Arbitration CAS 2018/A/5651 Georgios Kostakis v. Hellenic National Council for Combating Doping (ESKAN), award of 31 October 2018

Panel: Prof. Jens Evald (Denmark), Sole Arbitrator

Paralympic athletics
Doping (Selective Androgen Receptors Modulator - SARMS)
Departure from testing procedures in case of partial sample
Burden and standard of proof for causality between departure and positive finding
Burden and standard of proof for absence of intent
Burden of proof for source of prohibited substance

1. **Provided the Doping Control Form contains a box entitled 'Partial Sample', this box must be completed by the Doping Control Officer whenever a partial sample is obtained during the sampling process. Failure to tick the box results in errors and violations during sample collection process which constitute a departure from the International Standard for Testing and Investigation (ISTI).**

2. **In case an athlete succeeds in establishing a departure from the testing procedures it is further to the athlete to prove, on the balance of probability, that the departure could have reasonably caused the prohibited substance found in his or her sample. In this context, the athlete must adduce cogent evidence of supporting facts that prove that it is more likely than not that the departure was the cause of the adverse analytical finding.**

3. **The burden of proof with respect to intent lies with the athlete, who has the duty to establish, on the balance of probability, that the anti-doping rule violation was not intentional; *i.e.* the athlete must convince the Panel that the occurrence of the circumstances on which he/she relies is more probable than their non-occurrence.**

4. **In order to establish the source of the prohibited substance it is not sufficient for the athlete to protest innocence and to suggest that the substance must have entered his/her body inadvertently from some contaminated food or water. Rather, the athlete must adduce concrete and credible evidence to demonstrate that a particular supplement, medication or other product taken contained the substance in question.**

I. PARTIES

1. Mr. Georgios Kostakis (the "Athlete" or the "Appellant") is a Greek citizen and was born in 1987. Mr. Kostakis is an International-Level Athlete who has been competing for over a decade

in athletics, namely in triple jump and long jump in class T 47 (below elbow or wrist amputation).

2. The Hellenic National Council for Combating Doping (the "Respondent" or "ESKAN") is the National Anti-Doping Organisation of Greece.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' submissions on the merits of this appeal. Additional facts and allegations found in the Parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 2 July 2016, on the occasion of the Panhellenic Track & Field Championship for Persons with Disabilities, the Athlete underwent an in-competition doping control.

5. The analysis of the A Sample revealed the presence of LGD-4033 or (4-2((S))-2,2,2-trifluoro-1-hydroxyethyl) pyrrolidin-1-yl)-2(trifluoromethyl)-benzonitrile), which is a Selective Androgen Receptors Modulator (SARMS). LGD-4033 is a non-specified substance prohibited at all times under S1.2 (other anabolic agents) of the 2016 WADA Prohibited List.

6. On 8 August 2016, ESKAN informed the Athlete of the Adverse Analytical Finding (the "AAF") and gave the Athlete a deadline until Tuesday 9 August 2016 to declare whether he wished for the B Sample to be analyzed.

7. The Athlete did not request the analysis of the B Sample.

8. On 9 August 2016, the Athlete was informed by the Hellenic Paralympic Committee that he had been disqualified from the Greek Team for the Paralympic Games of Rio.

9. On 13 October 2016, ESKAN delivered copies of the entire file as well of the Laboratory Documentation Package to the Athlete's lawyer.

10. On 23 December 2016, ESKAN notified the Athlete's lawyer at the time of the ascertained Anti-Doping Rule Violation (the "ADRV") and a fifteen-day deadline was set for the Athlete to lodge an appeal. The deadline passed without any action taken by the Athlete.

11. On 14 February 2017, the Board of Directors of ESKAN imposed a four (4) year ineligibility period on the Athlete starting from the date of sample collection (the "ESKAN Decision"). The ESKAN Decision did not contain any information of an appellate instance or of a deadline for an appeal.

12. On 28 December 2017, the Athlete appealed the ESKAN Decision to the Supreme Council of Dispute Resolution in Sport (the "ASEAD").

13. On 8 March 2018, ASEAD dismissed the appeal due to lack of jurisdiction (the "ASEAD Decision"). In its Decision, ASEAD stated that the Athlete was an International-Level Athlete and therefore the Court of Arbitration for Sport had the exclusive jurisdiction for deciding the appeal against the ESKAN Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 28 March 2018, the Appellant filed his Statement of Appeal against the ESKAN Decision with the Court of Arbitration for Sport (the "CAS") in accordance with Article 47 et seq. of the Code of Sports-related Arbitration (the "CAS Code").

15. On 6 April 2018, the CAS Court Office opened this procedure and invited the Appellant to file his Appeal Brief with CAS within ten (10) days following the expiry of the time limit for the appeal. In the same letter, the Respondent was granted a deadline of ten (10) days from the receipt of such letter by courier to nominate an arbitrator.

16. On 18 April 2018 (after an extension of the time limit), the Appellant filed his Appeal Brief.

17. On 25 April 2018, the Respondent was granted a twenty (20) days deadline to submit to the CAS an Answer.

18. On 7 May 2018, the CAS Court Office informed the Parties that the Respondent did not nominate an arbitrator within the prescribed deadline. The Parties where advised that it was thus for the President of the CAS Appeals Arbitration Division or her Deputy, to nominate an arbitrator in lieu of the Respondent.

19. On 30 May 2018, the CAS Court Office informed the Parties that it had not received the Respondent's Answer, or any communication from the Respondent in this regard. The Parties were invited to inform the CAS Court Office by 6 June 2018 whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions. The CAS Court Office noted that the Respondent had failed to submit an Answer, the Panel may nevertheless proceed with the arbitration and deliver an award.

20. On 1 June 2018, the Appellant requested *"a selection of a sole arbitrator in order to reduce the costs"*.

21. On 6 June 2018, the Appellant informed the CAS Court Office that he preferred "an award based solely on the parties' written submissions".

22. On 6 June 2018, the CAS Court Office invited the Respondent to declare to the CAS Court Office, on or before 8 June 2018, whether it agreed with the Appellant's request to nominate a Sole Arbitrator, and informed that silence would be considered as an agreement. The Respondent failed to communicate to the CAS whether or not it agreed with the Appellant's request to nominate a Sole arbitrator.

23. On 3 July 2018, in accordance with Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that Prof.

Jens Evald had been appointed as the Sole Arbitrator. The Parties did not raise any objection to the constitution and the composition of the Panel. In the same letter, the Parties were invited to inform the CAS Court Office by 10 July 2018 whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

24. On 10 July 2018, the Appellant informed the CAS Court Office that he would prefer a hearing to take place.

25. The Respondent failed to communicate to the CAS whether or not it preferred a hearing.

26. On 26 July 2018, the CAS Court Office informed that a hearing would be held on Wednesday 8 August 2018 at 9.30 am (Swiss time) at the CAS Court Office in Lausanne, Switzerland. The Parties were invited to provide the CAS Court Office, on or before 2 August 2018 with the names of all the persons who would be attending the hearing.

27. On 30 July 2018, an Order of Procedure was issued.

28. On the same date, on behalf of the Sole Arbitrator, the CAS Court Office invited the Appellant to provide the CAS Court Office, on or before 3 August 2018, with the following documents: i) an English version of the relevant Anti-Doping Rules applicable in the present proceedings, and ii) in the event the Appellant has it, with a copy of the Laboratory Documentation Package.

29. On 3 August 2018, the Appellant returned the signed Order of Procedure together with an English copy of the 2016 WADA Prohibited List. The Respondent failed to sign the Order of Procedure.

30. On 8 August 2018, a hearing was held in Lausanne, Switzerland. In addition to Ms. Andrea Zimmermann, Legal Counsel to the CAS, the following persons attended the hearing in person:

For the Appellant:

- The Athlete
- Mr. Emmanouil Arvanitis, Legal Counsel.

Due to cancelled flights and the concatenation of circumstances in Frankfurt Airport on 7 and 8 August 2018 it was not possible for the Sole Arbitrator to attend the hearing in Lausanne in time. With the Appellant's express consent, the Sole Arbitrator conducted the hearing via Skype from a conference room at Frankfurt Airport.

31. The Respondent did not attend the hearing.

32. At the outset of the hearing, the Sole Arbitrator invited the Appellant to provide to the CAS Court Office an English version of the relevant Anti-Doping Rules applicable in the present proceedings. Further, the Appellant informed the Sole Arbitrator that he did not have a copy of the Laboratory Documentation Package.

33. Before the hearing was concluded, the Appellant expressly stated that he had no objections to the overall conduction of the proceedings, in respect of his right to be heard and be treated equally in these arbitration proceedings.

34. On 15 August 2018, and upon the Appellant's request, the CAS Court Office, on behalf of the Sole Arbitrator, granted the Appellant an extension until 17 August 2018 to submit an English translation of the Anti-Doping Rules relevant to this matter.

35. On 17 August 2018, the Appellant informed the CAS Court Office that the relevant Anti-Doping Rules where *"mentioned in our submissions and in ASEAD and ESKAN Decisions which have been translated and submitted to CAS Court Office"*.

36. On 22 August 2018, the CAS Court Office, on behalf of the Sole Arbitrator, requested the Appellant to get in contact with the relevant Greek Ministry and/or World Anti-Doping Agency (the "WADA") to ask for an English version of relevant Anti-Doping Rules and any Articles on which the ASKEAN Decision and the ASEAD Decision was based, as well as the one mentioned in the Appellant's submissions on or before the 29 August 2018.

37. On 29 August 2018, the Appellant filed, i.e., i) copies of exhibits that were already part of the case file, ii) copy of the WADA Code and informed the CAS Court Office that the relevant Anti-Doping Rules where already mentioned in the ASKEAN and ASEAD Decisions, which was based on the WADA Code.

38. On 4 September 2018, the CAS Court Office, on behalf of the Sole Arbitrator, requested the Appellant to clarify and provide the CAS Court Office on or before 7 September 2018, with the following: i) the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS, ii) the English version of the relevant Articles of the Greek Anti-Doping Rules, and if this was not possible with the English version of the relevant Articles of the Greek Anti-Doping Rules, which was already referred to as exhibits by the Appellant in his submissions, and iii) an English version of different Articles of the Greek Anti-Doping Rules not mentioned the Appellant's submissions with reference to the correct Article numbers of the Greek Anti-Doping Rules, in particular Article 2, Article 3, Article 10.2, Article 10.2.1, Article 10.2.3, Article 10.11 and Article 10.11.3.1 of the WADA Code.

39. On 7 September 2018, the Appellant submitted the requested translation of the relevant Greek Anti-Doping Rules and informed the CAS Court Office that *"the correct article is not 10.2.1, 10.2.3 and 10.11 but 11.2.1, 11.2.3 as there are in our document"*. Further, the Appellant stated that he was not able to get an English translation of the Greek Anti-Doping Rules neither from the Greek Ministry nor somewhere else.

40. On 19 September 2018, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that unless any objection from the Respondent on or before 25 September 2018 the Appellant's translation of the relevant Greek Anti-Doping Rules would be accepted.

41. On 26 September 2018, the CAS Court Office informed the Parties that no objection was raised by the Respondent regarding the translation provided by the Appellant on 7 September 2018. In this view, such translations were admitted as part of the file.

IV. PARTIES' SUBMISSIONS

42. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in his deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

43. The Appellant's submissions, in essence, may be summarized as follows:

- The Athlete's due process rights has been violated for, *inter alia*, the following reason:

  ➢ ESKAN never properly and officially informed the Athlete of the ADRV that was ascribed to him. Instead, ESKAN notified the Athlete's lawyer at the time, who was not authorized to represent the Athlete and *"was never appointed to accept service of documents"*. As a result, the Athlete was unable to exercise his right of appeal. Therefore, the Athlete's constitutional rights to plead his case, as prescribed under Article 20 of the Constitution of Greece was infringed. Article 20 states: *1. Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law. 2. The right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.*

- The Athlete disputes the finding of the AAF for the following reasons:

  ➢ *"The Protocol for the delivery and the receipt of the biological samples by the anti-doping control laboratory, submitted at 23:20, states that twelve (12)* ***BEREG-KITS*** *with biological urine samples from Pan-Hellenic Track & Field Championship for Persons with Disabilities 2016 were delivered. My sample number appears third from the end and according to the completed laboratory questioner the samples were not checked. More specifically, in the question whether the sample codes in the Protocols, the Protocol envelopes and the BEREG-KITS correspond with each other, the* ***ANSWER IS THAT THEY HAVE NOT BEEN CHECKED*** *[…].*

  In light of this fact and since the samples collected by the athletes and delivered to the laboratory for analysis were not examined in relation to the above issues, I am inclined to reach the conclusion that the samples was not properly analysed and as such I contest the result, since the way the sample was examined was not reliable. It is not possible to state with certainty that the prohibited substance was actually traced in my sample. Indeed, since the samples were not checked in respect of the above mentioned aspects (which they should have) how is it possible to consider the result reliable and how is it possible to be certain that the samples truly correspond to the specific athletes".

- The Prohibited Substance found in the Athlete's A Sample is not on the 2016 WADA Prohibited List.

- If the Athlete does not succeed to establish a departure from the International Standard for Laboratories ("ISL") occurred which could reasonably have caused the AAF, the Athlete asserts, *inter alia*, the following:

  - The Athlete never deliberately used a Prohibited Substance.

  - *"There is a possibility that the prohibited substance I am accused of using resulted from the consumption of a contaminated product […]".*

  - The Athlete sent to ESKAN the food supplements that he had collected as to be examined by ESKAN:

    - The Athlete has constantly asked for the food supplements that he used to be examined by ESKAN and such examination has not taken place until today.

  - The Athlete had different types of food supplements tested for LDG-4033 in a laboratory, but the laboratory concluded that it *"required techniques that are not available in our laboratories".*

  - The Athlete underwent a doping test in Dubai between 17 and 20 March 2016 and nothing irregular was identified in the urine.

  - The Athlete truly believes that he was not in fault or negligent in respect of the AAF.

- The four (4) year disqualification imposed on the Athlete is *"unlawful, harsh, unreasonable and disproportionate and in any event the reasons provided were ungrounded and vague* […]*".* The Athlete relies, *inter alia*, on CAS 2014/A/3639, CAS 2013/A/3395, CAS 2012/A/2804, and CAS 2006/A/1168, in which cases the Athletes were suspended for a period of two (2) years with similar substances in the Athletes' samples.

44. In light of the above, the Athlete submits the following prayer of relief:

*"**X)** ***<u>REQUEST FOR RELIEF</u>***

[…], The Appellant respectfully requests the CAS to:

1) On a preliminary basis if needed, to reject the Decision of ESKAN (Decision No 1/14.02.2017 of the Board of Directors of ESKAN).

2) Find that the appellant is not guilty and annul the Appealed Decision of ASEAD (Decision 34/8-3-2018 ASEAD).

3) Subsidiarily reduce the four (4) years exclusion penalty for all sporting activities, (ESKAN Decision).

4) Audit the reliability of the results as it will be analyzed in our appeal brief.

Additionally it is requested for CAS to:

Order the Respondent to pay the entire costs of the present arbitration.

Order the Respondent to pay the legal fees and expenses of the Appellant, to be determined at a later stage".

45. At the hearing, the Appellant clarified that the precise nature of the relief that the Appellant actually seeks is that the CAS annuls the ASKEAN Decision and replace it by a new decision. Further, the Appellant clarified that he does not seek that the CAS annuls the ASEAD Decision.

46. Although duly invited, the Respondent did not file an Answer to the Athlete's Statement of Appeal/Appeal Brief within the prescribed time limit or thereafter.

V. JURISDICTION

47. Article R47 of the CAS Code provides as follows:

48. *"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 said body".*

49. The jurisdiction of the CAS, which is not disputed, derives from Article 14.2.1 of the Greek Act no. 437 of 2016 (Government Gazette A 49 1.4.2016 that introduced the required regulations for the harmonization of Greek legislation with the 2015 WADA Code) (the "Greek ADR"), which states: *"Appeals in respect of athletes with an international standing, or international sporting events, when participating in international sporting events […] can be lodged exclusively to CAS".* The Athlete in the present case is an International-Level Athlete for the purposes of the applicable rules.

50. Hence, it follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

51. According to Article 14, 14.7 and 14.7.1 of the Greek ADR, the time limit for appeal to CAS is twenty-one days after the decision of the ASEAD has been received.

52. The Athlete received the ASEAD Decision on 8 March 2018. As the Statement of Appeal was filed on 28 March 2018, the appeal was lodged within the deadline set forth under Article 14.7.1 of the Greek ADR. The appeal complied with all other requirements of Article R47 of the CAS Code.

53. It follows that the appeal is admissible.

VII. APPLICABLE LAW

54. Article R58 of the CAS Code provides the following:

"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 the law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

55. The above mentioned provision was expressly mentioned in the Order of Procedure and was accepted by both Parties.

56. In accordance with Article R58 of the CAS Code, the applicable regulation to this case is the Greek ADR.

57. As the "seat" of this arbitration is Lausanne, Switzerland, Swiss Law governs all procedural aspects of this proceeding.

VIII. MERITS

58. The Sole Arbitrator will address the issues as follows:

(A) Violation of the Athlete's Due Process Rights?

(B) Whether the Athlete Committed an Anti-Doping Rule Violation?

(C) Were There Errors and Violations Committed in the Collection of the Athlete's Sample?

In case of the affirmative:

(D) Could these Errors and Violations Reasonably Have Led to the AAF?

Depending on the findings on the above mentioned issues:

(E) Should the Athlete be sanctioned?

In case of the affirmative:

(F) Period of Ineligibility.

A. Violation of the Athlete's Due Process Rights

59. The Athlete asserts that his due process has been violated as he was not informed timely by ESKAN:

"[…] I was never informed of the violation that was ascribed to me nor was I informed of the fifteen day deadline for launching an appeal against the decision ascertaining the violation, as prescribed under Articles 8.10 and 9.5 of N 4373/2016". […] I was […] never informed and finally it was not possible for me to appeal before the Disciplinary Committee and use my rights to hearing, where I could present my arguments in respect of the violation of anti-doping regulations".

60. The Sole Arbitrator notes that Article R57 of the CAS Code entails a procedure *de novo* ("The Panel shall have full power to review the facts and the law") and that such review by the CAS, as repeatedly decided by well-established CAS jurisprudence, cures any procedural irregularities in the proceedings below, cf. CAS 2008/A/1545; CAS 2009/A/1880-1881; CAS 2013/A/3262; CAS 2014/A/3467; and MAVROMATI & REEB, 'The Code of the Court of Arbitration for Sports', Wolters Kluwer, 2015, p. 513 f.

61. Therefore, the Sole Arbitrator considers that any possible infringement of the Athlete's due process rights committed by ESKAN are hereby cured and thus insignificant for this procedure. As a result, the Sole Arbitrator may proceed to rule on the merits of this case.

B. Whether the Athlete Committed an Anti-Doping Rule Violation?

62. According to Article 3.1 of the Greek ADR:

"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

3.1.1 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 Article 3.

3.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle".

63. As to the burden of proof, Article 4 of the Greek ADR provides that the ASKEAN shall have the burden of establishing that the anti-doping rule violation has occurred. The standard of proof shall be whether the ASKEAN 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 the mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut the presumption or establish specified facts, the standard of proof shall be by a balance of probability.

64. Article 4 of the Greek ADR further adds that WADA-accredited laboratories and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the ISL. The Athlete or other Person may rebut this presumption by establishing that a departure from the ISL occurred which could reasonably have caused the AAF.

65. From the facts and evidence it is apparent that:

    i) On 2 July 2016, ESKAN collected a urine sample from the Athlete which was stored in a Sample Bottle affixed with the code number 489919;

    ii) On 2 July 2016, the Sample Bottle code number 489919 collected by ESKAN was sent for analysis to the Laboratoire de Contrôle.

    iii) On 8 July 2016, the Laboratoire de Contrôle reported that its analysis of the A Sample of the Sample Bottle 489919 revealed the presence of LGD-4033 or (4-2((S))-2,2,2-trifluoro-1-hydroxyethyl) pyrrolidin-1-yl)-2(trifluoromethyl)-benzonitrile).

    iv) The Athlete filled in the Doping Control Form, confirming his satisfaction with the manner in which his sample had been collected.

66. The Athlete maintains that the substance, LGD-4033, found in the Athlete's A Sample is not on the 2016 WADA Prohibited List.

    i) The Sole Arbitrator observes that LDG-4033 is a Selective Androgen Receptors Modulator (SARMs), and that S. 1.2 ("Other Anabolic Agents") of the 2016 WADA Prohibited List expressly states that "SARMs" is included on the Prohibited List. Therefore, the Sole arbitrator holds that the substance found in the Athlete's A Sample is in fact on the 2016 WADA Prohibited List.

67. Further, the Athlete asserts that his A Sample *"was not properly analysed […] since the way the sample was examined was not reliable"*. The Sole Arbitrator observes that the Athlete does not maintain that the sample analysis and custodial procedures departed from the ISL. Instead, the Athlete bases his assertion on the fact that the Laboratoire de Contrôle on the Doping Control Laboratory Receiving Specimens Form ticked "NOT CHECKED" to the following questions: i) *"Do the code numbers on the Official Record Forms and the official record's envelope correspond with the sample code numbers?"*, and ii) *"Are the Sample bottles securely closed?"*.

68. The Sole Arbitrator finds the Athlete's assertion to be unfounded, as:

    i) The Doping Control Laboratory Receiving Specimens Form filled in by the Laboratoire de Contrôle documents that the transport bag was sealed, and that the transport bag seal code number was the same with the code number stated on the Doping Control Laboratory Receiving Specimens Form;

    ii) Pursuant to the International Standard for Testing and Investigation 2016 (the ISTI") (D.4.13-4.15) it is for the Doping Control Officer ("DCO") and the Athlete to ensure

the correct code number is recorded accurately, and it is the Athlete's responsibility to seal the A and B bottles as directed by the DCO;

iii) The ISL 2016 does not require laboratories to check if the code numbers on the Official Record Forms and the official record's envelope correspond with the sample code numbers, and if the Sample bottles are securely closed.

69. It follows, that ticking the boxes "NOT CHECKED" does not imply that the Athlete's A Sample *"was not properly analysed […] since the way the sample was examined was not reliable"*.

70. In view of the above facts and findings made by the Laboratoire de Contrôle in relation to the A Sample of code number 489919, it follows that the ESKAN has discharged its burden of proving the presence of a prohibited substance, LGD-4033 in the Athlete's body to the Sole Arbitrator's comfortable satisfaction.

C. Were There Errors and Violations Committed in the Collection of the Athlete's Sample?

71. Under Article 4 of the Greek ADR, the level of proof required from the Athlete in order to rebut the above facts and findings as established by ESKAN is that of a balance of probabilities.

72. At the hearing, the Athlete explained how the sample collection was conducted by ESKAN on 2 July 2016. The Athlete's explanation may, in essence, be summarized as follows:

i) Together with 11 other athletes, the Athlete was escorted by ESKAN DCO to two rooms separated only by a door, which was open at all time during the sample collection process;

ii) The collection of urine in the Collection Vessel was conducted at a toilet close to the two rooms;

iii) One room served as a waiting room for the athletes;

iv) The other room was occupied by a table at which the athletes poured the urine from the Collection Vessel into the A and B Sample Bottles;

v) The volume of urine provided by the Athlete was insufficient, and he was instructed by the DCO to place his Collection Vessel on the table, and to take a seat in the waiting room. His Collection Vessel was left uncovered on the table;

vi) Other athletes, who provided insufficient volumes of urine were also instructed to leave their Collection Vessels on the table, and to take a seat in the waiting room;

vii) The Athlete sat in the waiting room for two hours before he was able to provide the sufficient volume of urine;

viii) During his time in the waiting room, the Athlete had a good view through the open door at the table with his Collection Vessel. He did not look at the table or his Collection Vessel all the time. He did not see any one interfere with his Collection Vessel;

ix) The Athlete has undergone doping tests numerous times (more than twenty times), but it is the first time he has provided a partial sample;

x) He signed the Doping Control Form without any comments because he did not know the partial sample collection procedure.

73. The Sole Arbitrator observes that, the ISTI, Annex F, "Urine Samples – Insufficient Volume, F.4 Requirements" (F.4.1-F4.6) states the following:

"F.4.1 If the Sample collected is of insufficient volume, the DCO shall inform the Athlete that a further Sample shall be collected to meet the Suitable Volume of Urine for Analysis requirements.

F.4.2 The DCO shall instruct the Athlete to select partial Sample Collection Equipment in accordance with Article D.4.4.

F.4.3 The DCO shall then instruct the Athlete to open the relevant equipment, pour the insufficient Sample into the new container (unless the Sample Collection Authority's procedures permit retention of the insufficient Sample in the original collection vessel) and seal it as directed by the DCO. The DCO shall check, in full view of the Athlete, that the container (or original collection vessel, if applicable) has been properly sealed.

F.4.4 The DCO and the Athlete shall check that the equipment code number and the volume and identity of the insufficient Sample are recorded accurately by the DCO on the Doping Control Form. Either the Athlete or the DCO shall retain control of the sealed partial Sample.

F.4.5 While waiting to provide an additional Sample, the Athlete shall remain under continuous observation and be given the opportunity to hydrate.

F.4.6 When the Athlete is able to provide an additional Sample, the procedures for collection of the Sample shall be repeated as prescribed in Annex D – Collection of Urine Samples until a sufficient volume of urine will be provided by combining the initial and additional Sample(s)".

74. The Sole Arbitrator observes that the Athlete's explanation how the sample collection was conducted is not disputed by the Respondent. Further, the Sole Arbitrator notes that the Athlete's explanation is partly supported by the twelve signatures on the List of Incoming and Outgoing Athletes, who underwent doping control on 2 July 2016, in conjunction with the Doping Control Laboratory Receiving Specimens Form, which contains twelve sample code numbers.

75. The Sole Arbitrator observes that the Doping Control Form contains a box entitled 'Partial Sample', which must be completed by the DCO whenever an athlete provides a partial sample. However, despite the fact that the Athlete has explained that he provided an initial partial sample, that box was left empty when the Doping Control Form was completed. The Sole Arbitrator notes that the Respondent regrettably did not attend the hearing and notes the overall

passive attitude by the Respondent in these proceedings. As the Athlete's explanation is not disputed by the Respondent, it follows that the Athlete's oral testimony before the CAS stands undisputed.

76. Based on the above, the Sole Arbitrator finds that the Athlete has proved on the balance of probabilities that there were errors and violations committed to the collection of the Athlete's Partial Sample that led to a departure of the ISTI.

77. The Sole Arbitrator will now consider whether the departure of the ISTI could reasonably have led to the AAF.

D. Could these Errors and Violations Reasonably have led to the Adverse Analytical Finding?

78. The Sole Arbitrator notes that it is for the Athlete to prove on the balance of probabilities that the departure of the ISTI could reasonably have been the reason why LGD-4033 was found in his urine sample. In this respect the Athlete must adduce cogent evidence of supporting facts that prove that it is more likely than not that the departure from the ISTI was the cause of the AAF.

79. The Sole Arbitrator remarks that it is doubtful whether the departures from the ISTI led or could reasonably have led to the AAF because:

    i) The Athlete had a good view through the open door at the table with his Collection Vessel;

    ii) The Athlete did not see any one interfere with his Collection Vessel during his time in the waiting room;

    iii) After giving the full sample, the Athlete signed the Doping Control Form, confirming his satisfaction with the manner in which the sample had been collected and did not raise any concerns or comments regarding the procedure;

    iv) The Athlete offered no explanation how a deliberate or inadvertent contamination of his urine sample could reasonably have led to the AAF;

    v) LGD-4033 is an non-specified substance not prevalent in wastewater, groundwater or drinking water;

    vi) The Athlete has not summoned or adduced expert evidence proving that the unsealed Collection Vessel could have been contaminated;

    vii) The Athlete did not summon an expert to explain the analytical image of the volume of LGD-4033 in his A Sample that may have indicated that the Athlete's urine sample had been contaminated with LGD-4033.

80. Therefore, the Sole Arbitrator concludes that the Athlete has not proved on the balance of probabilities that the departure of the ISTI could have reasonably led to the AAF.

E. Should the Athlete be sanctioned?

1. The Occurrence of an ADRV and the Standard Sanction

81. Having found that the Athlete committed an ADRV, the Sole Arbitrator must now consider the appropriate period of Ineligibility.

82. With respect to the appropriate period of ineligibility, Article 11 of the Greek ADR provides that:

"The period of ineligibility shall be four years where:

11.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional;

11.2.1.2 The anti-doping rule violation involves a specified substance and it can be established that the violation was intentional".

83. The Sole Arbitrator notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete (or other Person) can establish that the ADRV was not intentional.

2. Burden and Standard of Proof

84. In the present case, the burden of proof that the ADRV was not intentional bears on the Athlete, cf. Article 4 of the Greek ADR and it naturally follows that the Athlete must establish how the substance entered his body.

85. Pursuant to Article 4 of the Greek ADR, the standard of proof is the balance of probabilities.

86. The Sole Arbitrator notes that this standard requires the Athlete to convince the Sole Arbitrator that the occurrence of the circumstances on which the Athlete relies is more probable than not.

3. Was the Athlete's ADRV Intentional?

87. The main relevant rule in question in the present case is Article 11.2.3 of the Greek ADR, that reads as follows:

"As used in Article 11.2 and 11.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance

and the Athlete can establish that the Prohibited Substance was used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition in a context unrelated to sport performance".

88. The 2015 WADA Code Appendix 1 (Definitions) provides the following guidance:

> "***No Fault or Negligence:*** *The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule […].*
>
> ***No Significant Fault or Negligence:*** *The Athlete's establishing that he or her negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation […]".*

89. The Sole Arbitrator aligns with the Panel in cf. CAS 2014/A/3820, at para. 80 that *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation"* and CAS 2016/A/4377 at para. 52 that it is not enough for Athletes to establish the origin of Prohibited Substances *"merely to protest their innocence and suggest that the substance have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather the athlete must adduce concrete evidence to demonstrate that a particular supplement, medicine or other product that the athlete took contained the substance in question".*

90. In the present case, the Sole Arbitrator finds that the Athlete's explanations have virtually no evidentiary basis supporting them. The Sole Arbitrator holds as follows:

    - The Athlete explains that, *"There is a possibility that the prohibited substance I am accused of using resulted from the consumption of a contaminated product"*. The Sole Arbitrator observes that the Athlete merely suggests that the Prohibited Substance *may* have entered his body due to the fact there *is a possibility* that the AAF was caused by consuming a contaminated product. The Sole Arbitrator holds that the Athlete's explanation is unsubstantiated;

    - The Athlete explains that he had different types of food supplements tested for LDG-4033 in a laboratory. The Sole Arbitrator observes that in the laboratory in its report concluded that the examination *"required techniques that are not available in our laboratories"*. The Sole Arbitrator holds that the laboratory report is of no relevance to this case;

    - Further, the Athlete explains that he has sent to ESKAN different food supplements that he used to be examined by ESKAN, but such examination has not taken place. The Sole Arbitrator reiterates that it is for the Athlete to prove how the prohibited substance entered his body, and that the ADRV was not intentional. It follows that it is of no

pertinence to this case that the Respondent did not examine the food supplements sent to it by the Athlete.

91. The Sole Arbitrator is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the CAS Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para. 72, is, *inter alia*, stated that *"the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare"*. The Sole Arbitrator finds, however, that there are no exceptional circumstances in the present case which show on the balance of probabilities that the ADRV was not intentional (without the Athlete having to establish the origin of the prohibited substance).

92. Accordingly, the Sole Arbitrator finds that the Athlete has not met his burden of proof, and the ADRV must be deemed to be intentional. The Athlete must therefore be sanctioned with a four-year (4) period of ineligibility under Article 11.2.1. of the Greek ADR.

93. The Sole Arbitrator observes that the Athlete asserts that the sanction imposed is *"Unlawful, harsh, unreasonable and disproportionate"*. The Athlete relies, *inter alia*, on CAS 2014/A/3369; CAS 2013/A/3395; CAS 2012/A/2804, and CAS 2006/A/1168, in which cases the Athletes were suspended for a period of two (2) years with the similar substances in the Athlete's samples.

94. The Sole Arbitrator notes that the WADA Code has been drafted to reflect the principle of proportionality, thereby relieving the need for the appellate body to apply this principle, cf. WADA Code 2015 (introduction): *"The Code has been drafted giving consideration to the principles of proportionality and human rights"*. In other words, the principle of proportionality is "built into" the WADA Code and the Greek ADR (see also CAS 2007/A/1290). It follows, therefore, that the Sole Arbitrator cannot consider the application of the principle of proportionality.

95. For the sake of completeness, the Sole Arbitrator holds that the CAS cases and the National Anti-Doping Panel decisions on which the Athlete relies are of no relevance to the present case based on the following findings: i) the CAS cases all concern violations of Anti-Doping Rules prior to the 2015 WADA Code, where the standard sanction for an ADRV was two (2) years, ii) CAS 2014/A/3639; CAS 2013/A/3395, and CAS 2012/A/2804 concerns specified substances (as opposed to a non-specified substance in the present case), and CAS 2006/A/1168 is not a doping case, and iii) as for the National Anti-Doping decisions, the Athlete has offered no arguments in support of his assertion, and a mere referral to the National Anti-Doping cases does not suffice to support the Athlete's conclusion that the sanction imposed on him is *"Unlawful, harsh, unreasonable and disproportionate"*.

F. Period of Ineligibility

96. With respect of the period of Ineligibility, the Sole Arbitrator is guided by Article 11.11 of the Greek ADR which provides that 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 of Ineligibility is accepted or otherwise imposed.

97. Article 11.11.3.1 of the Greek ADR states that if a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

98. In this case, the sample collection was made on 2 July 2016 and according to the ESKAN, the Athlete was provisionally suspended on 8 August 2016. It follows therefore, that the Athlete should receive credit for the period of ineligibility already served. In this regard, the Sole Arbitrator determines that the Athlete's four-year period of ineligibility shall commence as from the date of provisional suspension (i.e. 8 August 2016), thus giving him full credit for time already served. Consequently, the period of ineligibility starts as from 8 August 2016.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 28 March 2018 by Mr. Georgios Kostakis against the 14 February 2017 Decision of the Hellenic National Council for Combating Doping is dismissed.

2. The decision rendered by the Hellenic National Council for Combating Doping on 14 February 2017 is confirmed.

(…)

5. All further and other requests for relief are dismissed.