

DECISION
OF THE FIM INTERNATIONAL DISCIPLINARY COURT (CDI)

Sitting in the following composition:

Mr Lars NILSSON (CDI Single Judge)

in the following case:

Championship: FIM Speedway Grand Prix World Championship

Event: Latvia – 17 August 2014 (IMN 502/08)

Venue : Daugavpils

Case concerns: Alleged anti-doping rule violation committed by Mr Darcy Ward.

Present at the Hearing:

Mr Darcy Ward, Rider
Mr Louis Weston, Rider's Counsel

Mr Lars Nilsson, CDI Single Judge

The FIM, represented by Mr Richard Perret, FIM Legal Director assisted by Mrs Ruth Griffiths,
FIM Legal Assistant

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I. RECAPITULATION OF THE RELEVANT FACTS

1. Mr Ward is a professional speedway rider and was participating in the 2014 FIM Speedway Grand Prix World Championship (hereinafter referred to as 'the Championship').

2. Mr Ward was due to compete in the Championship's meeting in Latvia (the "Meeting").

3. The Meeting was scheduled to take place in Riga on 16 August 2014 but was, due to bad track conditions, moved to the following day, to Daugavpils to start at 3 pm.

4. On 17 August 2014, as part of a routine In-Competition doping control, Mr Ward was drawn together with two other riders in the ballot for alcohol controls to be carried out before the start of the races.

5. Starting at 1:53 pm on 17 August 2014 four breath alcohol tests were taken on Mr Ward.

6. In the protocol from the breath test (the "Test Protocol"), it was noted that the test results for Mr Ward were "0.52" at the first breath test, followed by "0.44" at 1:55 pm, "0.37" at 2:30 pm and "0.34" at 2:37 pm (jointly the "Test Results"). In the Test Protocol it was also noted that the test results for the other two riders were "0.00".

7. Based on the Test Results, the International Jury concluded that the level of alcohol exceeded the threshold for alcohol – 0,10 g/l - set out in Fédération Internationale de Motocyclisme's ("FIM") Anti-Doping Code ("CAD"), Appendix 3, Section P1. The Jury accordingly excluded Mr Ward from the Meeting and, in addition, decided to fine Mr Ward three thousand Euros.

8. In a letter submitted by email and dated 18 August 2014 (the "Ward Letter") Mr Ward set out to clarify the circumstances in which he failed the alcohol test at the Meeting in Daugavpils the day before. In summary, Mr Ward claimed that he had learned on the evening of 16 August 2014 that his parents were to divorce after a long marriage and that his family home was being put up for sale and that this information shocked and upset him. Mr Ward further claimed that he had consumed a single alcoholic drink with his food at a restaurant and a second before leaving the restaurant at 10 pm. He had then drunk one small alcoholic drink at the hotel sky bar while watching the city's firework display and one more drink at the bar some time afterwards before going back to his room at around 2 am. Mr Ward also claimed to be aware that it was irresponsible of him to consume any alcohol the night before a meeting and to be stunned by the results of the test. He could not believe that the alcohol had stayed in his system. He felt fully alert on the morning of 17 August. He did a TV interview during the meeting where he explained the circumstances and expressed his deep regret.

9. Mr Ward was informed by FIM by letter of 27 August 2014, i.a., that the positive result of the test for alcohol, which is a Specified Substance in the meaning of Article 4.2.2 CAD, indicated that the FIM Anti Doping rules had been violated, that the FIM, after consultation with the FIM CMI Director, had decided to suspend him provisionally from participating in any competition from 28 August 2014 until further notice, and that, if he believed that he had valid reasons to do so, he could request that the provisional suspension be lifted.

10. On 3 September 2014 the FIM received a submission issued by Mr Ward's legal counsel, Mr Jonathan Morrissey, requesting that the provisional suspension of Mr Ward be lifted forthwith.

11. The grounds put forward by Mr Ward in the submission for lifting the provisional suspension were, in summary, that the Specified Substance was not performance-enhancing and not intended to be, nor was it a masking substance, that Mr Ward was able to identify how the Specified Substance came to be in his person, that the circumstances of the consumption of the

Specified Substance were exceptional and wholly out of character for Mr Ward, and that he was therefore eligible for the elimination or reduction of penalty under Article 10.4 CAD.

12. The submission from Mr Ward was accompanied by four written testimonials concerning Mr Ward's person and character; one from Mr Matt Ford, Club Owner, Poole Speedway Ltd, dated 2 September, one from Mr Mark Lemon, Australia Speedway Team Manager, dated 26 August, one from Mr Joe Parsons, Director of Special Marketing Projects, Monster Energy, dated 27 August, and one from Mr Neil Middleditch, Team Manager of the Poole Pirates, dated 3 September 2014, (jointly the "Ward Testimonials").

13. On 19 September 2014 the CDI Single Judge decided to uphold the provisional suspension of Mr Ward. In his decision the CDI Single Judge also stated that the merits of the case would be determined on the basis of the materials placed before the CDI at a final hearing and recommended that the final hearing should be fixed expeditiously, preferably in the month of October or November 2014, so that a decision on the merits could be taken in a timely manner.

14. In a letter to FIM dated 29 September 2014 Mr Morrissey requested to be served with the case papers, including all papers relevant to the breath testing device used, in order to enable him to present Mr Ward's defence. Mr Morrissey also reminded FIM of the recommendation of the CDI Single Judge regarding the time for a final hearing. Mr Morrissey repeated said request in a letter dated 22 October 2014.

15. On 29 October 2014 Mr Morrissey was informed by the FIM in a letter that a hearing scheduled to take place in the last week of November had to be postponed until January 2015 due to Mr Morrissey's request for disclosure of information regarding the device used at the breath alcohol test on Mr Ward.

16. In a letter dated 4 November 2014 Mr Morrissey protested against the postponement of the hearing and denied that the responsibility for the delay was on Mr Ward's side. Mr Morrissey further explicitly stated that Mr Ward had not admitted any breach of Article 2.1 or 2.2 CAD.

17. In the end of November 2014 Mr Morrissey accepted that the hearing should take place on 8 January 2015. The convening letter for this hearing was sent from FIM on 11 December 2014.

18. In a letter to FIM dated 19 December 2014 Mr Morrissey declared that Mr Ward had not been given sufficient time to prepare his case and that he – considering the upcoming Christmas/New Year period – would not be able to do this by 8 January 2015.

19. As a consequence of the foregoing, the hearing was postponed to 30 January 2015. The convening letter for the hearing was sent out by FIM on 9 January 2015. In the letter FIM alleged that the positive result of Mr Ward's alcohol test carried out at the Meeting was considered as an anti-doping rule violation under Article 2.1 or 2.6 CAD.

20. The convening letter stipulated a deadline of 22 January 2015 for Mr Ward to file his submissions. Mr Ward, through his legal counsel Mr Louis Weston, barrister, filed his written submission on 22 January 2015. Attached to the submission were, i.a., witness statements from Mr Ward himself and from his father Mr Bryan Ward, respectively, and operating instructions for AlcoQuant 6020 Breathalyser.

21. On 29 January 2015, the evening before the hearing, FIM submitted some documents which FIM wanted to add to the existing file in response to some issues raised by Mr Ward in his submission on 22 January 2014 (the "Additional Documents").

22. In consideration of Article 8.1.1 CAD and Article 3.3.2 of the FIM Disciplinary and Arbitration Code, Mr Ward, assisted by Mr Weston, was heard by the CDI during a hearing held at the Best Western Hotel at Chavannes-de-Bogis, Switzerland on 30 January 2015 ("the CDI Hearing").

23. The CDI Hearing was held in the presence of the FIM Legal Director, Mr Richard Perret, acting as FIM's Representative who was assisted by Mrs Ruth Griffiths, FIM Legal Assistant.

24. On 25 February 2015, the CDI published the operative part of the present decision.

II. ASSESSMENT IN LAW AND IN FACT BY THE CDI

1. GENERAL PROCEDURAL ISSUES

A. CDI Jurisdiction

25. The CDI has jurisdiction to handle this case and decide on its merits in accordance with Article 8.1.1 CAD and Article 3.3.2 of the FIM Disciplinary and Arbitration Code.

26. In addition, the CDI notes that Mr Ward has not called into question or challenged the competency of the CDI in the proceedings.

27. The Director of the International Commission of Judges (CJI) has appointed Mr Lars Nilsson of Sweden as the single CDI Judge for this particular case.

28. During the CDI Hearing of 30 January 2015, in accordance with Article 8 CAD, Mr Ward was given the opportunity to exercise in full his right to be heard (present his version of the facts, arguments and submit relevant evidence in particular).

29. It is noted that Mr Ward never raised any objections against the person of the CDI Single Judge for this case or – with the exception set out under par. 39 below - against the procedure before the CDI itself.

Mr Ward specifically requested the CDI to announce the operative part of the decision in advance. Mr Ward also agreed that the decision should be sent to him by e-mail.

2. MERITS (Procedure before the CDI)

A. Scope of review of the CDI

30. When adjudicating in first instance (FIM Disciplinary and Arbitration Code, Article 3.3.2), the CDI enjoys full powers to establish the relevant facts and apply the law applicable to the case.

31. Below is a summary of the relevant facts and allegations (which may also be set out, where relevant, in connection with the legal discussion that follows) based on Mr Ward's written submissions, pleadings and evidence adduced therein and at the CDI Hearing.

32. While the CDI has considered all the facts, allegations, legal arguments and evidence submitted by Mr Ward and FIM in the present proceedings, it refers in its decision only to the submissions and evidence it considers necessary to explain its reasoning.

B. Applicable law

33. The 2014 FIM Anti-Doping Code, the FIM Track Racing Appendices ("TRA"), the FIM Speedway Grand Prix World Championship Regulations ("SR"), the FIM Sporting Code and

complementarily Swiss law, if necessary, as the FIM has its seat in Switzerland [cf. Arbitration CAS 2003/A/461 & 471 & 473 WCM-GP Limited v/ Fédération Internationale de Motocyclisme (FIM), Award of 19 August 2003] apply to this case. The CDI shall also consider the relevant case law of the Court of Arbitration for Sport (“CAS”).

C. The parties’ submissions during the written and oral proceedings before CDI

I. *FIM’s written submissions in support of its allegations against Mr Ward*

34. The convening letter sent by FIM on 11 December 2014 (cf. par. 17) included a reference to 21 appendices to be put forward before the CDI as evidence, including, i.a.:

1. The Test Protocol.
2. A photo of an AlcoQuant Breathanalyser, reading on the display “BAC”, “0.37 ‰”, “2:26 pm”, “17.08.14” and labelled with a green slip of paper bearing the figures “304750” (the “Device” and “Device Photo”, respectively).
3. The Ward Letter and the Ward Testimonials.
4. Second Jury Meeting Minutes, Riga, 16 August 2014.
5. Third Jury Meeting Minutes, Daugavpils, 13.00, 17 August 2014.
6. Letter from FIM CMI Director David McManus 6 November 2014 (the “First McManus Letter”).
7. Certificate of verification issued 12 March 2014 concerning an AlcoQuant 6020 Breathanalyser with number “123564” (the “Verification Certificate”), in original in Latvian and in a copy translated into English.

35. The Additional Documents sent by FIM on 29 January 2015 (cf. par 21) included, i.a., the following documents:

1. Supplementary Report from David McManus dated 29 January 2015 (the “Second McManus Letter”) and related appendices.
2. The FIM Jury President's Report re. 2014 FIM Speedway Grand Prix of Latvia dated 18 August 2014.
3. Affidavit issued by Mr Krister Gardell, FIM Referee at the Meeting.
4. The Signing On Sheet from the Meeting, Riga 16 August 2014.

36. In the First McManus Letter, David McManus, the Director of FIM’s International Medical Commission (CMI), provided a general description of the alcohol testing procedures of FIM. In summary these are described in the letter as follows:

37. Alcohol controls may be carried out before the start of practice, racing or at any time during the meeting. Due to obvious safety concerns and related important and indisputable risks arising from the use of alcohol in a high-speed sport such as speedway alcohol testing is normally conducted following the riders’ briefing immediately prior to the commencement of the practice sessions and heats and normally three riders will be randomly selected by means of a ballot involving the FIM Jury President, FIM Referee, FMNR Delegate and the Chief Medical Officer. The testing is then carried out by the Chief Medical Officer for the event or a nominated alcohol control officer competent in the use of the device and alcohol testing procedure and the procedure is observed by the FIM Jury President, FIM Referee and FIM Medical Representative, if present. As the alcohol controls are performed prior to racing the riders cannot be selected by finishing position therefore are selected randomly or, if necessary on some occasions, by target testing.

38. The alcohol test of Mr Ward was described in the First McManus Letter as follows:

39. On this occasion three riders were selected by ballot during the third Jury Meeting on 17

August 2014. The three riders that were selected were riders' number 33, 43 and 45. Mr Ward was rider number 43. The Alcohol Controls on the three riders were carried out by Dr. Ivars Bekmanis, the Chief Medical Officer for the event, in the presence of the FIM Jury President, FIM Referee, and FMNR Delegate. This is reflected in the FIM Track Racing Commission Ballot for the Alcohol Controls Document. The same also indicates that the alcohol measurements for the other two riders were zero (0.00g/dl) but that the initial alcohol measurement for Mr. Ward was 0.52 g/dl. The document also shows that a further three measurements were made on Mr Ward during the subsequent 44 minutes when the alcohol measurement gradually fell to 0.34 g/dl. Dr. Bekmanis has confirmed that the device he used on this occasion was an ENVITEC AlcoQuant 6020 Serial Number A 123564 which is calibrated to provide readings from 0.00 g/dl to 5.00 g/dl. He has also confirmed that he is very familiar with this particular device as he has been trained in its use and uses it in his work in the hospital in Daugavpils on a regular basis as part of his assessment and management of patients. He has also confirmed that he personally brought the device from the hospital where he works and uses the device to the event. He has also confirmed that the device was laboratory checked and verified on 12 March 2014 and a certificate to this effect issued on that date which is valid until 4 September 2014 when the device will again be checked and verified. He has also provided a copy of the most recent Reverification Certificate for that particular device.

40. In the Second McManus Letter, Mr McManus corrected the units he had expressed in the First McManus Letter and stated, i.a., that it was an error on his part to express the units g/dl instead of the correct g/l or g/L. He pointed out that he in his previous letter referred to the anti-doping violation threshold for alcohol as 0.10g/dl when this should have been clearly 0.1g/l. Regarding the units of measurement used, the FIM Anti-Doping Code and the WADA Prohibited List state the threshold level for alcohol as a Blood Alcohol Concentration (BAC) in units of g/l. This is therefore the unit in which the alcohol is measured, recorded and reported in all FIM Alcohol Controls. The normal convention is that Blood Alcohol Concentration (BAC) is recorded using the unit ‰ which is a symbol for parts per thousand (equivalent to g/l).

41. At the beginning of the hearing Mr Weston objected to the evidence of the First and Second McManus Letter and also the Affidavit of Mr Gardell and claimed that they should not be admitted. In summary, Mr Weston alleged that Mr McManus and Mr Gardell should have been called as witnesses by FIM to make their statements at the hearing. To allow these written submissions by Mr McManus and Mr Gardell as evidence would therefore be in conflict with the principles of a fair hearing set out in FIM Disciplinary and Arbitration Code. In addition, Mr Weston claimed that FIM provided the Second McManus Letter and the Affidavit of Mr Gardell with him as late as the morning of the hearing which also is in conflict with the principle of a fair hearing.

42. FIM's Legal Director explained that the Second McManus Letter had been drawn up because of questions raised in Mr Ward's written submission. Clarifications were made in order to answer questions related to establish the relevant facts in the case. Mr Ward had not contested the First McManus letter earlier in the proceedings. Mr McManus was not a witness; he was the FIM Medical Commission Director. Moreover, FIM had no obligation whatsoever to call any witness. If Mr Ward thought it was important to hear Mr McManus or Mr Gardell he might have called them to the hearing himself.

43. After a short break and deliberation, the CDI announced that Mr McManus should not be considered as a witness or an expert in the meaning of FIM Disciplinary and Arbitration Code. Instead he should be considered as a representative of FIM and any statements from him would be evaluated in the light of this. If Mr Ward considered that he would need more time for analysing and commenting on Mr McManus' statement, Mr Ward would be given opportunity to supplement his written submissions within a short time after the hearing.

44. The FIM Legal Director submitted at the hearing, in short summary, the following:

45. In FIM's view the testing procedure had been adequate and in accordance with CAD. The

Guidelines were not mandatory for FIM. The validity of the Test Results could not be seriously challenged. The Device was properly calibrated and operated by a trained person.

46. Mr Ward's drinking on 16 August 2014 was in-competition. The races to be held in Riga and the races in Daugavpils were the same event. The administrative scrutineering demonstrated by the signing-on was made in Riga on Saturday afternoon.

47. Mr Ward's drinking of alcohol in reaction to the bad news he received was understandable but before the race it was not to be tolerated. Considering the Test Results, Mr Ward had probably drunk more alcohol than he had admitted. It was hard to accept that Mr Ward could have believed that there would not be any alcohol left in his blood when he was tested. The only sensible thing to do for Mr Ward would have been to withdraw from the races in Daugavpils under those circumstances. He could have risked his life and that of other riders had he competed. His behaviour was blameworthy and it was difficult to forgive him.

48. Mr Ward had not challenged the Test Results until recently. He had not challenged the test at the event and not even in the Request for lifting the provisional suspension made with his lawyer. FIM submitted therefore that this challenge had been made much too late and therefore was not admissible. To raise this issue at such late stage in the proceedings, whereas he could have done so earlier, was in conflict with the principle of good faith as set out in the Swiss Civil Code and the Swiss Code of Civil Procedure.

49. FIM accepted that, given the circumstances, Mr Ward had no intention to enhance his sporting performance when he consumed the alcohol during the Meeting.

II. Mr Ward's submissions and approach to the alleged anti-doping violation

50. Mr Weston contested that Mr Ward had committed a violation of Article 2 CAD. In support of this position Mr Weston submitted, in short summary, the following.

51. The only time the use or existence of alcohol could be considered as an anti-doping violation was in-competition and in excess of 0.10 g/L. The FIM Jury President's Report explicitly said that the scheduled races at Riga were cancelled and transferred to Daugavpils starting at 3 pm on Sunday. In the Third Jury Meeting Minutes the meeting in Daugavpils was described as a "re-arranged meeting". The conclusion was that the races in Daugavpils should be seen as a new competition. The Third Jury Meeting was held at 1 pm on 17 August 2014. From the wording of the minutes from this meeting it seemed that the technical scrutineering took place a short time before the Jury Meeting. Mr Ward consumed alcohol on the evening of 16 August 2014. There was no evidence that this consumption took place less than 12 hours before the scrutineering at Daugavpils.

52. FIM had elected breath testing as its method of doping control for alcohol. As a consequence thereof, FIM had not used a WADA accredited laboratory for the testing and Mr Ward had not been allowed the protection of a 'B' sample test as it should have been the case under the CAD. FIM had in accordance with Article 3.2 CAD to demonstrate that it had a reliable means that established a blood alcohol concentration exceeding 0.10 g/L. In order to fulfil this requirement, FIM had to follow precisely a reliable testing regime to ensure that Mr Ward was protected from errors in the sample collection. Since Article 2 CAD imposed a strict liability on the rider it became important that the rules for the testing procedure should be crystal clear, that they were designed for reliability and that they were followed.

53. Reliable meant that FIM had to use reliable devices for the testing and that these devices

produce reliable and understandable data. FIM had also to follow the regulations set out in Article 6 CAD and afford the protection of the rights of Mr Ward provided by WADA's Guidelines for Breath Alcohol Collection (the "Guidelines").

54. Contrary to these requirements, FIM had neither been able to establish the validity of its test nor that it has any reliable evidence of the alcohol content of Mr Ward's blood alcohol level. There were, i.a., uncertainties with regard to the general condition and reliability of the Device and if it had been properly calibrated. The only evidence on the Device was the Device Photo but the number 304750 shown on the Device Photo was not identical with the number set out in the Verification Certificate and there was no evidence that the certificate related to the Device. In addition, there was no evidence that the readings on the Device corresponded to the unit g/L. Mr Ward had never accepted the Test Results.

55. Further, FIM had not complied with the mandatory requirements of Article 6 CAD. In addition, FIM had not afforded Mr Ward his protective rights in connection with the testing procedures. The result of the multiple violations by FIM of the Guidelines and CAD and the uncertainty about the Device and its certification was that FIM had not been able to discharge the burden of proving the reliability of the Test Results.

56. Alcohol was a widely used substance. Any interpretation of CAD which prohibited any rider from holding a glass of a drink which contained alcohol as being possession of alcohol in accordance with Article 2.6 CAD was a ridiculous interpretation. There was no evidence that Mr Ward had been in possession of alcohol 'In Competition'. Further, or in the alternative, any possession by Mr Ward of alcohol was justifiable within the meaning of Article CAD 2.6 in the circumstances that the event at Riga had been cancelled and abandoned and that there was no certainty that the event would proceed on 17 August 2014 in Daugavpils. Mr Ward was entitled to assume he was not In-Competition.

57. Mr Ward contested that he had breached the principle of good faith. He had never accepted the Test Results. Already by asking for additional tests he had challenged the result. There was no acceptance of a violation of CAD in the Ward Letter, only to drinking. Neither did the Request for lifting the provisional suspension include any admission in this respect.

58. Should a period of ineligibility be imposed on Mr Ward, Article 10.9.3 was applicable in this case. Mr Ward should receive credit for the period of provisional suspension. Fairness required that Article 10.8 CAD should not be applied in this case. The reason for this was that Mr Ward had not been told he was suspended until several weeks after the Meeting.

59. When questioned at the CDI Hearing, Mr Ward confirmed that the sign-on took place in Riga and that he was informed around 1.30 pm on 16 August 2014 by the Race Director, Mr Tony Olsson, that the meeting in Riga was cancelled and instead would take place the next day in Daugavpils, starting at 3 pm.

60. Mr Ward stressed that his drinking on the evening of 16 August 2014 was not aimed at enhancing his performance. The drinking was caused by the sad news he received from his father during the dinner. He had lost focus and drunk maybe 5 – 7 vodka drinks with lemon during the evening. He guessed they were "strong" drinks but he did not feel drunk.

61. According to Mr Ward the drinking started around 7 pm at the restaurant. He had dinner with Mr Joe Parsons from Monster Energy, one colleague Josh and two other riders. They all went back to the hotel around 8.30 and he went to bed at around 12.30. There was no discussion between them during the evening with regard to his drinking and the racing the next day. He and Joe Parsons, who sees him like his son, talked mostly about the news he got from his father.

62. He woke up around 9 am on Sunday morning and ate yoghurt before leaving for Daugavpils. He felt fine; he did not have any hangover or any problems with his speech or walking.

It did not cross his mind that he would test positive for alcohol.

63. When he read the first result on the breathalyser he challenged the result and asked the referee for a new test. Besides the referee there was another person present at the test. After the second test he agreed with the referee to do another test. After around 45 minutes he took the third test followed by another test shortly thereafter. Some hours later he was questioned by the International Jury. Mr Joe Parsons was with him at that hearing.

64. Mr Ward further claimed that his normal alcohol consumption in Australia was limited to a couple of drinks on Saturdays and sometimes on Sundays. He had never been involved in any incidents involving alcohol when riding a motorcycle or driving a car.

65. Mr Ward confirmed that he knew that alcohol was prohibited in-competition in motorcycling but claimed that he was unaware about how long it took to eliminate alcohol from the body. He was willing to participate in FIM's educational programme for young riders regarding alcohol use in motorcycling sport.

66. Mr Ward finally said the he could not believe that he had exceeded the threshold for alcohol but took full responsibility for what he had done. He added that there was no excuse considering that racing was his life and that he had missed the chance to win the World Championship through what had happened.

D. Findings of the CDI

I. Has Mr Ward committed an anti-doping rule violation?

67. FIM during the proceedings based its allegations on Article 2.1, 2.2 and 2.6 CAD as reflected in the Convening Letter. After taking cognizance of Mr Ward's submissions, FIM during the hearing relied notably on Article 2.2 by stating that "...we know for a fact that the signing on took place Saturday at midday, so even if the test is not accepted, Mr Ward has infringed the Anti-Doping Code. It is impossible to contest that he was above the threshold when he drank those 5-6 vodka lemons".

68. As set out under par. 30, the CDI has the powers to apply the law and regulations it finds applicable to the case. Consequently, the CDI has the powers to assess the allegations against Mr Ward in relation to all the various occurrences that constitute anti-doping rule violations under CAD.

69. Article 1 CAD defines doping as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 CAD.

70. According to Article 2 CAD riders shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods that have been included on the Prohibited List. Article 2 CAD also defines various occurrences that constitute anti-doping rule violations. Of relevance in this case are the occurrences set out under Article 2.1 (the presence of a prohibited Substance or its Metabolites or Markers in a Riders Sample), Article 2.2 (Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Methods).

71. Any first violation against each of Article 2.1, 2.2 and 2.6 CAD is subject to the same sanction in accordance with Article 10.2 CAD, that is a sanction of 2 years of ineligibility, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided in Article 10.6, are met.

72. It is undisputed in this case that Mr Ward drank alcohol during the evening of the 16 August 2014, i.e., the evening before he was supposed to compete in the races in Daugavpils.

73. Alcohol is included in the Prohibited List of CAD as a Prohibited Substance. According to Appendix 3, Section P1, alcohol (ethanol) is prohibited *In-Competition* only, in motorcycling and five other sports. Detection will be conducted by analysis of breath and/or blood. The doping violation threshold is equivalent to a blood alcohol concentration of 0.10 g/L.

74. Consequently, the question to answer in this case in relation to Art. 2.2 CAD is whether Mr Ward's consumption of alcohol took place In-Competition or not. As set out in Appendix 1 to CAD, *In-Competition* is defined as "the period commencing twelve hours before the Rider has passed the technical and/or administrative scrutineering, whichever is the earlier, before a competition in which the Rider is scheduled to participate through the end of such competition and the Sample collection process related to such competition." *Competition* is defined as "a single sporting meeting (composed, depending on the discipline, of practice sessions, qualifying practice sessions and race(s), rounds, legs, heats or stages".

75. FIM recognises the FIM Speedway Grand Prix World Championship Series as one of the FIM World Championships. FIM issued Sporting Regulations applicable to the Championship (the 2014 FIM Track Racing Appendices (TRA) 070 and the 2014 FIM Speedway Grand Prix World Championship Regulations (SGPWCR 077). The Championship is staged in a series of meetings (SGPWCR 0.77.1.2). A Track Racing meeting consists of all official activities related to racing, starting with the first administration controls and technical verifications until the settlement of all possible protests (TRA 070.1.2). All riders must sign-on during the period of time stipulated in the Supplementary Regulations (SR). By signing on, the riders enter the venue and accept to be under the jurisdiction of all FIM rules and regulations applicable to the meeting (TRA 070.4.7). When a rider has signed on, he is deemed to have entered the meeting and is not permitted to take part in any other motorcycle meeting until the completion of the Grand Prix meeting (SGPWCR 077.3.8).

76. Mr Ward has, with reference to the wording in the FIM Jury President's Report, submitted that the competition in Riga was cancelled, and that the races in Daugavpils should therefore be considered as a new competition. CDI cannot accept that view. CDI notes in this respect, as reflected in the same report, that it was the races in Riga, not the Meeting itself, which were cancelled. CDI further notes that the report states "the Technical staff made the safety check at Riga and the final verification for the race at Daugavpils". Consequently, it was the same meeting with the same officials and the same riders that were held in Daugavpils. The decision taken at the Second Jury Meeting on 16 August 2014 to move the event to Daugavpils did not involve a cancellation of the Meeting but was merely a decision to use another venue for the Meeting. It was still the same competition in the sense of CAD.

77. In addition, it follows from the signing-on sheet from the Meeting that the sign-on took place in Riga on 16 August 2014 and that there was no sign-on in Daugavpils on 17 August 2014. This was confirmed by Mr Ward at the hearing. Consequently, the administrative scrutineering for the Meeting was done already in Riga, and consequently the afternoon of 16 August 2014 shall be regarded as the starting-point for calculation of the In-Competition period for the Meeting.

78. As a result of the foregoing, it is clear that Mr Ward's consumption of alcohol during the evening of 16 August 2014 took place In-Competition.

79. As set out under paragraph 73 above, alcohol is only considered as a Prohibited Substance when the alcohol concentration exceeds a blood alcohol concentration of 0.10 g/L.

80. From Article 3.1 CAD, it follows that it is the FIM that has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof to be met by the FIM is that of "comfortable satisfaction". In other words, an anti-doping rule violation must be established by the FIM to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the

allegation that is made.

81. With regard to violations against Article 2.1 CAD, sufficient proof of an anti-doping rule violation is established by either the presence of a Prohibited Substance in the Rider's A Sample where the Rider waives analysis of the B Sample, or, where the analysis of the B Sample confirms the presence of the Prohibited Substance found in the Rider's A Sample. In the present case – where detection of alcohol is made by breath analysis – it is obvious that this way of establishing a violation is not of relevance.

82. For other violations against Article 2 CAD, Article 3.2 offers a possibility to establish facts related to anti-doping rule violations by any reliable means, including admissions.

83. Through Mr Ward's admission, given the first time already at the evening of the Meeting and then repeated on several occasions during the proceedings before CDI, it is established that Mr Ward consumed alcohol during the evening of 16 August 2014.

84. The exact amount of alcohol consumed by Mr Ward is, however not established. Mr Ward's own statements in this regard vary; from four drinks in the Ward Letter up to seven "normal" vodka/lemon drinks when Mr Ward was questioned at the hearing.

85. In CDI's opinion, it is obvious that a consumption of alcohol to the extent admitted by Mr Ward during a time period of around 5 hours, must have entailed a concentration of alcohol in Mr Ward's blood exceeding the threshold set out for an anti-doping rule violation. CDI notes in this respect that Mr Ward, on a direct question from FIM's Legal Director, informed the CDI that his weight was around 70 kg. Consequently, even in the absence of detection by analysis of breath and/or blood at that time, CDI finds, to its comfortable satisfaction, that Mr Ward's consumption of alcohol during the evening of 16 August 2014 in itself provides sufficient evidence of an anti-doping rule violation (in any case) under Article 2.2 CAD. It goes without saying that by drinking alcohol in-competition, Mr Ward was at the same time in possession of alcohol in-competition. Hence an anti-doping rule violation under Article 2.6. can also be retained against Mr Ward.

86. As a consequence of the findings above, CDI does not need to go into an assessment of whether Mr Ward's alcohol consumption should also be considered as a violation of Article 2.1 CAD. This being said, the validity of the alcohol test and the accuracy of the Test Results on 17 August 2014 are not decisive for the question whether Mr Ward had committed an anti-doping rule violation or not. Neither is the submission from FIM that Mr Ward has breached the principle of good faith. Bearing in mind Mr Ward's allegations with regard to the test procedures and the Test Results, CDI will, however, for the sake of completeness, also comment briefly on these issues. This being said, the conclusion that the CDI will make in this regard will not call into question the fact that the CDI has (already) found that Mr Ward has committed an anti-doping rule violation under the CAD, namely under Article 2.2 and 2.6 (see above).

87. FIM has elected breath testing as its method of doping control for alcohol. As a consequence hereof, there is no WADA accredited laboratory used for the testing and the protection for the rider of a B sample test is not at hand. Another consequence is that the detailed regulations in CAD concerning testing (Article 5) and analysis of samples (Article 6) are not, or only to a minor extent, applicable. In the last case, the application of the rules must be adopted to a situation where breath testing substitutes "normal" sample collection.

88. CDI notes that there are no mandatory International Standards for Testing by breath analysis approved by WADA (Article 5.3 CAD). The Guidelines issued by WADA in this respect are not mandatory as submitted by the FIM Legal Director during his opening and closing statements. This is clear from the wording in the introduction part of the WADA Code where it explicitly is said that "These models.....will be state of the art examples of best practice..." that provides "alternatives from which stakeholders may select" and that "stakeholders may choose to develop their own rules and regulations consistent with the general principles and specific

requirements set forth in the Code".

89. Notwithstanding the above, the breath testing procedures used by FIM must of course be performed in a way satisfactory to the requirements of safeguarding the rider's protective rights in connection with the testing procedures and ensuring that the test results are correct. In the absence of any specific rules with regard to testing of alcohol in CAD in this respect, CDI has made an assessment of whether the testing procedures used by FIM in the present case comply with these requirements.

90. Mr Ward has questioned both the validity of the testing procedures and the Test Results from many different angles. Mr Ward has however not provided any evidence to prove that the assertions with regard to errors and departures from CAD or the Guidelines could reasonably have affected and/or caused the positive Test Results. Considering all the circumstances and facts in this respect, CDI therefore concludes that the testing procedures in this case must be considered to be satisfactory and the Test Results reliable. CDI notes in this respect i.a. that:

- the selection of the riders to be tested was made in accordance with Article 5.7 CAD;
- the testing was conducted by the Chief Medical Officer, CMO, in accordance with Article 5.2 CAD;
- a CMO must, according to Article 09.6.1 of the FIM Medical Code, be a fully registered medical practitioner authorised to practice in the relevant country or state in which the event is taken place;
- the testing was executed in a separate room;
- besides the referee there was an official from FIM who was administering the test;
- a new mouthpiece was used for Mr Ward's test which he placed on the Device himself;
- after the first test Mr Ward requested and was granted a new test;
- after the second test Mr Ward requested and was granted two more tests;
- Mr Ward saw the readings on the display of the breath analyser;
- the CMO, Dr Bekmanis, has signed the Test Protocol and thereby certified that he had tested Mr Ward and two other riders with the results set out in the Test Protocol;
- Mr Ward did read the form that was filled in about his tests;
- the display of the Device according to the Device Photo shows that the reading was made at 17 August 2014 at 2.26 pm corresponding to Mr Ward's third test result;
- the display also shows the word BAC and the value '0.37 ‰' corresponding to the third result of the Test Results;
- the unit ‰ corresponds to g/L;
- the Operating Instructions for AlcoQuant 6020 state that BAC indicates that the unit is displaying the Blood Alcohol Concentration.

II. *Assessment of Mr Ward's fault and appropriate sanction (Article 10.4 CAD)*

91. It now remains for CDI to determine the appropriate sanction. It is undisputable that this is the first anti-doping rule violation recognised against Mr Ward.

92. FIM and Mr Ward are in agreement that Article 10.4 CAD is applicable in the case at hand, since alcohol is a Specified Substance within the meaning of CAD and because Mr Ward has established how the prohibited substance had entered his body. Furthermore, FIM and Mr Ward are in agreement that Mr Ward did not act with the intent to enhance his sport performance. Given the circumstances in this case CDI feels comfortably satisfied with the Parties' assessments in this respect.

93. Article 10.4. CAD reads as follows:

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

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

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

94. In accordance with Article 10.4 CAD the range of sanctions runs from a reprimand up to 24 months of ineligibility. As Article 10.4 says, the decisive criterion on which the period of ineligibility shall be determined within the applicable range of sanctions is fault.

95. The FIM Legal Director referred to the case of Cilic (CAS 2013/A/3327 and 2013/A/3335 Cilic vs International Tennis Federation) in which CAS set up some principles aimed at providing guidance on how to approach the determination within the 0 – 24 months range specified in Article 10.4. In summary CAS gave the following guidance of relevance in the present case.

96. The FIM Legal Director submitted that CAS recognizes the following degrees of fault: significant degree of fault, normal degree of fault and light degree of fault. When applying these three categories to the possible sanction range of 0–24 months, the following sanction ranges could be applied:

- a. Significant degree of fault: 16–24 months, with a “standard” significant fault leading to a suspension of 20 months.
- b. Normal degree of fault: 8–16 months, with a “standard” normal degree of fault leading to a suspension of 12 months.
- c. Light degree of fault: 0-8 months, with a “standard” light degree of fault leading to a suspension of 4 months.

The CDI notes that CAS held in particular that : *“In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation.*

CAS suggests that the objective element should be foremost in determining into which of the three

relevant categories a particular case falls. At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. For substances that are prohibited at all times (both in and out-of-competition) an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.

For substances prohibited in-competition only, two types of cases must be distinguished:

i. The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care should equally apply.

ii. The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different. The taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it is held:

“Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited” (para 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete)....”

Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LAROCHEFOUCAULD, CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):

a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).

c. The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).

d. Any other “personal impairments” such as those suffered by:

iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 seq.).

iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37). “

97. While stating that it would not be easy to go below a (16) sixteen-month suspension in view of all the circumstances of the case and the Cilic jurisprudence, the FIM Legal Director deferred the decision on the quantum of sanction to the CDI Single Judge. The FIM Legal Director nevertheless submitted that a period of ineligibility ranging from 10 (ten) to 16 (sixteen) months would appear as a just and proportionate sanction in this case. On the other hand, Mr Weston claimed that the fault of Mr Ward was very low and that the latter should not get more than a reprimand or alternatively, a period of ineligibility “of a few months rather than many”.

98. The starting point when assessing Mr Ward's degree of fault is the wording of Article 2 CAD; "[R]iders and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List".

99. When applying the principles set out above, CDI first wants to call attention to the fact that the prohibited substance in the present case is alcohol. Alcohol is widely used and accepted in the society all over the world.

100. From an anti-doping perspective alcohol is regarded as a prohibited substance in motorcycling and in a handful of other sports (See Section P.1 under CAD). In motorcycling one of the reasons for this is a reason related to safety, both for the rider himself, for competitors, the officials and the spectators.

101. In addition, ingesting alcohol is (only) regarded as an anti-doping rule violation if the blood alcohol concentration exceeds 0.10 g/L. Furthermore, alcohol is only prohibited in-competition, as defined in CAD.

102. Consequently, in order to live up to the duty of utmost caution implied in Article 2 CAD, the rider must not only know that the substance itself is included on the Prohibited List but also any additional pre-requisites that must exist for the substance to be regarded as a Prohibited Substance.

103. In this case Mr Ward consumed alcohol during the evening after the decision was taken to move the races in Riga scheduled on 16 August to the afternoon the following day in Daugavpils. He knew that alcohol was a Prohibited Substance. He claimed that he was however under the impression that the competition in Riga had been cancelled and that the following day's competition in Daugavpils was a new competition. In other words, Mr Ward believed, in-correctly, that the alcohol he consumed on the evening of 16 August was taken out-of-competition. CDI finds this misapprehension by Mr Ward to some extent excusable.

104. As reflected in CDI's assessments under par 74-78 above, to determine what should be considered as the (same) competition in the sense of "in-competition" might not be easy for a layman. Mr Ward could of course have made inquiries in order to determine whether the evening of 16 August should be regarded as in- or out-of-competition. CDI is of the opinion that Mr Ward, by simply failing to make the enquiries, has acted in a way that is not compatible with the exercise of utmost caution.

105. Based on the totality of the circumstances in this case, CDI finds that no significant degree of fault can be attributed to Mr Ward. At the same time the degree of fault cannot be considered as a light degree. Consequently, CDI concludes that Mr Ward's degree of objective fault falls into the normal degree (8 - 16 months suspension).

106. When it comes to assessment of the level of Mr Ward's fault, that is where within the category of normal degree of fault (8 – 16 months suspension) Mr Ward falls, CDI takes into consideration that Mr Ward was under considerable stress at the time in question. This state of mind may explain not only Mr Ward's extensive drinking during the evening of 16 August but also his lack of due diligence when it comes to the need for ensuring that the drinking did not take place in-competition.

107. CDI also attributes some weight to Mr Ward's youth.

108. Considering all of the circumstances in the case, CDI finds that the mitigating factors in this case to some extent outweigh the aggravating factors. CDI has come to the conclusion that an appropriate sanction to be imposed on Mr Ward would be a period of ineligibility of 10 (ten) months starting on 25 February 2015, being the date of the sending of the operative part of the present CDI decision.

109. The period of the provisional suspension already served and respected since 28 August 2014 until 25 February 2015 until the date of the sending of the notification of the operative part of the CDI decision, shall be credited against this period of ineligibility of 10 (fifteen) months as per 10.9.3 CAD.

III. Impact on Mr Ward's results

110. Article 10.8 CAD states that “In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (...) or any other anti-doping rule violation occurred, though 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.”

111. In this respect, Mr Ward has pointed out that Article 10.8 CAD shall not be applied in cases where fairness requires otherwise. Besides referring to the fact that he was not told he was suspended until several weeks later, Mr Ward has, however, not specified any reasons for fairness that would apply in this case.

112. CDI finds that, in the light of the clear wording of Article 10.8 CAD, it is not allowed to depart from the wording in other than exceptional circumstances. Mr Ward has not produced evidence in support of his allegation. Therefore, the principle set out in Article 10.8 CAD shall apply, and consequently all the results that Mr Ward obtained in all the Competitions in which he participated from 17 August 2014 until 27 August 2014, are to be cancelled, respectively forfeited.

E. Costs of Procedure

113. As regards the costs of the CDI proceedings, Article 6 of the 2013 Disciplinary and Arbitration Code provides that: “The costs of a disciplinary or arbitration decision will be assessed by the FIM Executive Secretariat and will be awarded against the losing party, unless the Court decides otherwise.”

114. Given the outcome of this case, the CDI considers that Mr Ward, as the losing party, shall bear the said costs.

On these grounds,

The International Disciplinary Court rules that:

- I. Mr Darcy Ward is sanctioned with a period of ineligibility of 10 (ten) months commencing on the date of this Decision (i.e. 25 February 2015).
 - i. The period of the provisional suspension already served and respected by Mr Darcy Ward from 28 August 2014 until 25 February 2015 shall be credited against the aforementioned period of ineligibility. Consequently, the period of ineligibility of 10 (ten) months imposed on Mr. Darcy Ward will end on 27 June 2015 at midnight.
- II. Mr Darcy Ward's results, obtained in all the Competitions in which he participated from 17 August 2014 until 27 August 2014, are cancelled, with all resulting consequences, including forfeiture of any points and prizes.
- III. The costs of the case shall be borne by Mr Darcy Ward.

Done in Stockholm on 25 February 2015

FIM INTERNATIONAL DISCIPLINARY COURT



Mr Lars Nilsson

Single Judge of the FIM International Disciplinary Court

This Decision is immediately enforceable. Pursuant to Article 13.6 of the 2014 FIM Anti-doping Code, an Appeal against this Decision may be lodged before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, **within 21 days from the date of receipt of the reasoning of this Decision**. Moreover, Articles R47 ff. of the Code of Sports-related Arbitration shall apply. The reasoned Decision will be issued in due course.

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