Arbitration CAS 2011/A/2671 Union Cycliste Internationale (UCI) v. Alex Rasmussen & National Olympic Committee and Sports Confederation of Denmark (DIF; *Dansk Idraetsforbund*), award of 4 July 2012

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Michele Bernasconi (Switzerland); Mr Lars Halgreen (Denmark)

Cycling
Doping (whereabouts failure)
Whereabouts failure within a period of 18 months
Departure from the rule providing for a notice within 14 days of the unsuccessful testing attempt
Determination of the applicable sanction

1. **Under Article 2.4 Danish National Anti-Doping Rules (NADR) (as well as under the corresponding provision – Article 21.4 – of the UCI ADR), any combination of three missed tests and/or filing failures within eighteen months constitutes an anti-doping rule violation. Such provision matches the obligation of the athletes, included in a Registered Testing Pool of athletes (RTP), to provide, and keep updated, his/her whereabouts information, in order to be located for out-of-competition testing. Out-of-competition testing is at the heart of any effective anti-doping programme.**

2. **There is no basis in the wording of art. 11.6.3 of the International Standard for Testing (IST) for finding that a deviation from the rule providing for a notice within 14 days of the unsuccessful testing attempt affects the possibility that a missed test be recorded as such. The basis of the anti-doping rule violation contemplated by Article 2.4 NADR is -in addition to the first two failures- the fact that the rider was not met by the competent anti-doping officer for out-of-competition testing at the time and place he had indicated in compliance with his obligation to provide accurate whereabouts information. Such factual basis is obviously not affected by events pertaining to the subsequent administration process regarding it. In other words, the fact that an unsuccessful testing attempt was notified within, or past, fourteen days thereof does change the fact that a test was missed by the rider. As a result, a departure from Article 11.6.3(b) IST cannot be invoked to invalidate the missed test. Furthermore, the recording of the missed after the 14 day s notice is not inconsistent with the respect of the athlete's rights and does not run against the purposes of the rule intended to protect them.**

3. **The period of ineligibility which can be imposed on a rider for the anti-doping rule violation contemplated by Article 2.4 NADR ranges from one to two years depending on the assessment of the athlete's degree of fault. The fact that the behaviour of the rider shows a patent disregard of his whereabouts obligations, commands a sanction much higher than the minimum stipulated.**

The Union Cycliste Internationale (UCI or the "Appellant") is the international governing body for the sport of cycling. UCI is an association under Swiss law and has its headquarters in Aigle (Switzerland).

Mr Alexander Rasmussen ("Rasmussen" or the "First Respondent") is a professional road racing cyclist of Danish nationality, born on 4 May 1981, holding a license issued by the Danish Cycling Federation (*Danmarks Cykle Union*).

The National Olympic Committee and Sports Confederation of Denmark (*Dansk Idraetsforbund*) ("DIF" or the "Second Respondent") is the National Olympic Committee in Denmark and is the confederation of the Danish sports federations.

Rasmussen and the DIF are hereinafter jointly referred to as the "Respondents".

The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

According to the rules governing the doping control program of UCI (the UCI Anti-Doping Rules: "UCI ADR") and of DIF (the Danish National Anti-Doping Rules: "NADR"), Rasmussen has been included since 2009 in the Registered Testing Pool of athletes (RTP) both of DIF ("DIF RTP") and UCI ("UCI RTP").

The World Anti-Doping Code (WADC) of the World Anti-Doping Agency (WADA), in fact, requires the signatories, which include UCI and DIF, to define a group of athletes as their RTP. Each athlete included in the RTP has the obligation to provide regular and updated whereabouts information, i.e. a three month schedule containing information, before the commencement of each quarterly period, about where he or she can be met for unannounced out-of-competition testing. In order to avoid unnecessary burden on athletes obliged to provide such information both to their National Anti-Doping Organisations and to the International Federation they belong to, WADA has developed a web-based application, called ADAMS – Anti-Doping Administration and Management System ("ADAMS") to enable athletes to enter their whereabouts into a single system. International Federations are then provided access by the relevant National Anti-Doping Organisation to the information entered into ADAMS by each athlete.

As a result of the above, Rasmussen had the obligation to enter, and keep updated, his whereabouts into ADAMS. UCI was allowed to access such information.

On 1 February 2010, officers of the Danish National Anti-Doping Organisation (Anti-Doping Denmark, ADD) unsuccessfully tried to locate Rasmussen for an out-of-competition doping control at the place he had indicated on ADAMS for that day: instead of being in Denmark, he was in Germany competing in the Berlin Six Days (from 28 January to 2 February 2011). A whereabouts failure was therefore recorded pursuant to Article 5.4.5 NADR and notified to Rasmussen on 16 February 2010, as the explanations he had provided were considered to be insufficient by ADD.

On 4 October 2010, ADD notified Rasmussen of a potential failure to file his whereabouts information for the fourth quarter of 2011 by the deadline of 30 September 2010: at the same time, ADD indicated to Rasmussen that it had remarked *"that you did not state your participation in the World Championships in Australia that has just taken place"*. Following said notification, Rasmussen filed the missing information on 5 October 2010, without providing any explanations. Therefore, on 26 October 2010, ADD recorded and notified to Rasmussen a filing failure for the purposes of Article 5.4.5 NADR.

On 28 April 2011, officers of the UCI unsuccessfully tried to locate Rasmussen for an out-of-competition doping control at the place in Spain he had indicated in ADAMS for that day: the UCI officers could only get in touch with Rasmussen on the phone, to discover that he was in Denmark, for his sister's confirmation. On 14 July 2011, UCI notified Rasmussen of such potential missed test, which was recorded on 18 August 2011.

On 13 September 2011, UCI informed ADD of the recording of the missed test of 28 April 2011, being *"the 3rd whereabouts failure of … Rasmussen"*, to indicate that according to Article 110 of the UCI ADR, ADD was *"responsible to bring proceedings against Rasmussen under art. 21.4* [UCI] *ADR as his previous whereabouts failures were recorded by your organization"*. On the same day, ADD referred the case to the Anti-Doping Committee (*Dopingudvalg*) of DIF for further proceedings.

On 14 September 2011, the Anti-Doping Committee of DIF imposed on Rasmussen a provisional suspension pursuant to Article 7.6.2 NADR.

On 12 October 2011, the Anti-Doping Committee sent to WADA an email as follows:

> *"… the Doping Commission of the NOC and Sports Confederation of Denmark urgently needs WADA's advice in an unusual case we are currently reviewing. Your last response was most helpful, so we kindly ask for your help once again.*
>
> *This is the first case in Denmark about an infringement of the whereabouts rules (3 infringements in an 18 months' period). In the current case, two infringements were recorded by the NADO (ADD) and one by the IF and thus the case will be heard before the NOC's Doping Tribunal.*
>
> *While reviewing the case, we have noticed a slight, but probably important difference between the whereabouts regulations of WADA's International Standard for Testing and the whereabouts regulations of the IF. A difference in the procedural rules that is to the disadvantage of the athlete.*
>
> *Although it is not mentioned in the World Anti Doping Code article 23.2 as an area that must be implemented by Signatories without substantial change, it is stated in art. 5.2 that Anti-Doping Organizations with testing jurisdiction shall conduct such testing in conformity with the International Standard for Testing.*
>
> *The Preamble to the International Standard for Testing states that International Standard for Testing is a mandatory International Standard (Level 2) developed as part of the World Anti-Doping Program. In addition, it is stated in art. 10 that Section 11.0 of the International Standard for Testing sets out mandatory standards to be implemented by IFs and NADOs (as well as recognized and applied by other Anti-Doping Organizations) as the whereabouts requirements applicable to Athletes in their respective Registered Testing Pools.*

Our question is therefore if WADA can confirm that the International Standard for Testing is indeed considered mandatory for IFs and NADOs and, consequently, that no changes from the Standard should be made when drafting the principles and procedural guidelines in the regulations of the IFs and the NADOs ?".

In an email of 13 October 2011, the Anti-Doping Committee then added the following:

"The case we are reviewing involves one missed test and one filing failure both recorded by ADD in accordance with WADA's International Standard for Testing and one missed test recorded by the UCI in accordance with UCI Antidoping Rules.

The problem in the current case is the difference between WADA's International Standard for Testing art. 11.6.3.b and the UCI's ADR art. 105.

Art. 11.6.3.b states:

"If it appears that all of the Clause 11.4.3 requirements relating to Missed Tests are satisfied, then no later than 14 (fourteen) days after the date of the unsuccessful attempt, the Responsible ADO (i.e. the ADO on whose behalf the test was attempted) must send notice to the Athlete of the unsuccessful attempt, inviting a response within 14 (fourteen) days of receipt of the notice. (…)"

UCI's ADR art. 105 states:

"UCI shall give notice to the Rider of any apparent Whereabouts Failure inviting a response within 14 (fourteen) days of receipt of the notice".

As can be seen, the UCI has not in its own rules repeated the obligation for the ADO to notify the rider no later than 14 days after the missed test. In fact, the UCI has not set up a deadline for itself at all, which theoretically could lead to grotesque situations where the UCI notifies the rider very much later than the day of the missed test, making it practically impossible for the rider to recollect what happened on the day of the missed test. This is what we mean by stating that the rule has been changed to the disadvantage of the athletes.

In fact, in the case we are currently reviewing, the UCI notified the rider of the missed test 10 weeks after the day of the unsuccessful attempt. (The unsuccessful attempt took place on 28 April 2011, and the UCI sent the notification on 14 July 2011.)

As the notification was 8 weeks late according to the mandatory rules in the International Standard for Testing, the athlete and his lawyer has challenged whether the missed test can be considered properly recorded according to mandatory rules in the World Anti Doping Code/International Standard for Testing.

As the late notification was nevertheless in accordance with a UCI Rule that differs from the "mandatory" WADA Standard, we believe the matter needs to be clarified, which is why we seek WADA's advice on the matter".

On 13 October 2011, WADA answered as follows:

"In our opinion, for the UCI recorded strike, UCI rules shall apply as an athlete shall be able to rely on his IF rules first, even if the Standard is mandatory.

We will contact UCI to ensure their rules are amended shortly in order to properly implement the IST rules.

In the case at hand, if the UCI strike has been notified to the rider before the next filing failure/missed test occurred, the delay taken by the UCI should not constitute an issue.

This was the rationale of this 14-day rule".

After an exchange of submissions with the counsel for Rasmussen, on 27 October 2011, the Anti-Doping Committee brought the case of Rasmussen before the Anti-Doping Board (*Dopingnaevn*) of DIF in accordance with Article 8 NADR. In its referral to the Anti-Doping Board, the Anti-Doping Commission requested that Rasmussen *"be banned for one year from all sport under the auspices of DIF, and this ban be counted from 28 April 2011"* and that Rasmussen *"be disqualified from all competitions he has participated in during the period 28 April 2011 – 14 September 2011"*. In support of that request, the Anti-Doping Committee indicated, *inter alia*, the following:

> *"… It is undisputed and can be admitted that AR [Rasmussen] has violated the rules concerning missed tests/registration errors three times within an 18-month period. It is also a fact that, on none of these three occasions AR has exercised his right to demand an administrative reassessment of the registered violation.*
>
> *It is likewise undisputed that the first two violations can be the basis of the ruling in the case.*
>
> *However, it is a matter of contention whether the third violation dated 28 April 2011 should be regarded as unlawful, as it is debatable whether UCI adhered to the applicable deadlines in its handling of the results.*
>
> *… prior to the present submission, AR, through his lawyer, waived submission of this as support for his acquittal, but merely submitted it in support of recognition of mitigating circumstances in establishing sanctions.*
>
> *On this basis, the anti-doping committee is of the opinion that the missed test of 28 April 2011 should be counted towards the three violations of the rules, thus constituting a violation of the anti-doping rules, but the anti-doping committee agrees with AR and his lawyer that the variations in the rules and consequent slow processing of the case at UCI should benefit AR in establishing the starting point of the sanction …".*

On 14 November 2011, the counsel for Rasmussen, following a request for clarification from the Anti-Doping Board, wrote the following:

> *"Further to the Anti-doping board's communication dated 31 October 2011 and e-mail dated 10 November 2011, I shall hereby set out my comments for use in the Anti-doping board's further processing of the case.*
>
> *In relation to the Anti-doping board's enquiry dated 10 November 2011, I can state that the original claim for acquittal lapsing because Alex Rasmussen is able to acknowledge the actual circumstances concerning whereabouts failure and does not wish to rely on UCI's insufficient implementation of WADA's rules. In this connection, it is my opinion that the Anti-doping board should be regarded as the framework for a civil law dispute. It is firmly established in Danish legal practice that the 'forhandlingsmaksime' or adversarial procedure gives the parties in civil cases access to narrow the scope of the case as well as the framework of the dispute.*
>
> *Instead, I ask the Anti-doping board to consider my point of view that there is a basis in the relevant legislation (WADC art. 10.9, UCI-ADR art. 317 and the DIF national anti-doping rules Section 10.9 respectively) to offset the period during which Alex Rasmussen has been suspended prior to the Anti-doping board's ruling. I shall therefore contend that this period be offset in Alex Rasmussen's final ban.*
>
> *I note in this regard that the aforesaid provisions, according to their wording, also cover bans that are calculated from the time of the third whereabouts failure. This question is not regarded as settled in practice.*
>
> *I therefore request the Anti-doping committee to consider the possibility of offsetting the temporary ban in the measurement of the final period of the ban for Alex Rasmussen, so that the ban expires on 25 February 2012.*

If the Anti-doping board cannot accept my view, I shall hereby contest the proceedings in relation to the Anti-doping committee's submission dated 27 October 2011, as I can then support the Anti-doping committee's claim of a 12-month ban calculated from 28 April 2011.

In conclusion, my opinion is that the case can now be settled on a written basis and I shall therefore ask the chair of the Anti-doping board to declare whether the case can be settled on a written basis ...".

In an email of 17 November 2011, the Anti-Doping Commission answered as follows a request from the Anti-Doping Board:

"In the opinion of the committee, AR should be judged in accordance with UCI's set of rules, which thus conversely should apply in accordance with the legislation (WADC and the international standard), because UCI's set of rules, first, was produced on the basis of this; secondly, should apply in accordance therewith; and, thirdly, takes higher precedence. This corresponds to creating national legislation based on EU legislation (whereby EU legislation is ratified). Here, judgment is passed in relation to national legislation, but only to the extent that there is no dispute with the "higher-ranking" EU legislation from which it proceeds.

As regards the defence's proposal of offsetting the temporary ban so that the quarantine should be measured as 10 months, the opinion of the anti-doping committee is, as stated in the summons, that this cannot be allowed, as there would then de facto be an offsetting of the temporary ban twice and the quarantine would be reduced to below the minimum penalty of 1 year as provided for in art. 10.3.3. The committee therefore upholds its position of the starting point of quarantine as 28 April 2011".

On 17 November 2011, the Anti-Doping Board issued a decision ("Decision") holding as follows:

"Alex Rasmussen is hereby acquitted".

In support of its Decision, the Anti-Doping Board stated the following:

"The board treats the case as a violation of the principles following from the anti-doping rules, corresponding to the principles by which the courts process cases concerning criminal matters. The board hereby emphasises which tasks the anti-doping board and the anti-doping committee should perform pursuant to DIF's regulations Sections 27 and 28.

Accordingly, the board considers itself obliged and entitled, for reasons of due process, to claim that in cases brought before the anti-doping committee, judgment is only passed if the rules can be regarded as having been violated, and if, in the case, the competent bodies have conducted themselves in accordance with mandatory principles, established in the rules that the athlete is alleged to have violated.

Thus, the board is neither obliged nor entitled to make a ruling concerning a ban, etc., based on free considerations, in cases where there is no legal basis for so doing, even if the athlete accepts the anti-doping committee's claim concerning such a ban.

The World Anti-Doping Code and the associated international testing standard, ITS, constitute the overarching set of rules, which are supplemented by UCI's rules and by the national anti-doping rules in Denmark. UCI's rules must therefore be interpreted in accordance with the rules that are mandatory in the WADA rules, including the ITS rules, cf. the preamble to ITS. Compliance with the international standards, including ITS, is also mandatory according to the national Danish anti-doping rules, cf. the preface to these rules.

It emerges from ITS art. 11.6.3.b that the athlete must be informed and be consulted concerning any violation of the whereabouts rules no later than 14 days after the violation in question occurred. This was not done in time after UCI's attempt to perform an anti-doping test on 28 April 2011, with notification and consultation only being given on 14 July 2011.

Because UCI did not meet the deadline in ITS art. 11.6.3.b, the third violation of the whereabouts rules on 28 April 2011 cannot result it sanctions in the form of a ban or disqualification".

The Decision was notified to the UCI by the DIF, together with the full disciplinary file, on 2 December 2011.

On 22 December 2011, UCI filed a statement of appeal, with 2 exhibits, with the Court of Arbitration for Sport (CAS), pursuant to Article R48 of the Code of Sports-related Arbitration ("Code"), to challenge the Decision. In such submission, the Appellant appointed Mr Michele Bernasconi as arbitrator.

In a letter dated 29 December 2011, Mr Lars Halgreen was appointed as arbitrator by the Respondents.

On 27 December 2011, UCI filed its appeal brief in accordance with Article R51 of the Code, together with 38 exhibits.

On 29 January 2012, the Respondents filed their answer, with 4 exhibits, to the appeal, seeking its dismissal.

By communication dated 31 January 2012, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Michele Bernasconi and Mr Lars Halgreen, arbitrators.

On 5 April 2012, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure ("Order of Procedure"), which was accepted and countersigned by the parties.

In a letter dated 14 May 2012, the Respondents requested to be authorized to submit, as additional exhibits, three decisions rendered by CAS panels. Such authorization was granted by the President of the Panel on 15 May 2012.

A hearing was held on 16 May 2012 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 12 March 2012.

At the hearing, the parties declared that no witnesses had been called to be heard and made submissions in support of their respective cases. At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings and that they had been given the opportunity to fully present their cases.

2The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

The UCI's requests for relief, as indicated in its appeal brief, is the following:

"May it please to the Arbitration Tribunal:

- *To set aside the contested decision;*
- *To sanction Mr Rasmussen with a period of ineligibility of two years starting on the date of the Panel's decision;*
- *To state that the period of provisional suspension from 14 September 2011 until 17 November 2011 shall be credited against the period of ineligibility;*
- *To disqualify Mr Rasmussen's results from 28 April 2011 until the date of the CAS award;*
- *To condemn Mr Rasmussen to repay all the prizes money he won from 28 April 2011 until the date of the CAS award;*
- *To condemn the DIF and/or Mr Rasmussen and/or the DIF to pay a contribution to UCI's costs".*

In its submissions, in other words, the Appellant criticizes the Decision, which it asks the Panel to set aside and to replace with a new decision sanctioning the First Respondent. According to the UCI, purpose of the appeal, in fact, is that of

"- having the contested decision reformed;

- *having declared that Mr. Rasmussen committed the anti-doping rule violation of violating the applicable requirements regarding Athlete availability for Out-of-Competition Testing (art. 2.4 NADR) and imposed upon Mr. Rasmussen a two years' ineligibility, in accordance with article 10.3.3 NADR, starting from the date of the CAS award in application of article 10.9.1 NADR. Any period of ineligibility served by Mr. Rasmussen before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served;*
- *having Mr. Rasmussen disqualified from all the competitive results achieved by Mr. Rasmussen from 28 April 2011 until the date of the CAS award and having Mr. Rasmussen ordered to return any prize-money earned in the competitions from 28 April 2011 until the date of the CAS award".*

In their answer, the Respondents requested the CAS to rule:

"a. That the appealed Decision rendered on 17th of November 2011 by the Doping Board of the National Olympic Committee and Sports Confederation of Denmark in the matter of Mr Alex Rasmussen is upheld.

- and -

b. That the UCI did not fulfil their obligations according to WADA's International Standard for Testing and so condemn the UCI.

c. That the Respondents be granted an award for costs. The Respondents expect their legal cost to be € 15.000,00. Further, Mr Rasmussen has currently lost an estimated € 50.000,00 in salary as a result of the Appellant's negligence.

- or -

d. That the Court sanctions Mr Rasmussen by a period of ineligibility no longer than on year, to be started from the time of the 3rd inaccuracy on 28th of April 2011".

At the hearing, however, the Respondents clarified that the request specified under point (b) (above), whereby a declaration that the UCI had breached its obligations under the IST was sought, had to be intended only as a defence to the Appellant's claims. Accordingly, the Respondents withdrew the request that the UCI be condemned or that a declaratory award be issued on such point (b) of their request for relief.

Finally, the Respondents request the Panel, should it find that Rasmussen has to be sanctioned, to impose a sanction of *"no more than a 12 months period of ineligibility, starting from the missed test of 28th of April 2011"*, for the following reasons:

i. "intentional cheating should be punished more severely than negligent violation of anti-doping rules";

ii. "Mr Rasmussen was only negligent and … did not try to cheat or to evade the anti-doping control. Indeed, upon confrontation, Mr Rasmussen tried to update the ADAMS system to reflect his current whereabouts and promptly notified the doping-control officer where he could be found. Such behaviour reflects … a low degree of fault";

iii. precedents in another International Federation show that athletes who did not try to evade doping control, but were merely negligent should not be punished beyond the minimum required period of ineligibility;

iv. "Mr Rasmussen's case has been unduly delayed for reasons not related to the Respondents". Inter alia, "had the UCI acted in accordance with the IST, Mr Rasmussen's case could have been resolved before the summer of 2011";

v. Mr Rasmussen was provisionally suspended between 14 September 2001 and 17 November 2011.

At the same time, and in any case, the Respondents request that *"the DIF is not condemned"*, since it correctly implemented the WADA rules.

LAW

CAS Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties.

2. The jurisdiction of CAS is not disputed and has been confirmed by the signature of the Order of Procedure. In addition, it is contemplated, for the purposes of Article R47 of the Code, by Article 13 NADR and by Article 329 of the UCI ADR.

3. More specifically, the provisions referring to CAS contained in the NADR and in the UCI ADR, which are relevant in these proceedings, are the following:

   a. *NADR*

   Article 13.2

   "A decision that … no anti-doping rule violation was committed … may be appealed exclusively as provided in this Article 13.2".

   Article 13.2.1

   "In cases … involving International Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court".

   Article 13.2.3

   "In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS … (c) the relevant International Federation …".

   b. *UCI ADR*

   Article 329

   "The following decisions may be appealed to the Court of Arbitration for Sport:
   1. a decision of the hearing body of the National Federation under article 272 …".

   Article 330

   "In cases under article 329.1 to 329.7, the following parties shall have the right to appeal to the CAS:
   …
   c) the UCI …".

   Article 331

   "The appeal of the UCI shall be made against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on his behalf. The National Federation or body concerned shall be liable for costs if the hearing panel which made the decision against which the appeal has been made has applied the regulations incorrectly".

Appeal Proceedings

4. As these proceedings involve an appeal against a decision rendered by a national sports-body (DIF) regarding an international level athlete in a disciplinary matter brought by an international federation (UCI) on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code in the version in force at the time the appeal was filed.

Admissibility of the Appeal

5. The statement of appeal was filed within the deadline set by Article R49 of the Code, in the absence of a deadline in the NADR. No further internal recourse against the Decision is available to the Appellant within the structure of DIF. Accordingly, the appeal is admissible.

Scope of the Panel's Review

6. According to Article R57 of the Code,

"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance…".

Applicable Law

7. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

8. Pursuant to Article R58 of the Code, the Panel is required to 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".

9. As a result of such provision, the Panel considers that the DIF rules (and more specifically those adopted in the NADR) are the applicable regulations for the purposes of Article R58 of the Code, with a possible reservation for the application on specific points of the UCI ADR (§ 0 below).The laws of Denmark apply subsidiarily. However, no party led any evidence of the content of relevant Danish law, nor was the Panel asked to consider or apply any provision of Danish law.

10. The provisions set in the IDF ADR in force in July 2011 which are relevant in this arbitration include the following:

Article 1

"… These anti-doping rules apply to Anti Doping Denmark, the Sports Confederation of Denmark, all member organisations under the NOC and Sports Confederation of Denmark (hereafter "national federations"), and all persons involved in activities by membership, accreditation or participation in any activity under a national federation under the NOC and Sports Confederation of Denmark.

Exempted from these rules are athletes who neither participates in sport at an international or national level, but who exclusively participates in sport at a recreational level, including competitions at a lower level under the NOC and Sports Confederation of Denmark. These persons are covered by the Danish Anti-Doping Regulations for Recreational Athletes …".

Article 2

"Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of these Anti-Doping Rules (Anti-Doping Rule Violations). …

2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation".

Article 3.2

"Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases: …

3.2.2 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then the Doping Commission under the NOC and Sports Confederation of Denmark shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

Article 5.4.2

"Anti Doping Denmark shall notify all athletes of his/her inclusion in the national registered testing pool and inform him/her of his/her responsibilities according to these anti-doping rules. All athletes included in the national registered testing pool shall file whereabouts with Anti Doping Denmark in accordance with the international standard for testing and the guidelines provided by Anti Doping Denmark. Athletes must specify on a daily basis the locations where he/she will be training, and/or competing each day of a quarter or conduct any other regular activity. Athletes shall update their information as necessary so that it is current at all times. In addition to this information athletes shall also specify for each day during the following quarter a 60 minutes testing slot where the athlete must be available for sample collection at the specified location. However, this does not limit in any way the possibility to test the athlete at any time or place outside the 60 minutes time slot".

Article 5.4.3

"Where athletes are included in Anti Doping Denmark's registered testing pool and a registered testing pool under his/her international federation and who are required to provide whereabouts to her/his international federation shall provide Anti Doping Denmark with a copy".

Article 5.4.4

"Failure by any athlete included in Anti Doping Denmark's registered testing pool to submit a mandatory whereabouts or failure to submit correct whereabouts will be considered an anti-doping rule violation in accordance with article 2.4 of the Code where the conditions of Article 11.3.5 of the International Standard for Testing are met".

Article 5.4.5

"Unsuccessful attempts made by Anti Doping Denmark to locate an athlete during the 60 minute time slot specified by the athlete in his/her whereabouts will be reported to Anti Doping Denmark in accordance with the International Standard for Testing.

Anti Doping Denmark will subsequently evaluate the circumstances described in the report and determine whether the failure by the athlete to be present constitutes a missed test. 3 missed tests within an 18 month period will be considered an anti-doping rule violation according to article 2.4 of the Code where the conditions or Article 11.4.3 of the International Standard for Testing are met.

Written notification shall be sent to the athlete in respect of each missed test".

Article 10.3

"The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows: …

10.3.3 For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault".

Article 10.8

"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), 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 the resulting Consequences including forfeiture of any medals, points and prizes".

Article 10.9.1

"Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed".

Article 10.9.2

"Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed".

Article 10.9.3

"Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the Doping Tribunal 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".

11. The provisions set in the UCI ADR in force in July 2011 which have been invoked in this arbitration include the following:

Article 21

"The following constitute anti-doping rule violations: …

4. Violation of applicable requirements regarding Rider availability for Out-of-Competition Testing. Any combination of three Missed Tests and/or Filing Failures (as defined in chapter V) committed within an eighteen-month period, as declared by UCI or any other Anti-Doping Organization with jurisdiction over the Rider, shall constitute an anti-doping rule violation".

Article 25

"Departures from any other International Standard, these Anti-Doping Rules, the Procedural Guidelines set by the Anti-Doping Commission or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

Article 99

"A Rider in a Registered Testing Pool shall be deemed to have committed an anti-doping rule violation under article 21.4 if he commits a total of three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) within any 18 (eighteen) month period, irrespective of which Anti-Doping Organization(s) has/have declared the Whereabouts Failures in question".

Article 105

"UCI shall give notice to the Rider of any apparent Whereabouts Failure inviting a response within 14 (fourteen) days of receipt of the notice".

Article 110

"Where it is alleged that a Rider has committed 3 (three) Whereabouts Failures within any 18-month period and two or more of those Whereabouts Failures were alleged by an Anti-Doping Organisation that had the Rider in its Registered Testing Pool at the time of those failures, then that Anti-Doping Organization (whether the UCI or a National Anti-Doping Organisation) shall be the responsible Anti-Doping Organization for purposes of bringing proceedings against the Rider under article 21.4. If not (for example, if the Whereabouts

Failures were alleged by UCI and two National Anti-Doping Organizations respectively), then the responsible Anti-Doping Organisation for these purposes will be the Anti-Doping Organization whose Registered Testing Pool the Rider was in as of the date of the third Whereabouts Failure. If the Rider was in both UCI's and a national Registered Testing Pool as of that date, the responsible Anti-Doping Organization for these purposes shall be the UCI".

Article 111

"Where the UCI is the responsible Anti-Doping Organization and does not bring proceedings against a Rider under article 21.4 within 30 (thirty) days of WADA receiving notice of that Rider's third alleged Whereabouts Failure in any 18-month period, then it shall be deemed that the UCI has decided that no anti-doping rule violation was committed, for purposes of triggering the appeal rights set out at article 329".

12. The provisions set in the IST in force in July 2011 which are relevant in this arbitration include the following:

Article 11.4.3

"An Athlete may only be declared to have committed a Missed Test where the Responsible ADO, following the results management procedure set out in Clause 11.6.3, can establish each of the following:

a. that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised of his/her liability for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;

b. that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;

c. that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any Advance Notice of the test;

d. that the provisions of Clause 11.4.4 (if applicable) have been met; and

e. that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Clauses 11.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to him/her (i) being unavailable for Testing at such location during such time slot; and (ii) failing to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day".

Article 11.6.3

"The results management process in the case of an apparent Missed Test shall be as follows:

a. The DCO shall file an Unsuccessful Attempt Report with his/her ADO, setting out the details of the attempted Sample collection, including the date of the attempt, the location visited, the exact arrival and departure times at the location, the step(s) taken at the location to try to find the Athlete, including details

of any contact made with third parties, and any other relevant details about the attempted Sample collection.

b. If it appears that all of the Clause 11.4.3 requirements relating to Missed Tests are satisfied, then no later than 14 (fourteen) days after the date of the unsuccessful attempt, the Responsible ADO (i.e. the ADO on whose behalf the test was attempted) must send notice to the Athlete of the unsuccessful attempt, inviting a response within 14 (fourteen) days of receipt of the notice. In the notice, the Responsible ADO should warn the Athlete:

i. that unless the Athlete persuades the Responsible ADO that there has not been any Missed Test, then (subject to the remainder of the results management process set out below) an alleged Missed Test will be recorded against the Athlete; and

ii. of the consequences to the Athlete if a hearing panel upholds the alleged Missed Test.

c. Where the Athlete disputes the apparent Missed Test, the Responsible ADO must re-assess whether all of the Clause 11.4.3 requirements are met. The Responsible ADO must advise the Athlete, by letter sent no later than 14 (fourteen) days after receipt of the Athlete's response, whether or not it maintains that there has been a Missed Test.

d. If no response is received from the Athlete by the relevant deadline, or if the Responsible ADO maintains (notwithstanding the Athlete's response) that there has been a Missed Test, the Responsible ADO shall send notice to the Athlete that an alleged Missed Test is to be recorded against him/her. The Responsible ADO shall at the same time advise the Athlete that he/she has the right to request an administrative review of the alleged Missed Test. The Unsuccessful Attempt Report must be provided to the Athlete at this point if it has not been provided earlier in the process.

e. Where requested, such administrative review shall be conducted by a designee of the Responsible ADO who was not involved in the previous assessment of the alleged Missed Test, shall be based on written submissions alone, and shall consider whether all of the requirements of Clause 11.4.3 are met. If necessary, the relevant DCO may be asked to provide further information to the designee. The review shall be completed within 14 (fourteen) days of receipt of the Athlete's request and the decision shall be communicated to the Athlete by letter sent no more than 7 (seven) days after the decision is made.

f. If it appears to the designee that the requirements of Clause 11.4.3 have not been met, then the unsuccessful attempt to test the Athlete shall not be treated as a Missed Test for any purpose; and

g. If the Athlete does not request an administrative review of the alleged Missed Test by the relevant deadline, or if the administrative review leads to the conclusion that all of the requirements of Clause 11.4.3 have been met, then the Responsible ADO shall record an alleged Missed Test against the Athlete and shall notify the Athlete and (on a confidential basis) WADA and all other relevant ADOs of that alleged Missed Test and the date of its occurrence".

Article 11.6.5

"The Responsible ADO shall keep a record of all Whereabouts Failures alleged in respect of each Athlete within its Registered Testing Pool. Where it is alleged that such an Athlete has committed 3 (three) Whereabouts Failures within any 18-month period:

a. Where two or more of those Whereabouts Failures were alleged by an ADO that had the Athlete in its Registered Testing Pool at the time of those failures, then that ADO (whether the IF or a NADO) shall be the Responsible ADO for purposes of bringing proceedings against the Athlete under Code Article

2.4. If not (for example, if the Whereabouts Failures were alleged by three different ADOs), then the Responsible ADO for these purposes will be the ADO whose Registered Testing Pool the Athlete was in as of the date of the third Whereabouts Failure. If the Athlete was in both the international and a national Registered Testing Pool as of that date, the Responsible ADO for these purposes shall be the IF.

b. Where the Responsible ADO fails to bring proceedings against an Athlete under Code Article 2.4 within 30 (thirty) days of WADA receiving notice of that Athlete's third alleged Whereabouts Failure in any 18-month period, then it shall be deemed that the Responsible ADO has decided that no anti-doping rule violation was committed, for purposes of triggering the appeal rights set out at Code Article 13 (in particular Article 13.2)".

Article 11.6.6

"An Athlete alleged to have committed an anti-doping rule violation under Code Article 2.4 shall have the right to have such allegation determined at a full evidentiary hearing in accordance with Code Article 8. The hearing panel shall not be bound by any determination made during the results management process, whether as to the adequacy of any explanation offered for a Whereabouts Failure or otherwise. Instead, the burden shall be on the ADO bringing the proceedings to establish all of the requisite elements of each alleged Whereabouts Failure".

Merits

13. As a result of the parties' submissions and requests, there are two main questions that the Panel has to examine in these proceedings:

    a. the first concerns the determination of whether the First Respondent committed the anti-doping rule violation contemplated by Article 2.4 NADR (corresponding to Article 21.4 UCI ADR), i.e. whether Rasmussen committed, under the rules held to be applicable, three whereabouts failures within a period of eighteen months;

    b. the second, to be addressed in the event such anti-doping rule violation is found, concerns the identification of the consequences to be imposed on Rasmussen.

14. The Panel shall consider each of said questions separately.

A. Has the anti-doping rule violation contemplated by Article 2.4 NADR been committed by Rasmussen?

15. Under Article 2.4 NADR (as well as under the corresponding provision – Article 21.4 – of the UCI ADR), any combination of three missed tests and/or filing failures within eighteen months constitutes an anti-doping rule violation. Such provision matches the obligation of the athletes, included in a RTP, to provide, and keep updated, his/her whereabouts information, in order to be located for out-of-competition testing. Out-of-competition testing is at the heart of any effective anti-doping programme. To carry out effective testing of this nature, it is vital that athletes produce accurate and timely whereabouts information, so that they can be tested by surprise. The question in this case, as already mentioned, is whether Rasmussen committed

within a period of eighteen months three missed tests and/or filing failures, which, under the applicable rules, could be considered to be violations of his whereabouts obligations.

16. In this respect, it is common ground between the parties that a first whereabouts failure, in the form of a missed test, was committed by Rasmussen on 1 February 2010, when the ADD unsuccessfully tried to locate him at the place he had indicated for such date; and that a second whereabouts failure, in the form of a filing failure, was committed when, at the end of the third quarter of 2010, Rasmussen failed to timely provide his whereabouts information for the following, fourth quarter.

17. The parties, however, disagree as whether Rasmussen committed a third whereabouts failure, when on 28 April 2011 the UCI anti-doping officers could not meet him at the place he had indicated: the Respondents defend the Decision that held that such missed test could not be recorded as a whereabouts failure; the Appellant submit that the Decision is wrong, and that on 28 April 2011 (i.e. within an eighteen month period of the first failure, committed on 1 February 2010) a third whereabouts failure was committed by Rasmussen, triggering the application of Article 2.4 NADR.

18. More specifically, the parties do not argue on the fact that the Rasmussen had been included in the UCI RTP, that he had been informed of his responsibilities according to the relevant anti-doping rules, and that on 28 April 2011 a doping control officer of UCI could not locate him by visiting the location specified for the time slot indicated in his whereabouts filing for that day. Such points, corresponding to the conditions indicated in Article 11.4.3(a)-(c) IST, are not disputed. On such basis, it is also common ground that that the whereabouts information provided by Rasmussen through ADAMS for 28 April 2011 were not correct.

19. The dispute concerns the way the apparent missed test of 28 April 2011 was managed by the UCI, which (the parties agree also on this point) was the responsible anti-doping organization for such purposes, since the test was attempted on its behalf. In essence, on one hand, the Respondents submit that UCI failed to comply with the rule set by Article 11.6.3(b) IST, since the notice of the unsuccessful attempt was sent to Rasmussen much later than fourteen days after its date; on the other hand, UCI contends that it complied with Article 105 of the UCI ADR, which does not provide for any deadline for such notice, that Article 11.6.3(b) IST does not apply and that in any case a deviation from that provision cannot invalidate the recording of a missed test on 28 April 2011.

20. Indeed, different rules can be found in Article 105 UCI ADR and Article 11.6.3(b) IST. While the former simply indicates that the *"UCI shall give notice to the Rider of any apparent Whereabouts Failure inviting a response within 14 (fourteen) days of receipt of the notice"*, the latter specifies that the notice of the unsuccessful attempt must be sent by the responsible anti-doping organization *"no later than 14 (fourteen) days of the attempt"*. As a result, the question, discussed by the parties in this arbitration, concerns the binding force for UCI of Article 11.6.3(b) IST, and the effects for Rasmussen of the non compliance by UCI with the provisions therein established.

21. This Panel, however, finds it unnecessary to settle the issue: the Panel, in fact, finds that, even conceding that Article 11.6.3(b) IST had to be applied, the failure by UCI to send a notice to Rasmussen within fourteen days of the unsuccessful attempt of 28 April 2011 did not prevent UCI from recording it as a missed test. The Decision, which held otherwise, is wrong.

22. The Panel is led to such conclusion by several reasons.

23. The first reason relates to the wording of Article 11.6.3 IST. Under such provision, at its para. (c), in fact, in the event the athlete, who has received the notice of the unsuccessful testing attempt, disputes the apparent missed test, a re-assessment procedure must be started by the responsible anti-doping organization. Such process is intended to determine whether the requirements set by Article 11.4.3 IST are met: a missed test can be recorded as such only if the responsible anti-doping organization concludes that said conditions are satisfied. Therefore, no weight is given in this re-assessment procedure to a deviation from the 14-day rule contained in Article 11.6.3(b). In the same way, in the event an administrative review is subsequently conducted upon request, the subject in charge of it shall only consider (again) the requirements set by Article 11.4.3 IST: only if it is determined that these conditions are not satisfied shall the unsuccessful attempt not be treated as a missed test. No room is given for any consideration, in the determination of a missed test, of the respect by the responsible anti-doping organization of the deadline to send a notice of the unsuccessful testing attempt. Therefore, the Panel finds in the wording of Article 11.6.3 IST no basis for finding that a deviation from the 14-day rule mentioned at para. (b) of that provision affects the possibility that a missed test be recorded as such.

24. The second reason refers to the purpose of the notice mentioned by Article 11.6.3(b) IST. Its function, indeed, appears that of offering the athlete the opportunity to give explanations – before a missed test is recorded – with respect to the fact that an anti-doping officer had failed to meet him/her for unannounced testing, and therefore persuade the responsible anti-doping organization that there has been no missed test. In that context, the notice to the athlete plays an important role. Article 11.6.3 IST describes the results management process in the case of an apparent missed test; in such "administrative" process, the fundamental rights of the athlete must be respected: the athlete must be informed and be given the opportunity to state his/her case and persuade the responsible anti-doping organization that the apparent missed test must not be registered as such. Said role, however, defines also the consequences of the failure by the responsible anti-doping organization to respect the 14-day rule mentioned at Article 11.6.3(b) IST. In fact, the purpose of the notice of the attempted test can be considered satisfied even though the notice has been given after the 14-day deadline had passed, in the event the athlete has had the actual possibility to give explanations – before a missed test is recorded – with respect to the fact that an anti-doping officer had failed to meet him/her for unannounced testing, and indeed has exercised the right to state his/her case. In that situation, no breach of the athlete's right to be heard is committed. This is the situation that occurred in the Rasmussen's case. Indeed, as the parties themselves concede, the First Respondent was put in the position to give reasons for his failure to be at the place he was supposed on 28 April 2011 to be according to the whereabouts details he had provided; reasons which were re-assessed by the UCI, but found unsatisfactory. Therefore, the recording as such of the missed test of 28

April 2011 by the UCI, even though notice of the unsuccessful attempt had been given past the 14-day deadline contemplated by Article 11.6.3(b) IST, was not inconsistent with the respect of Rasmussen's rights and did not run against the purposes of the rule intended to protect them.

25. The third reason is linked to the effects of a violation of Article 11.6.3(b) IST. The Panel underlines that a violation of the deadline contemplated by Article 11.6.3(b) IST is relevant in the results management process of an apparent missed test also in another direction, producing effects which, however, do not preclude the finding that, in the Rasmussen's case, a missed test occurred on 28 April 2011. As mentioned by WADA in an email of 13 October 2011 to the Anti-Doping Committee of DIF (above), and stated in the CAS award of 24 August 2011 (CAS 2011/A/2499, at para. 27) with respect to filing failures, notice of a whereabouts failure is necessary in order to prevent an athlete from committing unknowingly the same infringement again. In other words, an athlete cannot be notified of a second (or third) failure unless the first (or second) failure has been properly notified to him/her: the athlete must be given the opportunity to rectify his/her failure and to know how many violations he/she has committed. This principle means that a fourth (hypothetical) failure could not be recorded against Rasmussen if committed before the notice of the missed test of 28 April 2001; but does not preclude the recording as a missed test of the unsuccessful attempt to test him on 28 April 2011.

26. The fourth, and final, reason relates to the impact of Article 3.2.2 NADR on a deviation from Article 11.6.3(b) IST. Under Article 3.2.2 NADR, a departure from the IST can invalidate the finding of an anti-doping rule violation only in the event said anti-doping rule violation has been caused by the departure itself. In the Rasmussen's case, a departure from the rule providing for a notice within fourteen days of the unsuccessful testing attempt on 28 April 2011 did not cause the anti-doping rule violation for which the First Respondent is held responsible: the basis of the anti-doping rule violation contemplated by Article 2.4 NADR is (in addition to the first two failures) the fact that on 28 April 2011 Rasmussen was not met by the competent anti-doping officer for out-of-competition testing at the time and place he had indicated in compliance with his obligation to provide accurate whereabouts information. Such factual basis is obviously not affected by events pertaining to the subsequent administration process regarding it: the fact that an unsuccessful testing attempt was notified within, or past, fourteen days thereof does change the fact that a test was missed by Rasmussen on 28 April 2001. Therefore, also pursuant to Art. 3.22 NADR, a departure from Article 11.6.3(b) IST cannot be invoked to invalidate the missed test of 28 April 2011. Whether in another set of circumstances a non-respect of the notice period would make impossible for an athlete to state the reasons for his/her failure and whether such impossibility could have an impact on the acceptance of the existence of a failure is an issue that, for the above reasons, can be left open in the present case.

27. The above finding leads to the conclusion that a whereabouts failure was committed by the First Respondent on 28 April 2011. Such failure was the third in an eighteen month period, as it followed the missed test of 1 February 2010 and the filing failure for the fourth quarter of 2011. As a result of the above, the Panel holds that Rasmussen committed the anti-doping rule violation contemplated by Article 2.4 NADR.

B. What are the consequences to be applied for the anti-doping rule violation committed by Rasmussen?

28. The second question that the Panel has to answer concerns the consequences of the anti-doping rule violation committed by Rasmussen: while the Appellant holds that the maximum sanction of two years of ineligibility, together with the ensuing disqualification of results and other consequences, has to be applied, the Respondents allege that only the minimum sanction of one year, with the starting date backdated to the moment of the missed test of 28 April 2011, has to be imposed.

29. The first point, therefore, concerns ineligibility. The period of ineligibility which, under Article 10.3.3 NADR, could be imposed on Rasmussen for the anti-doping rule violation contemplated by Article 2.4 NADR ranges from one to two years. The closing period of Article 10.3.3 NADR makes it clear, then, that the measure of the sanction depends on the assessment of Rasmussen's degree of fault: the Anti-Doping Board decided not to impose any period of ineligibility; the UCI disputes this conclusion, and maintains that the level of negligence shown by the First Respondent in dealing with his whereabouts obligations was such as to command a sanction of two years' ineligibility.

30. The Panel finds that a period of eighteen months is the appropriate measure of ineligibility for the First Respondent, proportional to his degree of fault. On one side, the Panel notes that the behaviour of Rasmussen shows a patent disregard of his whereabouts obligations, commanding a sanction much higher than the minimum stipulated by Article 10.3.3 NADR: the missed tests for which he is responsible were in fact due not to unexpected occurrences, but to circumstances (participation in a competition in Germany or attendance at the sister's confirmation in Denmark) which had been scheduled in advance, and therefore had left him with sufficient time to keep his whereabouts information updated; the filing failure concerning the fourth quarter of 2010 was explained by an oversight (amounting to carelessness). On the other hand, the Panel remarks that there is no suggestion (let alone evidence) that Rasmussen committed the whereabouts failures, for which he is held responsible, in order to hide from testing and undergo a doping practice. For instance, when the first missed test occurred, on 1 February 2010, Rasmussen was publicly competing in Berlin, available for any form of doping control; then, on 28 April 2011, his location could be immediately traced. A sanction lower than the maximum therefore appears to be proportionate.

31. With respect to disqualification, however, the parties dispute as to its starting date. Pursuant to Article 10.9.1 NADR, the period of ineligibility starts on the date of the decision imposing the sanction. Therefore, as in the present case this Panel is imposing a sanction not applied by the Anti-Doping Board, the date of this award would be the starting moment of the ineligibility. Article 10.9.3 NADR, however, gives this Panel the possibility to start the period of ineligibility at an earlier date than the date of this award, if *"there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete"*. Such earlier date could be the date on which the anti-doping rule violation last occurred.

32. On the basis of Article 10.9.3 NADR, and by taking into due consideration the chronology of this case and factual elements, but without making any strict arithmetical calculation, the Panel

finds it proper to set on 1 October 2011 the starting moment of the period of ineligibility imposed on Rasmussen. The Panel comes to this conclusion by considering that on 17 November 2011, when the Decision was issued, Rasmussen was ready to accept an ineligibility sanction of one year. If not for the Decision, which went beyond the parties' requests and expectations, Rasmussen would have started to serve the sanction on that date. In addition, the Panel notes that delays occurred in the results management of the third whereabouts failure by UCI. The failure of the UCI to comply with the deadline indicated in Article 11.6.3(b) IST delayed in fact by around two months the administrative procedure for the recording of the missed test of 28 April 2011, and therefore the ensuing disciplinary proceedings before the DIF anti-doping bodies, which could in that event be completed by 1 October 2011.

33. Pursuant to Article 10.9.2 NADR, any period of provisional suspension is to be credited against the total period of ineligibility imposed. Rasmussen was provisionally suspended on 14 September 2011. The period of provisional suspension served by Rasmussen between 14 September 2011 and 1 October 2011, the starting date of the ineligibility, is to be credited against the eighteen months of ineligibility imposed on him.

34. The second point concerns disqualification. The UCI, in fact, requests that Rasmussen's results between 28 April 2011 and the date of the CAS award be disqualified.

35. Under Article 10.8 NADR, all competitive results obtained from the date an 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.

36. In this case, the Panel finds that fairness requires that no disqualification be imposed on the First Respondent with respect to the results obtained in the period between 28 April 2011, date of the third whereabouts failure, and 14 September 2001, date of the provisional suspension. In addition to the fact that Rasmussen was not responsible for the delay in the management of his case, the Panel finds it important to emphasize the circumstance that, as conceded by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen. Therefore, the Panel sees no reason to disqualify them. At the same time, the Panel underlines that the declaration that Rasmussen is ineligible to compete as from 1 October 2011 implies the forfeiture of the results (including medals, points and prizes) achieved in the period for which ineligibility is retroactively imposed (award of 27 July 2009, CAS 2008/A/1744, § 79-80).

37. In connection with above, the Appellant requests the Panel also to condemn the First Respondent *"to repay all the prizes money"* Rasmussen has won after 28 April 2011. The Panel, however, finds that, in addition to the holding concerning disqualification as well as forfeiture of results in the period of ineligibility, it has no power, failing a legal basis, to condemn Rasmussen to such repayment. Therefore, the request of the UCI in that respect cannot be granted. The Panel only notes that repayment of all prize money forfeited is a condition of regaining eligibility pursuant to Article 10.8.1 NADR.

Conclusion

38. In light of the foregoing, the Panel holds that the appeal brought by UCI against the Decision is to be partially granted: the Decision is to be set aside; Rasmussen, having committed an anti-doping rule violation under Article 2.4 NADR, is sanctioned, in accordance with Article 10.3.3 NADR, with a period of ineligibility of eighteen months, starting on 1 October 2011, with credit given for the period of provisional suspension at that time already served. The relief requested by the UCI with respect to disqualification of results and repayment of prize money is, on the other hand, to be dismissed to the extent not covered by the sanction of ineligibility.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Union Cycliste Internationale (UCI) on 22 December 2011 against the decision taken by the Anti-Doping Board (*Dopingnaevn*) of the National Olympic Committee and Sports Confederation of Denmark (*Dansk Idraetsforbund*) on 17 November 2011 is partially granted.

2. The decision taken by the Anti-Doping Board (*Dopingnaevn*) of the National Olympic Committee and Sports Confederation of Denmark (*Dansk Idraetsforbund*) on 17 November 2011 is set aside.

3. A suspension of 18 (eighteen) months is imposed on Mr Alex Rasmussen commencing on 1 October 2011, with credit given for the period of provisional suspension at that time already served.

4. The results achieved by Mr Alex Rasmussen in the period from 28 April 2011 to the date of his provisional suspension shall not be disqualified.

(…)

7. All other motions or prayers for relief are dismissed.