions posed by the disciplinary body, instead of appearing at the hearing. It must also be pointed out that, while the protection of young athletes is one of the fundamental concerns under the WADC, this does not mean *per se* that minors are granted a general immunity from anti-doping rules and sanctions. Such an approach would obviously have the negative effect of encouraging the use of doping substances on and by minors.

47. The Respondent contends that the criterion of the age for criminal responsibility is inappropriate to establish whether the Appellant can be held responsible for an anti-doping rule violation. The FIA is an organization of civil law and the sanctions imposed by it on its licensed individuals have exclusively civil law effects. The Respondent reminds that the Swiss Supreme Court has confirmed that criminal law principles are not *per se* applicable to doping disputes arising from decisions of international federations organized under private law. This is also consistent with the jurisprudence of the CAS, according to which anti-doping proceedings and sanctions imposed on an athlete as a consequence thereof have no criminal character.

48. The Respondent underscores that any analogy with the age of responsibility under criminal law should also be avoided because there is not, actually, a generally accepted age for the exclusion of criminal responsibility, which is different depending on the law of each country. There is also a fundamental distinction between disciplinary and criminal proceedings. Unlike criminal law, which has a general range, in disciplinary proceedings the only person on whom a sanction can be imposed is the athlete, so that the only possibility for sports authorities to contrast doping practices on minors is the imposition of sanctions on them.

49. The Respondent argues that, contrary to the Appellant's arguments, sports authorities have a considerable interest in sanctioning young athletes for anti-doping rule violations. The interest in sanctioning is actually greater with regard to young athletes than adults, considering the need for the protection of minors and for the early prevention of doping practices. What is more, if minors were to be granted immunity from sanctions, this would have as a consequence the practical liberalization of doping for minors.

50. According to the Respondent, it is not correct to argue – as the Appellant does – that the FIA-ADR should be interpreted flexibly with regard to athletes not having attained the age of criminal responsibility, because the WADC establishes that the athlete's youth may be considered in assessing his fault. This fact seems rather to show that the provisions of the WADC are supposed to apply to young athletes too. This follows also from a well-established jurisprudence of the CAS.

51. The Respondent also remarks that the presumption of fault applies to all competitors. To protect the fairness of competitions, all athletes have the duty to ensure that no prohibited substance enters their body. The WADC does not grant minors an exemption from this general rule. Furthermore, there is no duty for a sport governing body to communicate the rules in an age-specific manner. According to the Respondent, if a minor lacks the capacity to understand the wrongfulness of his acts and the capacity to control his conduct, he should stay away from an environment which requires the compliance with duties implying those capacities.

52. The Respondent contends that, even if the WADC provides that the youth of the athlete and his lack of experience may be considered in assessing the degree of fault and thus in reducing the sanction, this possibility is limited only to the specific cases

where the degree of fault is relevant in determining the sanction under the Code (*i.e.* in relation to the provisions of Articles 10.5.1 and 10.5.2). Under the corresponding provisions of the FIA-ADR, a reduced sanction for a Specified Substance like "Nikethamide" would be possible only if the athlete established how the substance entered his body and that he had no intention to enhance his sport performance. As the Appellant did not establish any of the two mentioned prerequisites, there is no possibility to assess his degree of fault or negligence. Therefore, the period of ineligibility with which he must be sanctioned is the standard period of two years, in accordance with Article 10.2 of the FIA-ADR.

53. Finally, the Respondent asserts that the arguments brought forward by the Appellant to show that he bears no significant fault or negligence – *i.e.* the fact that he and his parents did not have a detailed knowledge about doping substance in general and had never heard about "Nikethamide" before, and that the mentioned substance is contained in products available "over-the-counter" – have been dismissed by the CAS in several decisions.

54. Therefore, the FIA requested the Panel to grant the following relief:

> «*1. To dismiss the appeal filed by Mr I. in its entirety;*
>
> *2. to order Mr I. 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;*
>
> *3. to dismiss any other relief sought by Mr I..*»

V. JURISDICTION

55. Article R47 of the CAS Code reads 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*».

56. Article 12.2 of the FIA-ADR provides that "*a driver may appeal only to the Court of Arbitration for Sport*" with reference to "*any sanction imposed in application of the Regulations, resulting from a Doping Control carried out during an international event registered on the calendar of the FIA, or following an Out-of-Competition Doping Control*".

57. The jurisdiction of the CAS has been also explicitly recognised by the parties in their briefs and in the Order of Procedure they have signed.

58. It follows that the CAS has jurisdiction over the present arbitration proceedings.

VI. ADMISSIBILITY

59. Article D.13 of the FIA-ADR provides a time-limit of twenty-one (21) days for an appeal before the CAS for decisions taken by the ACMC. The time-limit starts on the date of receipt of the relevant decision.

60. The decision was communicated to the Appellant on 20 October 2010.

61. The Appellant filed with the CAS a Statement of Appeal against the Decision on 4 November 2010.

62. The present appeal complies with the time-limit established by Article D.13 of the FIA-ADR. In any event, the Respondent has not raised any objection as to the admissibility of the appeal.

63. It follows that the appeal is admissible

VII. APPLICABLE LAW

64. Article R58 of the CAS Code reads as follows:

> «*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*».

65. The Panel 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 Panel holds that, in principle, French law shall apply on a subsidiary basis.

VIII. MERITS

66. Pursuant to Article R57 of the CAS Code, the Panel has "*full power to review the facts and the law*". As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review on the merits of the case, which it is not confined to deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it is the mission of this Panel to make its independent determination as to whether the parties' contentions are inherently correct rather than to assess the correctness of the Appealed Decision (see CAS 2007/A/1394 *Landis v. USADA*, para. 21).

A) THE DRIVER'S SUBMISSION TO THE ANTI-DOPING REGULATIONS

67. The Appellant argues that neither he nor his parents explicitly or implicitly recognized the anti-doping regulations (*i.e.*, the FIA-ADR and the WADC on which they are modeled); as a consequence, such regulations would not be binding on him. In the Appellant's view, the doping control carried out in Ampfing should then be considered illegitimate and there would be no possibility to impose any sanction on him, as both the control and the sanction would lack of any legal bases.

68. The Panel notes that it is common ground between the parties that the karting race in Ampfing was an international event, included in the FIA International Sporting Calendar, and that the possession of a valid FIA International Driver Licence was a requirement to take part in such race. The race must thus be considered as a FIA event, to which the FIA regulations in general and the FIA-ADR in particular are applicable. It seems to the Panel that an effective submission of the Appellant to these regulations can be clearly inferred by the documents on file.

69. The first evidence of such Driver's submission to the FIA-ADR is constituted by the application forms for the National and International Driver Licences for the season 2010 (*i.e.* the relevant season for the case at hand), signed by both the Appellant and his parents. In these documents it is clearly stated – even in Polish – that the signatory expressly acknowledges with his signature to be aware of the relevant FIA regulations,

that he agrees to comply with the competitors' obligations set forth by the FIA provisions and to observe the requirements of karting sport.

70. The signing of the application form for the International Driver Licence by the Appellant and both his parents is a clear acceptance of the FIA-ADR. It is inconceivable that an athlete – whatever his age – might take part in an international competition sanctioned by an international federation without, at the same time, submitting to the sporting rules duly adopted and duly published (in particular on the Internet, as is the case here) by that international federation. Sport requires for all competitors a level playing field, both in a literal and in a metaphorical sense, without which it would not be true sport.

71. The Panel remarks that the Appellant's submission to the FIA-ADR can also be clearly inferred from the fact that both he and his father signed the German entry form concerning the race in Ampfing, valid for the DJKM. The signing of this form, including a "General Declaration of Agreement of the Applicant and the Driver", must also be seen as the Driver's clear acceptance of all the rules adopted and published by the sporting organizations sanctioning such event.

72. According to the text of the mentioned "Declaration", the Applicant and the Driver, first of all, affirm that "*the statements made in the entry form are correct and complete*". The same text goes on stating, *inter alia*, that the Applicant and the Driver:

> «*declare by their signatures that*:
>
> – *[t]hey are aware of the International Sporting Code (ISG) of the FIA (…), the anti doping code of the National Anti-Doping Agency (NADA Code), the anti-doping regulations of the FIA, the DMSB rules, the general championship rules, the special series rules, the code of rules and regulations (RuVO), the DMSB environmental guidelines and the other FIA and DMSB rules.*
>
> – *They acknowledge that such rules are binding and that they will comply with them.*
>
> – *With their consent, these rules and regulations and the declarations in this entry form are an integral part of the contract with the organizer […].*

– *They commit not to take drugs or use prohibited methods, as defined in the prohibited list of the Anti-Doping Rules of WADA and the anti-doping regulations of the FIA*» (emphasis added).

73. Given the fact that the FIA-ADR and the WADA Prohibited List are readily available on the Internet, and the great publicity given to anti-doping matters by the media, the Panel cannot accept the assertion made by the Appellant that he or his parents could not "*be asked to look randomly for regulations which might apply* [to him] *in whichever place*". The above quoted declaration signed by the Driver and his father to enter the Ampfing race includes, actually, a very precise indication of the applicable regulations which the Driver had the duty to observe. Among the various regulations listed in the text, a specific reference is made to the FIA-ADR and to the WADA Prohibited List (see *supra* at 72).

74. The Appellant further complains about the fact that the FIA-ADR were, in any case, not available in his mother tongue (*i.e.* Polish). In this regard, the Panel notes again that the Ampfing race was an international event which required the holding of a FIA International Driver Licence to participate. In the Panel's view, this is without merit. Since the Driver, supported by his parents, chose to compete at international level in a foreign country, he is precluded from complaining about the typical features of any international sporting competition, among which the fact that often regulations are only issued in a few specified languages (usually English and French).

75. In the Panel's opinion, it is a principle of *lex sportiva* that the organizer and the sanctioning authorities of an international sporting event have a right to use their official languages and have no obligation to provide translations to the participants. It is up to the competitors who enter the event to put themselves in a condition – in case, hiring an interpreter – to understand the communications and rules issued by the organizer and the sanctioning authorities. In other words, athletes competing in foreign countries do not have a right to demand the translation in their own mother tongue of the relevant rules and documents.

76. For the same reason, the Panel cannot accept the Appellant's grievance that the doping control form was only in English (one of the official languages of the FIA) and in German (the language of the country in which the event took place).

77. In conclusion, the Panel holds that there was a valid and effective submission of the Appellant to the FIA-ADR and to the Prohibited List.

B) THE APPELLANT'S REPRESENTATION AT THE ANTI-DOPING CONTROL

78. The Appellant contends that he was invalidly represented during the anti-doping control carried out in Ampfing, because only his father was present and gave his consent to the test. In other words, the Appellant submits that, as the anti-doping control concerned a minor, the presence and the express consent of both his parents was needed, as they had his joint representation.

79. The Panel does not concur with the Appellant. The joint representation by the parents of a child does not require that both parents be present and expressly give their consent on every possible occasion when the minor could act in a way that could bring about – as in the present case – disciplinary consequences for the child. For instance, sometimes children do behave at school in a way that warrants disciplinary action by the school's principal; this commonly happens without any need for both children's parents to be present in the school premises.

80. A "factual" joint representation – meant as the actual need for the presence and expression of consent of both parents in a concrete circumstance – might be required only in situations characterized by a particular significance, which cannot be defined as a "normal act". This interpretation of the notion of joint responsibility and representation of a minor is very common all over Europe, and can be deemed to be a generally accepted legal principle.

81. The concrete examples of circumstances in which this factual joint representation is actually needed, put forward by the Appellant both in his Appeal Brief and in the exhibited expertise on Polish law, seem to corroborate this opinion. Those examples concern, *e.g.*, bank transactions and surgical interventions (the latter referred to in the Appeal Brief as "a situation involving a major risk for the child") or other situations (expressly defined as "significant cases" in the expertise on Polish Law filed by the Appellant) such as the choice of the name of the child, that of the place of his residence, that of his nationality and the like.

82. It is thus evident that those situations are of a completely different kind from that of a doping control carried out on occasion of a competition, which – even considering the young age of the Appellant – is not an unusual, but rather a "normal" occurrence in organized sport. The Panel is of the view that, once a young athlete is introduced with the consent of his parents in a context of international competitions, he must bear all the "normal" consequences of such competitions, including doping control procedures and the disciplinary consequences thereof. The Panel notes that in karting there are various cases in which a driver can be severely sanctioned (for example, under Article 2.24 of the already quoted General Prescriptions, if the driver willingly causes a collision or forces another driver out of the track). It appears evident to the Panel that a young driver could not avoid, just because one of his parents was not present at the race, a sanction deriving from such unsportsmanlike and dangerous behaviour. By the same token, he cannot avoid a sanction for an anti-doping rule violation.

83. It must also be noted (even though this is legally immaterial in light of the above considerations) that the Appellant's mother expressly stated at the hearing that she was aware of and consented to the participation of her son in the race in Ampfing. Furthermore, asked by the Panel about the reason why she let his son participate in the race accompanied only by his father, the Appellant's mother expressly explained to trust him and to be sure that he would try to take only the best decisions for their son.

84. In any event, the Panels observes that in the present case the possibility for the Appellant to undergo an anti-doping control has been not only implicitly, but expressly accepted by his mother when she signed the application form for the International Driver Licence, which implied the recognition of the FIA-ADR.

85. A different reasoning would seriously prejudice the fair protection of the other competitors, as it would practically leave it to the decision of the parents whether a minor could be submitted to an anti-doping test. In fact, if the Appellant's argument were to be followed, a doping control on a minor could be avoided by merely having one of the parents stay away from the competition venue. This is not acceptable as it would be particularly disruptive for those sports, such as for example women's artistic gymnastics, where many of the elite athletes are under 18 years of age.

86. The Appellant also contends that the presence and consent of both parents would be necessary because undergoing doping controls can be an intimidating and stressful experience for a child. In the expertise on Polish law filed by the Appellant, it is also reported that the carrying out of blood tests and other medical treatments for minors requires the consent of both parents. On the latter point, there is no need to comment, as the Appellant did not undergo either a "blood-sample doping control" or a medical treatment. As to the general "intimidating and stressful" nature of an anti-doping test, the Panel observes that the Appellant failed to indicate any evidence corroborating such a statement. In the Panel's view, providing a urine sample (as the Appellant did) cannot be considered as a "traumatic" experience from which any young athlete should be exempted. It is not particularly different, for instance, from what commonly happens on the occasion of normal analyses carried out by and on children to check their health.

87. For the above reasons, the Panel holds that the Appellant was duly represented on the occasion of the anti-doping control carried out in Ampfing and the anti-doping control did not violate any of his personal or other rights.

C) THE IMPACT OF ANTI-DOPING RULES ON EVERYDAY LIFE

88. The Appellant also argues (i) that the prohibition to take doping substances may collide with the need to take medications which contain forbidden substances, and (ii) that this has also a non-negligible influence on the everyday life as all products (foodstuffs, nutritional supplements, medication etc.) must be examined to ascertain if they contain any doping substances.

89. As to the first argument, the Panel notes that there is a well-established system to allow athletes to resort to some medications containing prohibited substances. The system is based on the request for a "Therapeutic Use Exemption", which allows, if the conditions for granting it are met, the use of specific medicaments or treatments. In the Panel's view, this system represents a fair balance between the medical needs of the athlete and the right of the other athletes to a fair competition.

90. As to the second argument, the Panel observes that it is not the obligation to comply with anti-doping rules which has a significant impact on the "normal" everyday life, but the participation itself in international competitions. During the hearing, for example, the Appellant's mother declared that the Appellant had to confront particular

efforts to recover his many absences from school lessons due to his participation in the races. It is inconsistent to argue that a twelve-year old child's life is upset by anti-doping rules while he devotes a good part of his life to racing, which is quite unusual for a child of that age and, in any case, is quite different from the regular life of the vast majority of coetaneous children.

D) THE ALLEGED IGNORANCE ABOUT THE SPECIFIED SUBSTANCE "NIKETHAMIDE"

91. The Appellant maintains that neither he nor his parents were aware of the existence and the effects of "Nikethamide", that is the prohibited specified substance found in the Appellant's urines. The Panel notes that the Appellant's or his parents' awareness of the prohibited substance is not a requirement for finding an adverse analytical finding and, thus a violation of Article 2.1 of the FIA-ADR.

92. Indeed, Article 2.1.1 of the FIA-ADR provides that "*it is not necessary that intent, fault or negligence or knowing use on the Driver's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1*". The comment to the corresponding provisions of the WADC confirms that this violation occurs "*whether or not the athlete intentionally or unintentionally*" makes use of a prohibited substance.

93. The Panel observes that it is a well-known facet of anti-doping law that every athlete has the duty to be acquainted with the contents of the Prohibited List and to ensure that no prohibited substance enters his or her body. In accordance with the legal principle *ignorantia legis neminem excusat*, an athlete may not escape anti-doping liability merely because he or she was unaware of the content of anti-doping rules. Fittingly, the first paragraph of Article 2 of the WADC states that "*athletes or other persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substance and methods which have been included on the Prohibited List*".

94. The Panel also notes that Poland has become a party to the UNESCO International Convention Against Doping in Sport (hereinafter the "UNESCO Convention") since January 2007. This means, in accordance with public international law principles, that the UNESCO Convention, which recognizes the Prohibited List and incorporates it as

Annex 1, has become part of Polish law, thus to be mandatorily known in the Appellant's country of origin.

95. In view of the above, the Panel finds that the Appellant's argument that neither he nor his parents were aware of the prohibited substance "Nikethamide" is of no avail when assessing the existence of an anti-doping rule violation.

E) APPLICABILITY OF ANTI-DOPING RULES TO MINORS

96. The Appellant contests the applicability of anti-doping rules to minors in general and to his case in particular.

97. According to the Appellant, the issue of minors has not been adequately dealt with in the WADC and the FIA-ADR, as the "age factor" must be taken into account when applying anti-doping rules and sanctions. The Appellant argues that a parallel has to be made between the imposition of a period of ineligibility for a doping offence and the imposition of a sanction under criminal law. Based on the application by analogy of the principles governing criminal law, the Appellant submits that no period of ineligibility may be imposed on him, as at the time of the relevant facts he had not attained the age of criminal responsibility either in his country of origin (Poland) or in the country where the anti-doping rule violation occurred (Germany).

98. The Panel observes that the rules contained in the WADC and the FIA-ADR – not considering the comment (in itself not a rule) to Articles 10.5.1, 10.5.2, 10.3.3 and 10.4 at page 58 of the WADC – do not specifically deal with the issue of age. However, the CAS has already been confronted in a number of cases both with the request to apply criminal law principles and with the imposition of anti-doping sanctions on young athletes. In all these cases the CAS jurisprudence has been guided by two principles: (a) that disciplinary proceedings in sport are governed by civil law rather than by criminal law and (b) that the young age of an athlete is not a circumstance which, by itself, warrants an exemption from or an attenuation of anti-doping rules.

(a) Applicability of criminal law principles

99. Many CAS panels as well as the Swiss Federal Tribunal have stated that sports disciplinary rules are civil law rules and not criminal rules and that judging bodies must apply civil law principles, rather than criminal law principles.

100. For instance, in the advisory opinion CAS 2005/C/841 *CONI*, the CAS panel stated as follows: "*Anti-doping rules are not intended to be subject to or limited by requirements and legal standards applicable to criminal proceedings*".

101. The Swiss Federal Tribunal, 2nd Civil Division, in its Judgment of 31 March 1999, stated as follows:

> «*According to Federal Tribunal case law, the CAS's opinion that it is sufficient for the analyses undertaken to show the presence of a banned substance in order for there to be a presumption of doping and, consequently, a reversal of the burden of proof, relates not to public policy but to the duty of proof and assessment of evidence, problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as the presumption of innocence and the principle of* in dubio pro reo *and the corresponding safeguards contained in the European Convention on Human Rights*» (5P.83/1999, para. 3.d, freely translated).

102. The Panel concurs with the above views. Indeed, there is a difference as to the nature of sporting and criminal sanctions and between the effects of doping sanctions imposed by a sporting federation and those of criminal punishments. The disciplinary powers of a federation are an expression of an association's genuine autonomy to regulate its own sporting affairs. Hence, the types of disciplinary measures that may be imposed on an individual are limited by the association's scope. They are directed – solely – to the individual's associative life. For instance, the effect of the FIA's most afflictive doping sanction, i.e. the ineligibility for a given period, is limited to avoiding that the sanctioned person may "*participate in any capacity in a Competition or activity (…) authorized or organized by the FIA or a* [*National Automobile Club or national body recognized by the FIA*]" (Article 10.10.1 of the FIA-ADR). The personal restriction deriving from such a sanction concerns, therefore, only the possibility of practicing organized sport. For everything else that is not related to the associative sphere, the sanctioned athlete may lead a normal life. These limited effects of sporting sanctions cannot be compared to the hardship and the stigma of a criminal punishment.

103. What is more, it is the WADC itself which provides as follows in its Introduction:

> «*These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are,*

therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters».

104. In this respect, the Panel observes that the already mentioned UNESCO Convention provides that "*States Parties commit themselves to the principles of the [WADA] Code*" (Article 4.1). The Panel also notes that the UNESCO Convention recognizes the role of the sports authorities, of WADA and of the national anti-doping organizations In particular, Article 2.2 recognizes that all anti-doping organizations – including international federations – are "*responsible for adopting rules for initiating, implementing or enforcing any part of the doping control process*". In addition, Article 16(g) the UNESCO Convention provides that State Parties should "*mutually recognize the doping control procedures and test results management, including the sport sanctions thereof, of any anti-doping organization that are consistent with the [WADA] Code*".

105. Therefore, it is the very national legislation of the relevant countries – Poland, as the country of the Appellant, France as the country of the Respondent, and Germany as the country where the anti-doping control took place – which recognizes as legitimate the current features of the anti-doping rules based on the WADC, including the sanctions set forth therein, and acknowledges that anti-doping law cannot be assimilated to criminal law. All three countries, indeed, ratified the already mentioned UNESCO Convention and, accordingly, inserted it into their own national legal systems.

106. Therefore, the Appellant's argument that one should make reference to the age limit for criminal responsibility in order to ascertain whether a young athlete may be sanctioned cannot be accepted, because even national legislations acknowledge the difference between disciplinary doping sanctions and criminal ones.

107. Moreover, if the proposed solution were to be followed, in competitions with athletes of different ages there would be a distinction between those who, having attained the age of criminal responsibility, could be sanctioned and those who, being still too young to be deemed capable of criminal responsibility, would enjoy an immunity from sanctions. Then, in competitions with athletes of different nationality, their subjection

to anti-doping sanctions would vary depending on their nationality, given that the age of criminal responsibility is different from country to country.

108. As a result, the Panel cannot accept the Appellant's arguments based on analogies with criminal law.

(b) Relevance of age for the applicability of anti-doping rules

109. The Panel is of the view that, in order for an athlete to be bound to anti-doping rules, the issue of age is in principle of no relevance. Accordingly, the fact that the Driver was very young at the time of the anti-doping control (12 years old) is in this respect utterly irrelevant.

110. In the Panel's view, if a young athlete enrols to compete in organized sport he must do it in accordance with the rules of the game, including the rules whose violation entails disciplinary consequences. This is especially appropriate in recent times, when athletes tend to emerge onto the international scene at ever younger ages.

111. After all, subjection to rules and to sanctions is not unknown to minors. For instance, when minors are in school, they must comply with school rules and be prepared to undergo disciplinary consequences – even harsh ones, such as the expulsion from the school or the repetition of the same school year – if they don't.

112. If a young athlete such as Mr I. is deemed by his parents mature enough to understand the applicable kart racing rules – quite complex, if one thinks of the fact that, for example, no less than twelve different types of coloured flags can be waved to drivers while they are on the track, all signifying different directions or warnings given by the race director (see Article 2.15 of the "General Prescriptions Applicable to International Karting Events And CIK-FIA Championships, Cups And Trophies") – while at the same time the drivers are going at very high speed and therefore potentially taking quite high risks for their physical integrity, he must be deemed mature enough to understand the applicable anti-doping rules.

113. In addition, the Panel remarks that anti-doping rules are aimed at protecting the vested interest of all participants in a fair competition. As already noted, the principle of a level playing field is a cornerstone of sports law in general and of anti-doping law in particular. This principle notably aims at protecting "*the Athletes' fundamental right to*

participate in doping-free sport and thus promote health, fairness and equality for Athletes" (see the preamble to both the WADC and the FIA-ADR).

114. The Appellant's arguments do 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.

115. In the Panel's view, the qualification of an athlete as a minor is, therefore, not a circumstance that could exempt him from being submitted to the anti-doping regulations in the same way as all the other participants to the competitions.

116. The Panel is of the view that a different approach would lead to intolerable consequences. One of the consequences would be that while some of the participants in a competition (*i.e.* those who have attained a certain age) would be subjected to a certain set of rules, others would have to obey to less stringent rules or to no rules at all. This would result, in particular, in young athletes being allowed to use doping substances and doping methods, as they could rely on a substantial immunity from the imposition of sanctions. This is incompatible with the idea of a level playing field and would be contrary to the protection of the health of minors, as the awareness of impunity would have the inevitable consequence of encouraging the use of doping. All of this cannot, of course, be accepted.

117. In this connection, the Panel takes note of the following passage of the CAS award issued in the case CAS 2006/A/1032 *Karatancheva v. ITF*:

> «*[…] 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*» (paragraphs 139-141).

118. The above remarks show that, contrary to what the Appellant argues, the fact that *all* competitors (including minors) are bound to the same set of rules (including the ones concerning the imposition of sanctions) is of the utmost importance to fight doping and thus to protect sport. The goal of establishing a level playing field through uniform rules applicable to all participants is not excessive, but necessary and proportionate.

F) EVIDENCE OF DOPING

119. In view of the above findings, the Panel must normally apply the rules on burden and standard of proof as set forth by the applicable anti-doping rules.

120. Therefore, pursuant to Article 3 of the FIA-ADR, the burden of proof is initially on the FIA to prove, to the comfortable satisfaction of the Panel, that an anti-doping rule violation has occurred. The Panel finds that the FIA has comfortably proven, through the adverse analytical finding detected by the WADA-accredited Cologne laboratory, that the Driver's urines contained the prohibited substance Nikethamide. The Appellant has not contested the Cologne laboratory's adverse analytical finding.

121. In accordance with Article 2.1 of the FIA-ADR, the presence in the Appellant's urines of the said prohibited substance is sufficient to establish an anti-doping rule violation and thus the Driver's presumptive guilt, regardless of his intent, knowledge, fault or negligence. This leads, in accordance with Article 9 of the FIA-ADR, to the automatic disqualification of the result obtained by the Driver in the Ampfing event, with all resulting consequences, including forfeiture of all trophies, points and prizes.

122. As to the period of ineligibility, Article 10.5 of the FIA-ADR allows the Driver, on the basis of "exceptional circumstances", to rebut the presumption of guilt and obtain from the judging body the elimination or reduction of such sanction. To that end, Article 10.5 of the FIA-ADR requires first of all the Driver to prove, on the balance of probability, an objective factual element: it's the so-called "route of ingestion", *i.e.* how the prohibited substance entered the Driver's body. Only after having proven what the factual circumstances were in which the substance entered his system, the Driver would have to demonstrate, on the balance of probability, a subjective element: that "he bears no fault or negligence" or, alternatively, that "he bears no significant fault or negligence".

123. Given that Nikethamide is a "specified substance", the period of ineligibility might be eliminated or reduced also by virtue of Article 10.4 of the FIA-ADR. This may occur only on condition that the Driver could prove (i) the route of ingestion, (ii) that such specified substance was not intended to enhance his sport performance or mask the use of a performance-enhancing substance, and (iii) that his degree of fault requires a lesser period of ineligibility than the standard two-year sanction (see CAS 2010/A/2230 *IWBF v. UKAD & Gibbs*, para. 11.3 *et seq.*).

124. Therefore, either under Article 10.4 or Article 10.5 of the FIA-ADR, the proof of the route of ingestion is the first precondition to examine the Driver's degree of fault or intention in ingesting Nikethamide. If the said precondition is not met by the Appellant, the Panel cannot even discuss the issue of the Driver's degree of fault. As a CAS panel stated:

> «*Obviously this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up*» (CAS 2006/A/1130 *WADA v. Stanic and Swiss Olympic Association*, Award of 4 January 2007, para. 39).

125. In this connection, the Panel notes that the Appellant has not provided any evidence whatsoever of how Nikethamide came to be present in his urines. The Appellant asserts that he does not recall having taken any product containing such substance and that he has no idea how it entered into his system. The Appellant thus submits some possible explanations.

126. As a first hypothesis, the Appellant contends that he could have been the victim of an act of sabotage. He does not give any detail as to the how, who, when and where of the alleged sabotage.

127. Then, the Appellant suggests that, given that the product is commercialized in a form that resembles that of candies, he might have taken it by mistake or some other driver might have given it to him while hanging out in the paddock during the Ampfing event.

128. The Panel remarks that the explanations put forward by the Appellant are no more than theoretical possibilities as to how the prohibited substance could have entered his body. Those possibilities are not even linked to definite circumstances, but they are

rather suggested in general as something that could have hypothetically happened. Unfortunately, the applicable standard of proof – balance of probability – requires that the Driver demonstrate that a given route of ingestion was probable, rather than merely possible.

129. The Panel notes that there is plenty of CAS jurisprudence stating that mere speculation as to what may have happened does not satisfy the requisite standard of proof and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (see for example CAS 2006/A/1067 *IRB v. Keyter*, para. 6.10; CAS 2010/A/2230 *IWBF v. UKAD & Gibbs*, para. 12.1 *et seq.*). In short, the Panel cannot base its decision on some speculative guess uncorroborated in any manner.

130. As a consequence of the Appellant's failure to prove the objective element of the route of ingestion, the subjective element of fault does not fall for consideration at all. In other words, the Panel is prevented by the applicable rules – Articles 10.4 and 10.5 of both the FIA-ADR and the WADC – to evaluate the Driver's degree of fault and, therefore, the Driver's young age is not a matter that is of relevance in this connection.

131. Neither Article 10.4 nor Article 10.5 can thus be of any avail to the Appellant. As a consequence, the ineligibility period cannot be reduced or eliminated under either provision.

G) MEASURE OF THE SANCTION

132. In view of the above, the Panel should impose on the Driver the sanction of ineligibility for a period of two years, in accordance with Article 10.2 of the FIA-ADR. In fact, once the conditions provided in Articles 10.4 and 10.5 are not met, Article 10.2 does not allow *per se* to graduate the sanction below the fixed measure of two years.

133. However, in the Panel's opinion, the case of Mr I. is one of those rare and exceptional cases where the ineligibility sanction provided by the strict application of a sporting federation's rules could appear excessive and disproportionate in view of the specific circumstances of the case and of the twofold aim – retributive and educational – of the sanction. In this respect, the present case may be compared to the Mellouli case, where the Panel so stated:

> «*Le cas de M. Mellouli fait donc partie de ces quelques rares cas d'exception où la sanction prévue par l'application stricte des règles antidopage d'une fédération sportive pourrait apparaître ni proportionnée au comportement reproché à l'athlète, ni tout à fait conforme au but – à la fois répressif et éducatif – recherché par lesdites règles*» (TAS 2007/A/1252 *FINA c. Mellouli & FTN*, para. 97).

134. The Panel feels indeed that, given the circumstances of this particular case, the fixed two-year sanction must be measured against the principle of proportionality. In other words, the Panel must check whether in the specific case of the Driver the sanction of ineligibility for two years is consistent with the principle of proportionality.

135. The Panel observes that, before the entry into force of the WADC, in many cases CAS panels had to deal with anti-doping rules which, *per se*, did not grant the authority to consider circumstances of individual cases that could yield a reduction of the sanction. Nevertheless, CAS panels sometimes reduced the sanction despite the applicable rules of the concerned international federations dictated a fixed period of ineligibility (see e.g. CAS 1996/56 *Foschi v. FINA*; CAS 2002/A/396 *Baxter v. FIS*).

136. In CAS 1999/A/246 *Ward v. FEI*, the CAS panel acknowledged that the principle of proportionality is a fundamental principle of sports law:

> «*The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions*» (para. 5.21).

137. Even after the entry into force of the WADC, the CAS has recognized that any anti-doping sanction inflicted by a sports federation – that is, a private association – must in any event be consistent with the principle of proportionality:

> «*The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person*

> *will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.*
>
> *A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim* (CAS 2005/C/976 & 986 *FIFA & WADA*, paras. 138-139, footnotes and italics omitted).

138. The CAS has also specifically stated that the principle of proportionality may mandate a judging body, in particular circumstances, to reduce the sanction below what is provided by the applicable sports rules derived from the WADC:

> «*Applying the above explained principle [of proportionality] was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athlete concerned, in particular his personality rights (see i.a. Aanes, v/FILA, CAS 2001/A/317). In the meantime substantial elements of the doctrine of proportionality have been implemented in the body of rules and regulations of many national and international sport federations – including the Respondent – by adopting the World Anti-Doping Code, which provides a mechanism for reducing or eliminating sanctions i.a. in cases of "no fault or negligence" or "no significant fault or negligence" on the part of the suspected athlete.*
>
> *However, the Panel holds that the mere adoption of the WADA Code (here FINA-Rule DC 10.5 being of interest) by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case*» (CAS 2005/A/830 *Squizzato v. FINA*, para. 10.24).

139. The weighing of any anti-doping sanction on the basis of the principle of proportionality is not only inherent in sports law but is also mandated by European Union ("EU") law, which is an integral part of French law, applicable to this case (see *supra* at 65). Indeed, the EU Court of Justice, in the Meca-Medina judgment of 18 July 2006 (Case C-519/04P *Meca-Medina and Majcen v. Commission*, [2006] 5 C.M.L.R. 18), specifically found that the principle of proportionality, which is a well-established mandatory general principle of EU law, applies to anti-doping rules and sanctions. In particular, the Court of Justice stated that in anti-doping cases it must be verified whether the severity of the penalty might end up being excessive, as a disproportionate sanction would be in violation of EU law (see paras. 47-48 and 55 of the judgment).

140. In any event, the Panel notes that the principle of proportionality is also one of the general principles of law recognized by the Swiss legal system, which is the legal system under which CAS awards may be reviewed. This was clearly stated by the CAS in the already quoted advisory opinion CAS 2005/C/976 & 986 *FIFA & WADA*:

> «*One of these general principles, which pervades Swiss jurisprudence and the Swiss legal system, and which is relevant in the context of this Opinion, is the principle of proportionality, a principle which has its roots in constitutional and administrative law*» (para. 124).

141. Therefore, as was already done in the quoted Mellouli award (TAS 2007/A/1252 *FINA c. Mellouli & FTN*) the Panel must exceptionally take into account the specific circumstances of the case and verify whether an ineligibility period of two years would be appropriate, in light of the principle of proportionality, to the case of Mr I.

142. In light of the above, the Panel deems that it must apply the principle of proportionality in order to assess a sanction which could be appropriate to the case at stake. As a result, the Panel finds the suspension of two years decided by the FIA to be excessive and disproportionate, particularly on the basis of the following considerations:

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 Mr I. 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 (contrary to the situation occurred in CAS 2006/A/1032 *Karatancheva v. ITF*, where the minor athlete was competing against adult athletes at top level).

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.

d) Furthermore and very importantly, given that the European karting season takes approximately place from February to November of each year and that the Driver's ineligibility period started on 18 July 2010 (right in the middle of the karting season), a suspension of two years would impair three karting seasons (2010, 2011 and 2012); in other words, the overall effect of the sanction on the Driver would extend well beyond twenty-four months and this would appear to be disproportionate, given the fact that even for adults a two-year sanction in practice often only entails losing two seasons and here we are dealing with a child who was competing in a youth category.

143. Considering all of the above and exercising its discretion, the Panel deems that, exceptionally, a period of ineligibility of eighteen months must be considered as proportionate to the offense and, thus, a just and fair penalty.

144. The Panel remarks that, in this way, the period of ineligibility would end on 17 January 2012 at midnight and this would allow the Driver to resume competitions from the start of the 2012 karting season; the impact of the sanction would thus not go beyond the 2010 and 2011 seasons. The Panel also remarks that this case presents a very exceptional situation with very limited precedential value. In particular, the reduction of the sanction below the normally applicable ineligibility period of two years in the case at hand should, in principle, have no precedential value with respect to cases in which minor athletes compete in youth categories above fifteen years or, even less, in competitions with no age limits.

145. The Panel wishes to specify that it does not deem appropriate to reduce the sanction below eighteen months because one cannot underestimate the seriousness of a situation where a twelve-year old child was given by someone a stimulating substance – meant to improve concentration, vigilance and reaction time – which, according to the uncontradicted expert evidence provided by Dr Hartstein, could trigger toxic effects such as disordered heart beats, tachycardia, elevated blood pressure and the like. According to the scientific evidence examined by the Panel, the prohibited substance was ingested on the day of the race and this could have endangered the safety of the Driver himself and of the other competitors. Therefore, notwithstanding the above indicated extenuating factors (see *supra* at 142), a sanction of no less than eighteen months is appropriate and proportionate also to warn the entourages of young karting drivers that they must be very careful in protecting those young drivers, in particular by educating them on doping issues and by checking what they ingest.

146. With regard to the starting date of the sanction, the Anti-Doping Committee-FIA Medical Commission set the starting date on the day of the anti-doping control (18 July 2010), which is the most favorable date for the Driver. The Panel sees no reason to modify the starting date of the ineligibility period, also considering its intent to avoid that the sanction affects a third karting season.

IX. COSTS

147. Articles R65.2 of the CAS Code provides that, subject to articles R65.2 and R65.4, for disciplinary cases of international level ruled in appeal, the proceedings shall be free.

148. Article 65.3 of the CAS Code provides that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

149. Taking into account the final result, the circumstances of the case, the conduct and, in particular, the financial resources of the parties, the Panel concludes that it is reasonable that each party bears its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr I. is partially upheld.
2. The decision no. 2/2010 rendered on 11 October 2010 by the Anti-Doping Committee-FIA Medical Commission of the Fédération Internationale de l'Automobile (FIA) is set aside.
3. Mr I. is declared ineligible for a period of eighteen months, starting from 18 July 2010.
4. Mr I. is disqualified from the individual results obtained in the karting event held in Ampfing, Germany on 18 July 2010, as well as from any competitive results obtained thereafter, with all resulting consequences including forfeiture of any trophies, points and prizes.
5. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
6. Each party shall bear its own costs.
7. All other requests, motions or prayers for relief are dismissed.

Lausanne, 15 September 2011

THE COURT OF ARBITRATION FOR SPORT

Massimo **Coccia**
President of the Panel

Ulrich **Haas**
Arbitrator

Quentin **Byrne-Sutton**
Arbitrator

Daniele **Boccucci**
Ad hoc clerk