



**Arbitration CAS 2018/A/5581 Filip Radojevic v. Fédération Internationale de Natation (FINA), award of 10 July 2018**

Panel: Mr Markus Manninen (Finland), President; Mr Romano Subiotto QC (United Kingdom); Mr Patrick Lafranchi (Switzerland)

*Aquatics (water polo)*

*Doping (pseudoephedrine)*

*Athlete's personal duty to ensure that no prohibited substance enters his/her body*

*Assessment of no significant fault or negligence*

*Adverse consequence of the failure to report the use of medication*

*Irrelevance of a potential performance enhancing effect with regard to the duty of diligence*

*Young age and lack of experience as mitigating factors*

*Significantly negligent behaviour*

*Backdating of start of ineligibility period*

- 1. The prescription of a medicinal product by an athlete's doctor does not excuse said athlete from investigating to their fullest extent that the medication at stake does not contain prohibited substances. Athletes cannot rely on the advice of their support personnel. Athletes themselves are responsible for knowing what constitutes an anti-doping rule violation (ADRV) and the substances included in the Prohibited List.**
- 2. The mere lack of intention to cheat does not signify that an athlete acted without significant fault or negligence. The concept of no significant fault or negligence requires more of an athlete than a conscious *bona fide* use of a prescribed medication. Athletes are required to seek information actively and to take precautions in order to avoid any ingestion of a prohibited substance.**
- 3. In the context of establishing whether an athlete acted with no significant fault or negligence, a failure to report the use of a medication on a doping control form is not an action that can illustrate no significant fault or negligence on the athlete's side.**
- 4. The fact that a prohibited substance may, in an athlete's *ex post facto* view, lack a performance enhancing effect does not explain a departure from the expected standard of behaviour. An athlete must demonstrate the same level of diligence with regard to all substances included in the World Anti-Doping Agency Prohibited List irrespective of their capability of enhancing performances.**
- 5. Even if an athlete is not a minor, age and lack of experience as an athlete and in anti-doping matters may be taken into account as mitigating factors in the assessment of the degree of fault or negligence.**

6. An athlete whose level of care and investigations was inexistent in relation to what should have been the perceived level of risk acts in a significantly negligent way.
7. According to Rule DC 10.11.2 of the FINA Doping Control Rules, backdating the commencement date of the ineligibility period is at the discretion of the FINA Doping Panel (FINA DP), even where the athlete promptly admitted the ADRV. In the absence of proof that *in casu*, FINA DP's decision is inconsistent with its practice, no backdating of the commencement date of said athlete's ineligibility period appears justified.

## I. THE PARTIES

1. Mr Filip Radojevic (the "Athlete" or the "Appellant"), born in 1997, is an international water polo player from Belgrade, Serbia. He was a member of the Serbian national team, which participated in the 19<sup>th</sup> FINA World Men's Junior Water Polo Championships held in the Athlete's hometown, Belgrade, Serbia.
2. The Fédération Internationale de Natation ("FINA" or the "Respondent") is the world governing body for aquatic sports, including the sport of water polo, with its headquarters in Lausanne, Switzerland.

## II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and evidence adduced. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. The Panel refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning, while it has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings.
4. The Athlete was selected for the Junior National Team of Serbia to participate in the 19<sup>th</sup> FINA World Men's Junior Water Polo Championships held in Belgrade, Serbia, from 5 to 13 August 2017 (the "Competition").
5. On 1 August 2017, the Athlete went to see his paediatrician Dr Milicevic because the Athlete was suffering from respiratory problems due to bronchial and nasal obstructions. Dr Milicevic prescribed the Athlete "Defrinol forte" tablets for ten days, Olynth spray for seven days, and Durophilin for five days. The Athlete commenced his treatment on the same day. He administered Defrinol forte tablets, which contain pseudoephedrine, from 1 to 11 August 2017.
6. On 13 August 2017, FINA undertook an in-competition doping control on the Athlete at the Competition. The Athlete's urine sample was sent to the Seibersdorf Labor GmbH Doping

Control Laboratory located in Austria. The analysis of the A sample revealed the presence of pseudoephedrine. The quantity of pseudoephedrine exceeded the Decision Limit of 170 µg/mL, as the mean concentration measured was 206 µg/mL. The results met the requirements of WADA Technical Document TD2017DL “Decision Limits for the Confirmatory Quantification of Threshold Substances” (the “TD2017DL”) for an Adverse Analytical Finding (“AAF”) for the presence of pseudoephedrine. Under S6.b of the 2017 Prohibited List, pseudoephedrine is a specified stimulant prohibited in competition when its concentration in urine is greater than 150 µg/mL.

7. By letters dated 5 October 2017, FINA notified the Athlete and the Water Polo Federation of Serbia (“WPFS”) of the AAF. The Athlete was invited to indicate whether he accepted the AAF or requested the analysis of the B sample.
8. On 11 October 2017, WPFS sent the Athlete’s letter of explanation dated 11 October 2017 and two medical reports, dated 12 February 2005 and 1 March 2017, to FINA.
9. On 12 October 2017, FINA requested confirmation from the Athlete and WPFS on whether the Athlete wished to proceed with the B sample analysis. WPFS confirmed that the Athlete would waive such right.
10. On 23 October 2017, the Athlete provided FINA with an executed “Voluntary acceptance of provisional suspension” form dated the same day.
11. On 3 November 2017, the Athlete sent an e-mail to FINA and requested that a hearing be conducted via Skype.
12. On 12 January 2018, the FINA Doping Panel (the “FINA DP”) arranged a hearing via Skype in Lausanne, Switzerland. On the same day, the FINA DP issued a decision pursuant to the FINA Doping Control Rules valid as of 22 July 2017 (the “FINA DCR”) imposing a two-year period of ineligibility on the Athlete and disqualifying the Athlete’s results obtained on or after 13 August 2017 (the “Appealed Decision”).

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

13. On 21 February 2018, the Appellant filed a Statement of Appeal with the CAS in accordance with Article R48 of the Code of Sports-related Arbitration (2017 edition) (the “CAS Code”) to challenge the Appealed Decision.
14. On 28 February 2018, the CAS Court Office initiated the present arbitration and specified that it had been assigned to the CAS Appeals Arbitration Division, requiring it to be handled in accordance with Articles R47 *et seq.* of the CAS Code. The CAS Court Office invited the Appellant to submit an Appeal Brief to the CAS containing a statement of facts and legal arguments giving rise to the appeal, together with all exhibits and other evidence on which the Appellant intended to rely as well as the names of any witnesses and experts whom he intended to call. The CAS Court Office advised that the appeal would be deemed withdrawn if the

Appellant failed to submit an Appeal Brief by the given time limit. Finally, the CAS Court Office noted the Appellant's nomination of Mr Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium, as arbitrator and invited the Respondent to nominate an arbitrator from the list of CAS arbitrators within ten (10) days of receiving the letter of the CAS Court Office.

15. On 8 March 2018, the Respondent nominated Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland, as arbitrator.
16. On 15 March 2018, the Appellant filed his Appeal Brief.
17. On 21 March 2018, the CAS Court Office invited the Respondent to submit an Answer to the CAS containing a statement of defence, any defence of lack of jurisdiction, any exhibits or specification of other evidence upon which the Respondent intended to rely as well as the names of any witnesses and experts whom it intended to call. The CAS Court Office advised that if the Respondent failed to submit an Answer by the given time limit, the Panel could nevertheless proceed with the arbitration and deliver an award.
18. On 28 March 2018, the CAS Court Office informed the Parties that the Deputy Division President of the CAS Appeals Arbitration Division had appointed Mr Markus Manninen, Attorney-at-Law in Helsinki, Finland, to act as the President of the Panel and reminded the Parties that any challenge should be filed within seven days after the ground for the challenge becoming known.
19. On 6 April 2018, the CAS Court Office noted that no challenge had been filed against the appointment of the President of the Panel and informed the parties that the Panel appointed to decide the case is constituted as follows:

President: Mr Markus Manninen, Attorney-at-Law in Helsinki, Finland;

Arbitrators: Mr Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium, and London, United Kingdom

Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland
20. On 11 April 2018, the Respondent filed its Answer.
21. On 12 April 2018, the CAS Court Office submitted the Respondent's Answer to the Appellant and reminded the Parties that, unless the Parties agree or the President of the Panel orders otherwise on the basis of exceptional circumstances, the Parties shall not be authorized to supplement or amend their requests or their arguments, produce new exhibits, or specify further evidence on which they intend to rely. Finally, the CAS Court Office noted that the Appellant had informed the CAS Court Office he did not consider a hearing necessary and that the Respondent deferred to the decision of the Panel in this regard.

22. On 13 April 2018, the CAS Court Office informed the Parties that the Panel had considered the Parties' positions with respect to a hearing, and advised that the Panel deemed itself sufficiently well informed to decide the case based solely on the Parties' written submissions, without the need to hold a hearing. In addition, the CAS Court Office sent an Order of Procedure to the Parties. The Appellant's and the Respondent's counsels signed the Order of Procedure on 16 April 2018 and on 18 April 2018, respectively.

#### IV. SUBMISSIONS OF THE PARTIES

23. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered in its deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to these arguments in the following outline of their positions and the ensuing discussion on the merits.
24. The Athlete submits, in essence, the following:

##### *Facts*

- The Athlete is a 20-year-old water polo player. At the age of seven, he was diagnosed with allergies, and at the age of sixteen, with bronchial asthma.
- On 1 August 2017, the Athlete decided to see his paediatrician because he "*was experiencing occasional seizures and wheezing due to bronchial and nasal obstructions*". As a consequence, the paediatrician prescribed him, among other medicines, Defrinol forte tablets for 10 days. The Athlete started the treatment immediately and consumed the medicines in accordance with the prescription. The last intake of Defrinol forte took place on 11 August 2017.
- The Athlete did not realise that Defrinol forte tablets contained pseudoephedrine until FINA approached him with the letter dated 5 October 2017, confirming the AAF for pseudoephedrine. Neither did the Athlete know that pseudoephedrine was prohibited.
- The Athlete admitted the anti-doping rule violation ("ADRV") in the letter dated 11 October 2017. He accepted a voluntary provisional suspension on 23 October 2017.

##### *No significant fault or negligence*

- The Athlete submits that the ADRV was not intentional. This was also confirmed in the Appealed Decision.
- With regard to the Athlete's fault, he submits that there are exceptional circumstances entitling him to a finding of "*no significant fault or negligence*" ("NSF") stipulated in Rule

DC 10.5.1.1 of the FINA DCR. The FINA DP did not take proper account of the objective and subjective elements of the degree of fault.

- The Athlete highlights that pseudoephedrine entered his system because he took a prescribed medicine to treat his respiratory problems. The medicine was prescribed by his paediatrician, who perfectly knows the medical history of the Athlete and the health issues he has been suffering from a very young age. The paediatrician has also always been aware of the Athlete's sporting activities. Therefore, the Athlete had no reason to question the professional judgment of his doctor, *i.e.* that he chose to prescribe Defrinol forte tablets for the Athlete's respiratory problems.
- Another mitigating factor is the fact that the Athlete only purchased and used the medicine as part of a prescribed treatment and for a very short period of time. Furthermore, Defrinol is exclusively designed for therapeutic purposes and was purchased in a regular pharmacy in Belgrade with a prescription. Both the Athlete and his father, who still assists his son in many issues, firmly believed that Defrinol forte was reliably sourced.

*Nature of pseudoephedrine and its concentration in the Athlete's sample*

- The exceptional circumstances surrounding the nature of pseudoephedrine should also be considered by the Panel. Pseudoephedrine is currently a threshold substance, which is prohibited in competition only when its concentration in urine is greater than 150 µg/mL. It is still under debate whether pseudoephedrine actually is capable of generating any ergogenic effect. Pseudoephedrine was removed from the Prohibited List from 2004 to 2010. The banning of pseudoephedrine in competition is a highly debated and continually changing field.
- Several studies show that low doses of pseudoephedrine have no ergogenic effects. A recent study "Effect of pseudoephedrine in sport: a systematic review" concludes that only doses  $\geq 180$  mg or 2.5 mg/kg showed significant results, while doses below 180 mg or 2.5 mg/kg showed insignificant changes in athletic performance. In the present case, the dose of Defrinol prescribed for the Athlete contained only 60 mg of pseudoephedrine, which is clearly an insufficient concentration to produce any favourable effect on the Athlete's sporting performance.
- According to the laboratory report, the concentration of pseudoephedrine in the Athlete's sample was 206 µg/mL. According to TD2017DL, the Decision Limit for pseudoephedrine is 170 µg/mL. Thus, the concentration of pseudoephedrine detected in the Athlete's sample exceeded the Decision Limit by 36 µg/mL and the allowed threshold by 56 µg/mL only. Had the concentration found in the Athlete's sample been 37 µg/mL lower, the result of the analysis would not have been an AAF.

*The Athlete's youth, competitive level and lack of experience in anti-doping matters*

- The Athlete's youth should be taken into account in determining the level of his subjective fault. The Athlete, born on 2 November 1997, represents VK Partizan in the junior category. He participated in the 2014, 2015, and 2017 Junior Water Polo World Championships and the 2016 European Water Polo Junior Championship. Regarding the senior competitions, he has only participated in three games of the World League in the past years. It is the lowest level of senior competitions in water polo.
- The Athlete is not remunerated for playing water polo. He should be considered an amateur. He still studies at the Secondary School of Design in Belgrade.
- The first and only time the Athlete has been subject to a doping test was at the Competition when the Athlete was 19 years old. The only anti-doping education which the Athlete has received is a lecture for the National Men's Junior Team. It focused on supplements, procedures in doping control, and "what he could or could not take". The Athlete would not take a drug if he knew it was prohibited.

*Proportionality, commencement of the ineligibility period, and disqualification of results*

- CAS jurisprudence makes it clear that the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the athlete's guilt. Considering all the mitigating factors, a two-year period of ineligibility is clearly disproportionate to the degree of fault of the Athlete.
- The period of ineligibility may start as early as the date of the sample collection. The FINA DP did not take into consideration that the Athlete admitted the ADRV once the AAF was communicated to him. The AAF was notified on 5 October 2017, and the Athlete's prompt admission took place on 11 October 2017. Thus, any period of ineligibility should start on the date of the sample collection, *i.e.* 13 August 2017.
- If the Appealed Decision is set aside and no period of ineligibility is imposed on the Athlete, all medals, points, and prizes achieved by the Athlete on or after 13 August 2017 should be reinstated.

25. In light of the above, the Athlete submits the following prayers for relief in his Appeal Brief:

*"the Appellant respectfully requests the Panel to:*

1. *Set aside the Decision of the Fédération Internationale [sic] de Natation (FINA) dated 12 January 2018;*
2. *Impose a reprimand and no period of ineligibility on Mr. Filip Radojevic on the basis that he acted with "no significant fault or negligence" and in accordance with the principle of proportionality;*

3. *Alternatively, significantly reduce the otherwise applicable sanction on the basis that Mr. Filip Radojevic acted with “no significant fault or negligence” and in accordance with the principle of proportionality;*
4. *Backdate any period of Ineligibility imposed on Mr. Filip Radojevic to the date of sample collection (13 August 2017) in accordance with Rule DC 10.11 based on prompt admission;*
5. *Reinstate all medals, points and prizes achieved by Mr. Filip Radojevic on or after 13 August 2017; and*
6. *Grant this party a contribution towards its legal fees and other expenses incurred in connection with the proceedings according to the Art. R65.3 of the CAS Code”.*

26. The Respondent filed an Answer on 11 April 2018 and submits, in essence, the following:

- The FINA DP came to the conclusion that the Athlete acted without intent. There is no reason to come back on this finding. Therefore, the maximum sanction for the Athlete shall be two years, subject to a possible reduction under the NSF provisions.
- In order to be entitled to a NSF finding, the Athlete must first establish the origin of the prohibited substance. The Athlete’s explanation that the positive finding came from Defrinol forte, which contains pseudoephedrine and which the Athlete used for 10 days in accordance with the prescription by his family doctor, is not challenged.
- Secondly, the Athlete must establish that he bore no significant fault or negligence. Only then may his sanction be reduced based on the Athlete’s degree of fault.
- The provision on NSF is meant to apply in exceptional circumstances only. In the present case, the Athlete did not take any steps to check that he was not ingesting a prohibited substance. He did not ask his doctor whether the products that he was prescribed could contain prohibited substances, and he did not check that the substances contained in the product were not on the WADA Prohibited List. FINA points out that pseudoephedrine is expressly indicated on the package of Defrinol.
- The Athlete is effectively claiming to have blindly relied on his family doctor, who does not have any knowledge of anti-doping regime in sport and who would not have given him a medicine containing a prohibited substance. The Athlete does not even claim to have asked his family doctor to check.
- According to the established CAS case law, to qualify for a reduction on the basis of no significant fault or negligence, there must be more grounds than simply the reliance on a doctor.

- The fact that the Athlete might have only had little anti-doping education does not justify a reduction of sanction in itself either. In any event, the Athlete confirmed that he had received a lecture on anti-doping. Therefore, he had had some anti-doping education.
- The Athlete was 19 years old at the time of the doping control and had participated in five international competitions as a member of the National Men's Junior Water Polo team of Serbia as well as three games of the FINA World Water Polo for the National Men's Senior Water Polo team of Serbia. He was not an inexperienced athlete.
- The fact that the substance was taken for therapeutic purposes is irrelevant. According to CAS case law, it is of little relevance to the determination of fault that a product has been prescribed with professional diligence and with a clear therapeutic intention.
- Athletes have the strict duty of avoiding the ingestion of prohibited substances, which entails a duty of utmost caution especially when they take medicines. The Athlete did nothing to ensure that no prohibited substance entered his body. Therefore, the Athlete showed extreme negligence. The FINA DP was correct in finding that the Athlete could not benefit from any reduction on the basis of the no significant fault or negligence provision.
- As clearly set out in CAS case law, the principle is that the no fault or negligence and no significant fault or negligence exceptions to an otherwise strict liability anti-doping rule are themselves embodiments of proportionality. It is only if there is a gap in the rules that the principle of proportionality might potentially apply, which is clearly not the case with respect to the Athlete.
- FINA does not challenge the fact that the Athlete promptly admitted the ADRV. However, Rule DC 10.11.2 of the FINA DCR leaves discretion to a panel to backdate any suspension to the sample collection. Nothing suggests that an athlete is entitled to a backdating, especially not all the way to sample collection. The FINA DP used discretion and decided that the ineligibility period should start on 23 October 2017. This discretionary decision should not be tinkered with. FINA DP's decision should be confirmed because it is not evidently and grossly disproportionate.

27. In light of the above, the Respondent submits the following prayers for relief in its Answer:

*"1. The Appeal filed by Filip Radojevic is dismissed.*

*2. FINA is granted an award for costs".*

28. The CAS panel adjudicating the matter has the power to decide whether a hearing is necessary. The Panel deems itself sufficiently well informed to render an award without a hearing, considering that none of the Parties requested a hearing and, in addition, that there is no witness or expert testimony.

## V. JURISDICTION

29. The Appellant puts forth that the jurisdiction of the CAS derives from Article R47 of the CAS Code and Rule C 12.11.4 of the FINA Constitution, to which the Appealed Decision refers.

30. Paragraph 1 of Article R47 of the CAS Code provides as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.*

31. The Panel observes that the relevant parts of Rule C 12.11.4 of the FINA Constitution, valid as of 22 July 2017, provide as follows:

*“An appeal against a decision by (...) the Doping Panel (...) shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland”.*

32. Rules DC 13.2 and DC 13.2.1 of the FINA DCR also contain a reference to the CAS:

*“Decisions made under these Anti-Doping Rules may be appealed as set forth below in DC 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards”.*

*“In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court”.*

33. In the FINA DCR, the definition for “International Competition” covers competitions where FINA is the ruling body for the competition or appoints the technical officials for the competition. The 19<sup>th</sup> FINA World Men’s Junior Water Polo Championships fulfil this criterion.

34. The Panel finds that Rule C 12.11.4 of the FINA Constitution and Rule DC 13.2.1 contain clear provisions according to which the Appellant has the right to appeal against the decision of the FINA DP to the CAS. The Respondent did not raise any jurisdictional objection, and both Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. Therefore, the CAS has jurisdiction to adjudicate and decide on the present dispute.

35. The present case shall be dealt with in accordance with the Appeals Arbitration rules. Under Article R57 of the CAS Code and in line with the consistent jurisprudence of the CAS, the Panel has full power to review the facts and the law. The Panel has therefore dealt with the case *de novo*, evaluating all facts and legal issues involved in the dispute.

## VI. ADMISSIBILITY

36. Article R49 of the CAS Code provides as follows:

*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties”.*

37. Rule C 12.11.4 of the FINA Constitution reads as follows: *“An appeal against a decision by (...) the Doping Panel (...) shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.11.3”.* Rule C 12.11.3 stipulates as follows: *“Except in accordance with FINA Rule C 12.11.4, an appeal shall be submitted by the appealing party (...) within twenty-one (21) days from the date of receipt of the decision”.*

38. According to the first sentence of Rule DC 13.7.1 of the FINA DCR, *“The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party”.*

39. The FINA DP rendered the Appealed Decision on 12 January 2018. However, the Appellant did not receive the reasoned Appealed Decision until 14 February 2018. The Appellant filed his Statement of Appeal on 21 February 2018, *i.e.* within the 21-day time limit set forth in Rules C 12.11.3 and C 12.11.4 of the FINA Constitution and Rule DC 13.7.1 of the FINA DCR.

40. It follows that the appeal is admissible. The Respondent has not objected to the admissibility of the appeal.

## VII. APPLICABLE LAW

41. The Appellant submits that the FINA DCR are the applicable rules in this matter. The Respondent concurs with the Appellant, adding that Swiss law applies subsidiarily.

42. Article R58 of the CAS Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

43. This provision is in line with Article 187, Paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *“The arbitral tribunal shall rule*

*according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected”.*

44. According to Rule DC 13.2.1 of the FINA DCR, *“the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court”.*
45. Based on the above and considering that the Respondent, the federation who issued the Appealed Decision within the meaning of Article R58 of the CAS Code, applied the FINA DCR in adjudicating the present case, the applicable law under which the Panel will decide the present dispute is to be found in the FINA DCR and, subsidiarily, Swiss law.

## VIII. MERITS

46. Considering the Parties’ submissions, the Panel notes that many issues pertaining to the merits of the case are undisputed: (1) the Athlete has committed an ADRV, (2) the source of pseudoephedrine in the Athlete’s system, (3) the Athlete has not committed the ADRV intentionally, (4) the Athlete is not entitled to a finding of no fault or negligence, and (5) the Athlete promptly admitted the ADRV. It follows that the main issues to be resolved by the Panel are the following:
- A. Is the Athlete entitled to a finding of NSF, and, if so, what is the appropriate sanction to be imposed on the Athlete?
  - B. Is the sanction for the ADRV disproportionate to the Athlete’s fault?
  - C. Should the ineligibility period be backdated?
  - D. Should the Athlete’s results obtained on or after 13 August 2017 be reinstated?

### A. No Significant Fault or Negligence

47. The Panel observes that the following general regulatory framework is relevant as to the merits of the case at hand.
48. The relevant parts of Rule DC 2 of the FINA DCR read as follows:

*“Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.*

*The following constitute anti-doping rule violations:*

*DC 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample*

*DC 2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be*

*present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under DC 2.1".*

49. Rule DC 3.1 of the FINA DCR, titled "*Burdens and Standards of Proof*", reads as follows:

*"FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete (...) alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".*

50. Rule DC 10.5.1.1 of the FINA DCR provides as follows:

*"Where the anti-doping rule violation involves a Specified Substance, and the Athlete (...) can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's (...) degree of Fault".*

51. The Panel observes that, in his attempt to establish NSF under Rule DC 10.5.1.1 of the FINA DCR, the Athlete relies on various factors and circumstances. The Panel will address them in the following.

**a. *The role of the paediatrician and the purpose of taking Defrinol***

52. The Athlete's key defence appears to be that he ingested the pseudoephedrine unknowingly and only to treat his medical condition as prescribed by a physician. FINA does not challenge the source of the pseudoephedrine. Therefore, the Panel has to assess whether the Athlete had a legitimate right to rely on his paediatrician in the circumstances of the case, and whether such reliance can be taken into consideration as a factor reducing the Athlete's degree of fault.
53. As provided in Rule DC 2 of the FINA DCR, athletes themselves are responsible for knowing what constitutes an ADRV and the substances which have been included in the Prohibited List. Indeed, it is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are liable for taking the necessary precautions and performing their own checks to show exceptional circumstances and to fulfil the criteria for a reduced fault or negligence. Depending on the extent of an athlete's measures, the duration of the ineligibility period may be reduced to a minimum of a reprimand.
54. The CAS has frequently found that athletes cannot rely on the advice of their support personnel, including medical doctors. In CAS 2012/A/2959, the Panel confirmed the position adopted in CAS 2008/A/1488 and noted that "*the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited*

*substances*” (para 8.19). Furthermore, the Panel noted that “*an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist*” (ibid.).

55. The same principle was confirmed in CAS 2017/A/5015 and 2017/A/5110, where the Panel continued that “*It is not appropriate for an athlete, without any substantiation, to draw a conclusion that her doctor has carried out his responsibilities properly, and subsequently adjust her own level of diligence according to what she thought the doctor could have done*” (para 192).
56. In line with the above rationale, the Panel finds that the Athlete was not entitled to rely on his paediatrician or on the assumption that since Dr Milicevic was aware of the Athlete’s sporting career – a fact that FINA has not disputed – he would not prescribe a prohibited substance for the Athlete. This is all the more true taking into consideration that according to Dr Marija Andjelkovic of WPFS, Dr Milicevic had “*zero knowledge of the anti-doping regime in sport*” (para 6.9 of the Appealed Decision).
57. In this context, the Panel also underlines that pseudoephedrine is not prohibited at all times. In fact, it is possible to take therapeutic doses of pseudoephedrine even the day before a competition without exceeding the threshold set by WADA. This fact highlights the Athlete’s own responsibility. It may well be that Dr Milicevic generally considered the Athlete’s sporting career, which as such does not preclude the Athlete from administering pseudoephedrine, but was not aware of the upcoming Competition and the Athlete’s participation in it. However, neither of the Parties sought the testimony of Dr Milicevic. Therefore, his reasons to prescribe Defrinol forte tablets for the Athlete on 1 August 2017, only four days before the Competition started, remain unknown to the Panel.
58. Taking the medicine for a therapeutic purpose is irrelevant in assessing the degree of fault as confirmed by the CAS case law. As noted by the panel in CAS 2008/A/1488 (para. 17), “*it is of little relevance to the determination of fault that the product was prescribed with ‘professional diligence’ and ‘with a clear therapeutic intention’*”. In CAS 2012/A/2959 (para. 8.20), the Panel confirmed that “*it is irrelevant that Mr. Nilforushan’s consumption of Phentermine was allegedly for a legitimate therapeutic use. As was made clear in ITF v. Nielsen (...), athletes have a personal duty to ensure that any medication they are taking does not infringe the WADC code, and it ‘is not relevant to this issue whether the player might have been granted a therapeutic use exemption if he had taken proper steps to check all his current medication against the prohibited list from time to time’*”.
59. The Athlete has shown before the FINA DP that he did not intend to enhance his sporting performance by taking Defrinol forte and thus (unknowingly) pseudoephedrine, which he needed to treat his respiratory problems and which his long-standing physician prescribed to him. The FINA DP considered these established facts, which the Athlete vigorously invoked during the CAS proceedings and which entitled him to a finding of an unintentional ADRV, and eventually led to a shortened two-year ineligibility period instead of a ban of four years.
60. The Panel stresses, however, that mere lack of intention to cheat does not mean that the Athlete has acted without significant fault or negligence. The concept of NSF requires, as the name suggests, more than a conscious *bona fide* use of a medication without any measures to avoid an

ADRV. Athletes are required to seek information actively and, based on the acquired knowledge, to take precautions in order to avoid any ingestion of prohibited substances.

61. Based on the established facts of the case, the Panel finds that the Athlete did not take any of the measures, some of which are very simple, that could potentially justify a reduction of an ineligibility period based on NSF. The Athlete did not consult a sport physician, a pharmacist, or even a member of the Serbian national water polo team. He apparently failed to remind Dr Milicevic, who prescribed the medication, that he in general is not entitled to take prohibited substances and that he would soon participate in the Competition. Importantly, the Athlete also neglected to check the active ingredients of the Defrinol forte tablets himself. Furthermore, the Athlete has expressly admitted that he was not aware that pseudoephedrine is prohibited in competition if the quantity of said substance exceeds the limit set by WADA. The Athlete simply took Defrinol forte tablets for 10 days, of which six days during the Competition, without any checks whatsoever.
62. The Athlete has also invoked the fact that he purchased the Defrinol forte tablets from a pharmacy. The Panel does not consider this as a factor reducing the Athlete's fault or negligence. On the contrary, the fact that a medical doctor prescribed the Defrinol forte tablets, which had to be obtained from a pharmacy, emphasizes the need to check the ingredients of the medicine. It is commonly known that various pharmaceuticals contain prohibited substances. The Athlete should have been particularly careful before ingesting Defrinol considering that it was a new medicine for him. The Athlete's argument that he obtained the Defrinol forte tablets from a reliable supplier may have had significance, had the product been contaminated. However, that is not the case here.
63. In conclusion, although the Panel does not consider the Athlete to have acted recklessly, he clearly has been completely passive and even careless with regard to his anti-doping duties. In addition to neglecting to check that the medicines prescribed by Dr Milicevic did not contain prohibited substances, the Athlete failed to report the use of Defrinol forte in the doping control form (para. 6.22 of the Appealed Decision). The non-disclosure of the medication on the form is not an action that can illustrate NSF, quite to the contrary. The fact that the Athlete went to see a physician and used medication prescribed to him by Dr Milicevic to treat his respiratory problems, combined with the lack of any precautions and lack of transparency through non-disclosure, do not justify a finding of NSF.

***b. Nature of pseudoephedrine and its quantum in the Athlete's sample***

64. The Panel will now assess the relevance of the Athlete's explanation of the nature of pseudoephedrine as a prohibited substance, its inability to affect sporting performance in general, and the quantum of pseudoephedrine found in his A sample.
65. The Panel considers it irrelevant to discuss whether pseudoephedrine may enhance sporting performance, and in what quantities, because pseudoephedrine has clearly been on the Prohibited List in 2017 (provided that it is found in an in-competition sample and the concentration exceeds the limit set by WADA). The effect of a substance on an athlete's

sporting performance is extraneous in assessing both the commission of an ADRV and the degree of an athlete's fault.

66. An athlete is responsible for any substances found in his or her system and for being aware of the banned substances and cannot challenge the content of the Prohibited List. The latter has been explicitly noted in Rule DC 4.3 of the FINA DCR, which reads as follows:

*“WADA’s determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List, the classification of substances into categories on the Prohibited List, and the classification of the substance as prohibited at all times or In-Competition only, is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport”.*

67. Regarding the effects of a prohibited substance in relation to an athlete's fault, the Panel is mindful of the definition of “Fault”, which is stipulated in the FINA DCR as follows:

*“Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete [sic] or other Person’s degree of Fault include, for example, the Athlete’s (...) experience, whether the Athlete (...) is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete’s (...) degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete’s (...) departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2”.*

68. The fact that a prohibited substance may, in an athlete's *ex post facto* view, lack a performance enhancing effect, does not explain the departure from the expected standard of behaviour prior to the administration of the substance. An athlete must demonstrate the same level of diligence with regard to all substances included in the WADA Prohibited List irrespective of their capability of enhancing sporting performance.
69. The Panel further observes that the Athlete also acknowledges that high doses of pseudoephedrine may improve athletic performance. Therefore, only low doses of pseudoephedrine are allowed in competition, given also that pseudoephedrine is widely available particularly as a component of multi-ingredient cold and influenza treatments.
70. With regard to the concentration of pseudoephedrine in the Athlete's A sample, the Panel understands that the Athlete endeavours to establish a reduced level of fault or negligence by invoking the quantity of the prohibited substance in his A sample. The Panel recognizes that the quantity of pseudoephedrine in an athlete's sample may possibly have significance in assessing an athlete's fault in some special situations, but not in the Athlete's matter.

71. Indeed, this is not a case where an athlete was conscious of high quantities of pseudoephedrine being prohibited in competition and endeavoured to adjust the administration of the substance in relation to the competition, but failed. Neither is this a case where the Panel would have to assess whether the prohibited substance ended up in an athlete's system inadvertently through contamination.
72. As noted above, the Athlete was not even aware of pseudoephedrine being prohibited in competition and consciously took it shortly before – and during – the Competition. The Athlete ingested 20 Defrinol forte tablets from 1 to 11 August 2017, and the Competition lasted from 5 to 13 August 2017. Thus, the concentration of pseudoephedrine in the Athlete's A sample is not a result of an accident or misfortune. Instead, the concentration of pseudoephedrine found in the Athlete's A sample is a coincidental derivative of, among other factors, the total volume of pseudoephedrine ingested by the Athlete, his individual metabolism, and the timing of the doping control.
73. Finally, the Panel notes that the quantity of pseudoephedrine found in the Athlete's A sample undisputedly exceeds the limit set by WADA. Pseudoephedrine is prohibited in competition when its concentration in urine is greater than 150 µg/mL. The concentration of pseudoephedrine in the Athlete's sample was 206 µg/mL, *i.e.* 56 µg/mL or 37% above the limit. The concentration in the Athlete's A sample exceeded the Decision Limit of 170 µg/mL, whose purpose is to prevent any false positives, by no less than 36 µg/mL or 21%. The Athlete has not called into question the correctness of the laboratory analysis. The Panel concludes that this is not a borderline case where the concentration of a prohibited substance is at the limit or close to it.

***c. The Athlete's age and lack of experience***

74. The Athlete has also invoked his young age, low competition level as well as lack of education and experience in anti-doping matters as factors supporting a low degree of fault or negligence. He has referred to CAS jurisprudence, which in the Athlete's view should be used as guidance in adjudicating the case.
75. The Panel accepts that pursuant to the FINA DCR and established CAS case law, age and lack of experience may be taken into account as mitigating factors (see *e.g.* CAS 2008/A/1490 and CAS 2011/A/2493).
76. In fact, according to the definition of "Fault" in the FINA DCR, minority is a factor "*to be taken into consideration in assessing an Athlete [sic] or other Person's degree of Fault*". However, while minors may be treated more leniently under the FINA DCR, the Panel notes that a minor is defined in the FINA DCR as "*A natural Person who has not reached the age of eighteen years*". The Athlete was 19 years and eight months old at the time of the doping control. Therefore, he does not fulfil the criterion of a minor.
77. Even if an athlete is not a minor, their young age may be taken into account in assessing the degree of fault, as adolescence may, and many times does, reflect lack of experience.

78. The Panel notes that the definition for “Fault” in the FINA DCR does not limit the scope of “experience” to be taken into consideration in assessing an athlete’s degree of fault. Therefore, “experience”, and the lack thereof, may relate to an athlete’s experience in anti-doping matters but also to their experience in acting as an athlete.
79. While the Panel acknowledges that the Athlete was not particularly experienced in anti-doping matters, he has participated in an anti-doping lecture, *e.g.* about supplements. As testified by the Athlete in front of the FINA DP, he was taught “*what he could or couldn’t take*”. The Panel also notes that according to the Athlete’s testimony, “*he would not take a drug if he had known it was prohibited*”. The Panel is also persuaded by the FINA DP’s notion that the Athlete has not lived in a vacuum but has been exposed through media to anti-doping issues and to the extreme care to be taken as a sportsman. The Panel concludes that the Athlete was sufficiently well informed of his anti-doping responsibilities to have been able to avoid his ADRV.
80. The Panel cannot accept the Athlete’s position that he should be considered an amateur. The Panel does not question the Athlete’s announcement that he does not receive any remuneration for playing water polo or that he continues to study alongside playing. However, the Athlete has played in no less than five international competitions as a member of the National Men’s Junior Water Polo team of Serbia. In addition, in 2017, he played in three games of the FINA World Water Polo League as a member of the Serbian National Men’s Senior Water Polo team. The Athlete obviously is a top-level water polo player in Serbia and in his own age group internationally. This is highlighted by the fact that the Athlete is a gold medallist from both European and World Championships. At this elite level, an athlete can reasonably be expected not to ingest pharmaceuticals without somehow performing at least a very basic check on their active ingredients and comparing them with the Prohibited List.

**d. Conclusion on NSF**

81. For the above reasons, the Panel finds that the Athlete has failed to establish on the balance of probabilities that there are exceptional circumstances and that he acted with “No Significant Fault or Negligence”. The Panel concurs with the FINA DP that the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk was non-existent. As summarised by the FINA DP, to do nothing at all to investigate the contents of a prescribed medication is significantly negligent. It follows that the Athlete shall be sanctioned with a two-year ineligibility period, unless the Panel finds that such penalty is disproportionate in relation to the Athlete’s offence.

**B. Proportionality**

82. The Athlete has put forth that a two-year period of ineligibility is disproportionate to his degree of fault and invoked a number of CAS awards supporting his position. FINA has contested the Athlete’s position.

83. The Panel concurs with the Athlete that the principle of proportionality may be applied by the CAS if the special characteristics of an individual case so warrant. However, the Panel is not persuaded by the Athlete's argumentation that a two-year ineligibility period would be disproportionate in the circumstances of this case.
84. First, the case law referred to by the Athlete is aged – CAS 2001/A/330 with further references to CAS 92/73, CAS 95/141, and CAS 96/156 – and does not concern the prevailing anti-doping regime based on the 2015 edition of the World Anti-Doping Code (the "WADC").
85. Second, the current WADC has been found to be proportionate by Mr Jean-Paul Costa, the former President of the European Court of Human Rights, who has described the (draft) WADC in his Legal Opinion of 25 June 2013, *e.g.* as follows:

*"sanctions (or sentences) must not be automatic and they must be adjustable depending on the circumstances: this is a consequence of the principle of the individualization or personalization of sanctions and sentences. This is precisely what we are dealing with here: not only are sanctions not automatic, they are adjustable/scalable. The modularity of sanctions stems from the consideration of several circumstances: the nature of the prohibited substance, the gravity of the individual fault, behaviour during the procedure ("prompt admission"), or even age (minors)".*

86. Third, the Panel is mindful that the CAS has also recently confirmed that the WADC, from which the FINA DCR is derived and on which it is based, is proportional. As noted in CAS 2017/A/5015 and CAS 2017/A/5110 (para. 227), on the basis of CAS 2016/A/4643, *"the WADA Code has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction"*.
87. In conclusion, the Panel finds that imposing a two-year ineligibility period upon a 20-year-old international-level athlete for using a prohibited substance because he has neglected all precautions to avoid an ADRV cannot be considered disproportionate. The Panel also reminds that the current sanctioning system has enabled the imposition of a ban of two years instead of four due to the Athlete's established lack of intent to cheat. The facts of the case simply do not justify a further reduction of the sanction.
88. The Panel underlines that its duty is to impose a sanction in accordance with the applicable anti-doping code and not to rewrite the rules. A deviation from the established legal praxis would compromise the consistency of the anti-doping sanctions, prejudice the ideal of a level playing field, and create inequality between athletes.

### **C. Commencement of the Ineligibility Period**

89. With respect to the sanction start date, the Athlete has requested that the ineligibility period commence on the date of the sample collection, *i.e.* on 13 August 2017, based on delays not attributable to the Athlete and on timely admission.

90. The Panel is guided by Rules DC 10.11, DC 10.11.1, and DC 10.11.2 of the FINA DCR, which stipulate as follows:

*“DC 10.11 Commencement of Ineligibility Period*

*Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*

*DC 10.11.1 Delays not attributable to the Athlete or other Person.*

*Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete (...), the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection (...).*

*DC 10.11.2 Timely Admission.*

*Where the Athlete (...) promptly (which, in all events, means for an Athlete before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA or a Member Federation, the period of Ineligibility may start as early as the date of Sample collection (...). In each case, however, where this rule is applied, the Athlete (...) shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete (...) accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or date the sanction is otherwise imposed”.*

91. The Athlete has not expressly argued for a delay not attributable to him. He simply puts forth that the sample collection took place on 13 August 2017 and that the AAF was communicated to him on 5 October 2017.
92. The Panel takes note that the sample was received in the laboratory on 16 August 2017. The laboratory results were submitted on 7 September 2017, and FINA sent a letter notifying the AAF to the Athlete on 5 October 2017, *i.e.* four weeks after the laboratory results were available.
93. The prerequisite of “substantial delays” in Rule DC 10.11.1 of the FINA DCR means that a doping control conducted within a normal time frame does not entitle an athlete to an advanced ineligibility. Furthermore, in accordance with the clear wording of Rule DC 10.11.1 of the FINA DCR, a mere delay does not justify a backdated ineligibility either. The delay has been qualified as “substantial”.
94. Even though the Panel cannot rule out the possibility of FINA having been able to act more rapidly in sending the notification letter to the Athlete, the Panel finds the Athlete’s reasoning insufficient to discharge his burden of establishing a substantial delay.
95. With regard to timely admission, FINA does not challenge the fact that the Athlete promptly admitted the ADRV. In FINA’s view, however, the FINA DCR leaves discretion to an adjudicator in deciding whether an athlete should be entitled to backdating. FINA points out

that the FINA DP used this discretion and decided that the ineligibility period should start on 23 October 2017.

96. The Panel concurs with FINA. According to Rule DC 10.11.2 of the FINA DCR, backdating is not mandatory even if an athlete has admitted an ADRV promptly. Considering also that the Athlete has not shown that the decision of the FINA DP is not consistent with its other decisions, the Panel does not deem a backdating justified in the circumstances of the case.
97. However, the ban served by the Athlete shall be credited to him. This is stipulated in the second sentence of Rule DC 10.11.3 and in the first sentence of Rule DC 10.11.4 of the FINA DCR as follows:

*“If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete (...) shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal”.*

*“If an Athlete (...) voluntarily accepts a Provisional Suspension in writing from FINA or a Member Federation and thereafter refrains from competing, the Athlete (...) shall receive a credit for such period of voluntary Provisional Suspension against any period of Ineligibility which may ultimately be imposed”.*

98. The Panel takes note that the Athlete has accepted a voluntary suspension on 23 October 2017 and has been continuously suspended since 23 October 2017, because the FINA DP imposed a ban on the Athlete on 12 January 2018. Consequently, the period of ineligibility of two (2) years shall start on 23 October 2017.

#### **D. Disqualification of Results**

99. Rule DC 10.8 of the FINA DCR reads as follows:

*“In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes”.*

100. The Athlete has requested that all competitive results obtained by him from and including 13 August 2017, *i.e.* the date of the positive sample, be reinstated. However, the Athlete has conditioned his request to depend on whether the Panel imposes a ban on him: *“If the FINA Decision is set aside and no period of Ineligibility is imposed on the Athlete, all medals, points and prizes achieved by the Athlete on or after 13 August 2017 shall be reinstated”* (para. 88 of the Appeal Brief). There are no grounds to reinstate his competitive results, considering that the Panel is imposing a ban on the Athlete instead of a reprimand.
101. The Panel further notes that the Athlete has not presented any arguments or facts that would be relevant in assessing whether fairness requires that his results remain untouched in spite of

a ban. Therefore, the prerequisites to uphold the Athlete's results are not fulfilled, taking into account that the Athlete has failed to establish reduced fault or negligence, that the disqualification period is relatively short, and that there is no evidence (or even an argument) that the disqualification of results would cause significant harm to the Athlete – factors typically taken into consideration in assessing fairness.

102. Based on the above, the Panel accepts the FINA DP's ruling on the disqualification and considers it justified to dismiss the Athlete's request concerning the reinstatement of his results obtained on or after 13 August 2017.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed on 21 February 2018 by Mr Filip Radojevic against the decision rendered by the FINA Doping Panel on 12 January 2018 is dismissed.
2. The decision rendered by the FINA Doping Panel on 12 January 2018 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.