Arbitration CAS ad hoc Division (OG Rio) 16/011 Daniil Andrienko, Aleksander Bogdashin, Alexandra Fedorova, Anastasiia Ianina, Alexander Kornilov, Aleksandr Kulesh, Dmitry Kuznetsov, Elena Lebedeva, Elena Oriabinskaia, Julia Popova, Ekaterina Potapova, Alevtina Savkina, Alena Shatagina, Maksim Telitcyn, Anastasiia Tikhanova, Aleksei Vikulin, Semen Yaganov v. World Rowing Federation (FISA) & International Olympic Committee (IOC), award of 5 August 2016 (operative part of 2 August 2016)

Panel: Prof. Ulrich Haas (Germany), President; Mr José Juan Pinto (Spain); Mrs Margarita Echeverria Bermúdez (Costa Rica)

Rowing
Decision of an International Federation to declare athletes ineligible for the Rio 2016 Olympic Games
Interpretation of "reliable adequate international tests"
Principle "tempus regit actum"
Principles of good faith and "venire contra factum proprium"

1. **In order to examine whether the level playing field is affected or not when admitting a Russian athlete to the Rio Olympic Games, an International Federation (IF) must look at the athlete's respective anti-doping record, i.e. examine the athlete's anti-doping tests. In doing so, only *"reliable adequate international tests"* may be taken into account. The IF is allowed to consider that only those doping tests may be retained that have been analyzed by other laboratories than the Russian laboratories. The further reference to *"adequate international tests"* makes it clear that – in principle – a single test is not sufficient to rebut the presumption of "collective responsibility". This not only follows from the word "tests" being used in the plural form, but also from the word "adequate", since a single negative anti-doping test can hardly be adequate to rebut the presumption of "collective responsibility".**

2. **The principle *"tempus regit actum"* is a legal principle that applies to rules and regulations. They shall, in principle, not apply retroactively. However, the decision of the IOC Executive Board to encourage the IF to look at an athlete's testing history (i.e. the number of tests to which a single athlete has submitted) in order to assess whether his or her admission endangers the "level playing field" is not a rule, but a piece of evidence with the help of which the respective international federation shall establish whether or not in the case at hand the level playing field is affected. If the IF determines – in line with the applicable criteria – that the level playing field is only ensured if Russian athletes are admitted to competition that have been tested on three different days in the past 18 months, no issues of retroactivity arise, since the principle of *tempus regit actum* is not applicable to questions of evidence.**

3. **If an IF implements and applies to its own Russian athletes additional eligibility criteria specifically designed for Russian athletes by the IOC (that governs and administers the**

Rio Olympic Games), there is no breach of *venire contra factum proprium* as the qualification process is not changed with retrospective effect. This neither constitutes a breach of the principle of good faith. This is all the more true if the athletes specifically and repeatedly state that they do not wish to challenge the eligibility criteria established by the IOC.

1 PARTIES

1.1 The Applicants in the case CAS OG 16/011 are 17 rowers of Russian nationality (the "Athletes").

1.2 The First Respondent is the World Rowing Federation (the "FISA"), the organisation responsible for the sport of rowing, having its headquarters in Lausanne, Switzerland.

1.3 The Second Respondent is the International Olympic Committee (the "IOC"), the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the Olympic Charter.

1.4 The first interested Party is the Russian Rowing Federation (the "RRF"), the organisation responsible for the sport of rowing in Russia.

1.5 The second Interested Party is the Russian Olympic Committee (the "ROC"), the National Olympic Committee for Russia.

2 FACTS

2.1 The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

2.2 On 24 July 2016, the IOC took a decision concerning the eligibility of Russian athletes for competing in the Games of the XXXI Olympiad in Rio de Janeiro.

2.3 The IOC Executive Board decided that:

1. *The IOC will not accept any entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below.*
2. *Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:*

- *The IFs, when establishing their pool of eligible Russian athletes, to apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).*
- *The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.*
- *The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.*
- *The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.*
- *The IFs will also have to apply their respective rules in relation to sanctioning of entire NFs.*

3. *The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.*
4. *The IOC will accept any entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016.*
5. *The entry of any Russian athlete ultimately accepted by the IOC will be subject to a rigorous additional out-of-competition testing programme in coordination with the relevant IF and WADA. Any non-availability for this programme will lead to the immediate withdrawal of the accreditation by the IOC* (emphasis added).

2.4 The IOC Executive Board stated that *"Russian athletes in any of the 28 Olympic summer sports have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions, and the presumption of innocence cannot be applied to them"*. The decision also stated that *"according to the rules of natural justice, individual justice … has to be applied … [and] that each affected athlete must be given the opportunity to rebut the applicability of the collective responsibility in his or her individual case"*.

2.5 Following the IOC Executive Board's decision, the FISA Executive Committee on 24 July 2016 considered the issue of eligibility of the Russian athletes and decided – *inter alia* – as follows (the "Challenged Decision"):

Given the fact that the eligibility conditions at the Olympic Games are determined by the IOC, the FISA Executive Committee (EC) took the decision that it had to conduct the required evaluation in order to provide a list of Russian rowers who met the conditions set by the IOC at the Rio 2016 Olympic Games.…

The FISA EC has considered the issues starting with (1) the determination of the Russian rowers who will not be accepted as a matter of principle, based on the IOC specific criteria and in a second stage (2), an individual analysis of the anti-doping records of each entered Russian rower, whose entry could in principle be accepted.

1) a. FISA has examined the IP Report … and has identified one rower entered by the ROC who is implicated. Consequently and for this reason, this athlete will not be included in the list of rowers declared eligible ….

b. FISA further observes that the ROC will not be allowed to maintain the application for entry of two further rowers since they have previously been sanctioned for doping violations. For this reason and as is the case for the rower mentioned above, these athletes were not included in the review conducted as is indicated below.

2. In addressing the part of the IOC decision "The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field", the FISA EC has determined that, in order to meet the requirements that the IOC has prescribed for it to accept the entry of a Russian rower, and recommend to the IOC that to rebut the applicability of collective responsibility in his or her individual case, as required by the IOC, the following requirements must be met:

> *A Russian rower must have undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period.*
>
> *FISA considers a urine test, a blood test, o a urine and a blood test or multiple tests taken on the same day to constitute one anti-doping test for this evaluation.*

In determining this requirement (which includes both in and out-of-competition tests) and as directed by the IOC taking into account the specificity of the sport, FISA considered the following:

1) The fact that there is a history of doping cases in Russian Rowing Federation (RRF) over the recent past …;

2) A correct balance between the protection of the rights of clean athletes outside of Russia with the protection of the rights of clean athletes inside Russia;

3) The relatively small number of events FISA has where tests can be carried out compared to other sports and consequently the fact that the majority of testing is carried out by the national Anti-Doping Organisations (NAOs);

4) The indication set forth in the World Anti-Doping Agency's 'Guidelines Implementing an Effective Testing Programme, paragraph 4.1, Objective', which refers to a minimum of three (out-of-competition) tests per year for registered Testing Pool (RTP) athletes.

Taking all of the above into account … three tests over the 18 months period starting 1 January 2015 was determined to be reasonable requirement ….

The FISA Executive Committee considers that the coxswains should not be subject to the same testing requirements in this very exceptional situation and, therefore, has decided that they also meet the IOC conditions for participation at the Rio Olympic Regatta ….

2.6 As a result of the FISA Executive Committee decision, the Athletes were declared ineligible for the Rio Olympic Games, because they had not *"undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period"*.

3 CAS PROCEEDINGS

3.1 On 1 August 2016 at 16h45 (time of Rio de Janeiro), the Appellants filed an application with the CAS Ad Hoc Division against FISA and the IOC. The Applicants also mentioned as Interested Parties the RRF and the ROC.

3.2 At 22h54 (time of Rio de Janeiro), the Court Office of the CAS Ad Hoc Division notified the Appellants' application to the Respondents and interested parties.

3.3 On 1 August 2016, the Parties and the Interested Parties were informed that the President of the CAS Ad Hoc Division had decided that the Panel of arbitrators for this case was constituted as follows: Prof. Dr. Ulrich Haas (President); Mr José Juan Pinto and Mrs Margarita Echeverria Bermúdez (arbitrators).

3.4 The Panel allowed the Respondents to file their respective submissions to the Applicants' application by 2 August 2016, 12h00 (time of Rio de Janeiro).

3.5 The Parties were also summoned at a hearing to be held on 2 August 2016, 14h30 (time of Rio de Janeiro).

3.6 On 2 August 2016 at 11h00 (time of Rio de Janeiro), the ROC filed an *amicus curiae* brief.

3.7 On 2 August 2016 at 12h00 (time of Rio de Janeiro), FISA filed its Answer.

3.8 On 2 August 2016, at 02h30 (time of Rio de Janeiro), the hearing took place at the offices of the CAS Ad Hoc Division. The Panel was joined by Mr Brent J. Nowicki, Counsel to the CAS, and following persons also attended the hearing: for the Applicants, Messrs Mikhail Prokopets and Yury Zaytsev, Counsel (by telephone); for FISA, Mr Jean-Christophe Rolland, FISA President and Mr Matt Smith, FISA General Secretary (in-person); for the IOC, Messrs Howard Stupp, Director Legal Affairs, François Carrard and Nicolas Zbinden, Counsel (in-person). At the hearing the Panel advised the parties that in view of the urgency of the matter a decision would be rendered shortly after the hearing and that, consequently, the request of the Athletes to stay the execution of the Challenged Decision is considered moot.

4 PARTIES' SUBMISSIONS

4.1 The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. Applicant's Requests for Relief

4.2 The Applicants' requests for relief are as follows:

1. *The Application filed by the Applicants is accepted;*
2. *The Challenged decision of the FISA Executive Committee from 25 July 2016, according to which a Russian rower must have undergone a minimum of three anti-doping tests analysed by WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period, is null and void;*
3. *The Applicants are entered for participation at the Rio 2016 Olympic regatta subject to they were qualified to the Rio 2016 Olympic Games and included into the list of participants by the ROC by the deadline of 18 July 2016;*
4. *The FISA are obliged to allow the Applicants in 2016 Rio Olympic Games;*
5. *IOC shall accept entry of the Applicants in 2016 Rio Olympic Games;*
6. *The FISA shall bear all legal and other costs of the Applicants at the amount determined by the CAS Panel.*

b. First Respondent's Request for Relief

4.3 The First Respondent's request for relief is as follows:

"FISA asks the Court to reject the appeal".

c. Second Respondent's Requests for Relief

4.4 The Second Respondent did not submit any specific requests for relief.

5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter provides as follows:

61 Dispute Resolution

[…]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.

5.2 In view of the above, the Panel considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter. The jurisdiction of the CAS Ad Hoc Division was not contested in the written submissions and was expressly confirmed by all parties at the hearing.

5.3 Article 1 of the CAS Arbitration Rules for the Olympic Games (the "CAS Ad Hoc Rules") provides as follows:

Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective.

5.4 The Challenged Decision is dated 24 July 2016 and was communicated to the RRF on 27 July 2016. The appeal against the Challenged Decision was filed on 1 August 2016. Consequently, the dispute arose *"during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games"* and the appeal is therefore admissible.

6 APPLICABLE LAW

6.1 Under Article 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"*.

6.2 The parties agree that the "applicable regulations" within the meaning of Article 17 of the CAS Ad Hoc Rules are the rules and regulations of FISA.

7 DISCUSSION

A. Legal framework

7.1 These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport ("ICAS") on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the Ad Hoc Division and of its panels of arbitrators, pursuant to Article 7 of the CAS Ad Hoc Rules.

7.2 According to Article 16 of the CAS Ad Hoc Rules, the Panel has *"full power to establish the facts on which the application is based"*.

B. Merits

7.3 The scope of review of this Panel is limited. The Appellants specified in their application and again in the hearing that they do not challenge the eligibility criteria for Russian athletes established in the IOC Executive Board decision dated 24 July 2016. Instead, the appeal by the Athletes is solely directed against the application and implementation of the IOC Executive Board decision by FISA vis-à-vis the Athletes. Consequently, the Applicants accept that

(i) they *"assume the consequences of what amounts to a collective responsibility"* resulting from the systematic manipulations in the Russian anti-doping program, in particular in the Moscow laboratory as described in the Independent Report;

(ii) that they must rebut this collective responsibility in order to be eligible for the Rio Olympic games and

(iii) that in order to rebut the *"collective responsibility"* the Athletes must – *inter alia* – *"provide evidence to the full satisfaction"* of FISA that their admittance to competition *"ensures a level playing field"*.

a) Is the Challenged Decision in conformity with the decision of the IOC Executive Board dated 24 July 2016?

7.4 The Athletes submit that the Challenged Decision deviates from the criteria established in the IOC Executive Board decision dated 24 July 2016 in a number of ways. First, the Challenged Decision requires that any Russian athlete (who has neither been previously sanctioned nor been identified in the Independent Report as being implicated) must have undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18-month period. Furthermore, urine and blood tests taken on the same day constitute – according to the Challenged Decision – a single anti-doping test for this evaluation.

7.5 It is true that the IOC Executive Board decision does not refer explicitly to the requirement of three tests or to a period of 18 months. Nor does the IOC Executive Board decision specify what constitutes a single anti-doping test. Nevertheless, this Panel finds that the Challenged Decision is in line with the criteria established by the IOC Executive Board decision. The relevant part of the IOC Executive Decision is reiterated here for the sake of better understanding and reads as follows:

The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.

7.6 The paragraph provides that in order to examine whether the level playing field is affected or not (when admitting a Russian athlete to the Rio Olympic Games), the federation must look at the athlete's respective anti-doping record, i.e. examine the athlete's anti-doping tests. In doing so, the IOC Executive Board decision specifies that only *"reliable adequate international tests"* may be taken into account. FISA interpreted these terms as meaning that only those doping tests

may be retained that have been analyzed by other laboratories than the Moscow laboratory (irrespective of what legal entity ordered the taking of the sample). This Panel concurs with this view. Since – according to the Independent Report – the irregularities observed related to the Moscow laboratory. Therefore, a reliable adequate international test can only be assumed if the sample has been analyzed in a WADA-accredited laboratory outside Russia.

7.7 The relevant paragraph in the IOC Executive Board decision further refers to *"adequate international tests"* and, consequently, makes it clear that – in principle – a single test is not sufficient to rebut the presumption of "collective responsibility". This not only follows from the word "tests" being used in the plural form, but also from the word "adequate", since a single negative anti-doping test can hardly be adequate to rebut the presumption of "collective responsibility". In addition, the relevant paragraph refers to the "specificities" of the respective sport. It has not been contested by the Applicants that rowing is at the same time a sport requiring strength and endurance and, thus, is exposed to a significant doping threat. The latter is also evidenced by – what FISA refers to – a history of doping cases in the Russian Rowing Federation. FISA when determining the number of required *"reliable adequate international tests"* not only took into account the abstract exposure of its sport to doping, but took also into consideration WADA's "Guidelines Implementing an Effective Testing Programme", which refers to a minimum of three tests per year for Registered Testing Pool athletes. Finally, FISA also bore in mind that it only provides for a relatively small number of events where tests can be carried out compared to other sports. To conclude, the Panel finds that FISA's implementation and application of the criteria listed in the IOC Executive Board decision is consistent and fully compliant with the wording and the spirit of the IOC's decision. This has been also acknowledged by the IOC in the hearing.

b) No breach of the principle "tempus regit actum"

7.8 The Athletes submit that FISA's *"new rule of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory within 18 months"* breaches the legal principle *"tempus regit actum"*, since this rule was introduced *"post factum"*. According to the Applicants, this deprived the Athletes to comply with this new rule. The Panel does not concur with this view. The principle *"tempus regit actum"* is a legal principle that applies to rules and regulations. They shall, in principle, not apply retroactively. However, no new rule has been enacted by FISA in the case at hand. The IOC Executive Board – in view of the very exceptional circumstances deriving from the Independent Report concerning the doping situation in Russia – enacted new eligibility rules for Russian athletes. These eligibility rules are neither contested nor challenged by the Athletes. The criteria enacted by the IOC provide – *inter alia* – that the admission of the Russian athletes shall not endanger the "level playing field". In assessing whether such danger exists, the IOC Executive Board decision encourages the federation to look at the athlete's testing history. Thus, the testing history (i.e. the number of tests to which a single athlete has submitted) is not a rule, but a piece of evidence with the help of which the respective international federation shall establish whether or not in the case at hand the level playing field is affected. FISA determined – in line with the applicable criteria – that the level playing field is only ensured if Russian athletes are admitted to competition that have been tested on three different days in

the past 18 months. No issues of retroactivity arise here, since the principle of *tempus regit actum* is not applicable to questions of evidence.

c) No breach of good faith, procedural fairness, venire contra factum proprium or the right to be heard

7.9 The Athletes submit that it constitutes a breach of *venire contra factum proprium* if the qualification process is changed with retrospective effect. However, this is not the case here. FISA did not change the eligibility criteria. Instead, it was the IOC (that governs and administers the Rio Olympic Games) who imposed the additional eligibility criteria specifically on Russian athletes. FISA only implemented and applied these criteria to its Russian athletes. This neither constitutes a breach of the principle of *venire factum proprium* nor a breach of good faith. This is all the more true, since the Athletes specifically and repeatedly stated that they do not wish to challenge the eligibility criteria established by the IOC Executive Board in its decision dated 24 July 2016. The Athletes' reference to CAS 98/200, according to which it constitutes – allegedly – a violation of procedural fairness, if a rule is adopted too late, is of no avail here. The jurisprudence refers to rules and regulations and not to the taking of evidence, i.e. assessing the testing record of the respective athletes. Furthermore, the Panel finds that FISA did not act in bad faith when it refused the request of the RRF on 28 July 2016 to do additional testing on the Russian athletes. In view of the specificities of the sport of rowing, an effective anti-doping policy requires that athletes are being tested over a certain period of time. This is particularly true with respect to an important sporting event. Any athlete likely to dope will have finished his or her "treatment" well before the commencement of the Olympic Games. Last minute testing is, thus, not likely to contribute to establishing a level playing field with other competitors that have been under the umbrella of reliable testing over a longer period of time.

7.10 Finally, the Panel notes that this is a *de novo* procedure and that consequently, procedural mistakes that might have occurred at a prior instance fade to the periphery. The Athletes had an opportunity to state their case before this Panel. Thus, any alleged breach of the right to be heard at a prior instance must be considered healed.

8 CONCLUSION

8.1 In view of the above considerations, the Challenged Decision must be upheld and the Applicant's application filed on 1 August 2016 shall be dismissed.

The ad hoc Division of the Court of Arbitration for Sport renders the following decision:

The application filed by Daniil Andrienko, Aleksander Bogdashin, Alexandra Fedorova, Anastasiia Ianina, Alexander Kornilov, Aleksandr Kulesh, Dmitry Kuznetsov, Elena Lebedeva, Elena Oriabinskaia, Julia Popova, Ekaterina Potapova, Alevtina Savkina, Alena Shatagina, Maksim Telitcyn, Anastasiia Tikhanova, Aleksei Vikulin, Semen Yaganov on 1 August 2016 is dismissed.